SUPREME COURT OF ONTARIO

(DIVISIONAL COURT)

B E T W E E N:

MELITA MANALILI CHITTENDEN,
AVELINA MANALO VILLANUEVA,
THE TORONTO ORGANIZATION FOR DOMESTIC WORKERS' RIGHTS

Applicants

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent

APPLICANTS' FACTUM

PART 1 - NATURE OF PROCEEDINGS

1. This is an application for judicial review pursuant to the Judicial Review Procedure Act, R.S.O. 1980, c. 224 asking for a declaration that R.R.O. 1980, Reg. 283, ss. 3 and 6 as amended with the exception of that part of s. 6 which excludes domestics and nannies from the provisions of clauses 26 (1)(b), (c) and (d) of the Employment Standards Act, R.S.O. 1980, c. 137, and R.R.O. 1980, Reg. 285, ss. 3(f), 4(f), 6(e), 7(d) and 14 as amended are of no force or effect pursuant to the Charter of Rights and Freedoms, ss. 15 and 52.

**Notice of Application for Judicial Review,
Application Record, Tab. 1**

PART II - FACTS

2. Melita Chittenden came to Canada on a temporary work authorization, and was presently employed as a live-in domestic worker, since her arrival in Canada in 1985 until the date of the filing of this Application.

Affidavit of Melita Chittenden, paras. 1 - 4, Application Record, Tab. 11.

3. Melita Chittenden was employed by Mr. and Mrs. Dykstein from August 1985 to April 1986. Under her contract of employment she was paid a monthly salary of $827.50. Melita Chittenden worked approximately 70 hours each week. She was never paid extra wages for overtime. Averaged over a year, her hourly wage was $2.73.

Affidavit of Melita Chittenden, paras. 3, 6, 10, Application Record, Tab. 11.

4. Avelina Villenueva is a landed immigrant to Canada who is presently employed as a live-in domestic worker, and she has been so employed since her arrival in Canada in 1981.

Affidavit of Avelina Villenueva, paras. 1 - 4, Application Record, Tab. 14.

5. Avelina Villenueva was employed by Mrs. Lim from September 1981 to August 1984. During this time she worked approximately 87 hours each week. Under her contract of employment of August 10, 1982 she was to be paid a gross salary of $710.00. Ms. Villenueva was never paid any extra wages for overtime. Averaged over a year, her hourly wage was $1.88.

Affidavit of Avelina Villenueva, paras. 3, 8, 11, 13, Application record, Tab. 14.

6. Avelina Villenueva was employed by Mr. and Mrs. Feldman from August 1984 to September 1986. During this time she worked approximately 65 hours each week outside her statutory rest periods. Under her contract of employment she was paid a monthly salary of $792.50. Ms. Villenueva was never paid extra wages for overtime worked outside her statutory rest periods. Averaged over a year, her hourly wage of $2.81.

Affidavit of Avelina Villenueva, paras. 2, 18, Application Record, Tab. 14.

7. Situations such as those of Melita Chittenden and Avelina Villenueva, in which live-in domestic workers are required to work more than 44 hours weekly without any extra pay, are not uncommon. Indeed, these situations are the rule rather than the exception.

Affidavit of Judith Ramirez, para. 34, Application Record, Tab. 5.

Affidavit of Melita Chittenden, para. 18, Application Record, Tab. 11.

Affidavit of Avelina Villenueva, para. 24, Application Record, Tab. 14.

8. The Toronto Organization for Domestic Workers' Rights is a non-profit corporation operating under the name "Intercede" and existing to promote full rights for domestic workers in the labor and immigration areas.

**Affidavit of Judith Ramirez, paras. 1 - 10,
Application Record, Tab. 5.**

9. Domestic workers' positions are almost exclusively filled by women.

**Affidavit of Judith Ramirez, para. 34,
Application Record, Tab. 5.**

**Affidavit of Melita Chittenden, para. 18,
Application Record, Tab. 11.**

**Affidavit of Avelina Villenueva, para. 24,
Application Record, Tab. 14.**

10. Nearly all live-in domestics working in Ontario are immigrants to Canada. More than half of these women are in Canada on temporary employment authorizations.

**Affidavit of Judith Ramirez, para. 34,
Application Record, Tab. 5.**

11. An overwhelming number of live-in domestics work overtime beyond 44 hours per week and beyond the hours specified in their contracts of employment.

**Affidavit of Judith Ramirez, para. 34
Application Record, Tab. 5.**

12. Domestics are commonly not given their full 48 hours of rest as required by the Employment Standards Act.

**Affidavit of Judith Ramirez, para. 34,
Application Record, Tab. 5.**

13. Domestic workers seldom have recourse to existing enforcement procedures because they are afraid to lose their jobs and the possibility of gaining landed immigrant status. Domestic work has been the historical preserve of women from the third world. Live-in domestics on temporary employment authorizations are particularly vulnerable to extreme exploitation because they cannot remain in Canada unless they are employed.

**Affidavit of Judith Ramirez, para. 34,
Application Record, Tab. 5.**

PART III - THE ISSUES AND THE LAW

A. The Legislation

14. Sections 3 and 6 of Regulation 283 exclude live-in domestics and nannies (hereinafter referred to as "domestics") from the benefits and protections which are granted to other workers in Ontario in regard to the hours of work, minimum wage, overtime pay, and premium holiday pay provisions of the Employment Standards Act.

R.R.O. 1980, Reg. 283, ss. 3 and 6 as amended

15. This exclusion exists although the Employment Standards Act was introduced for the purpose of improving the position of non-unionized workes, who, as stated by the Honourable William Bales, then Minister of Labour: "require this basic protection and it will come from the Statute". Domestics are non-unionized.

Legislative Assembly, Ontario Debates, 28th Legislature, 1st Sess. at p. 3728 (31 May, 1968).

16. The result of Reg. 283 is that domestics, unlike other workers, have no statutory protection from being required to work more than 48 hours in a week, are not required to be paid the Ontario minimum wage if they work more than 44 hours in a week, are not required to be paid overtime for any hours worked in excess of 44 hours per week, and are not required to be paid a premium rate for any public holidays worked. The legislation does not bar an employer from requiring a domestic to work a total of 120 hours in a week at an effective hourly wage of $1.59. The minimum wage in Ontario for other workers is $4.35 per hour and $6.53 per hour for overtime.

R.R.O. 1980 Reg. 283, ss. 3 and 6 as amended

R.R.O. 1980 Reg. 285, s. 9(1) as amended

Employment Standards Act, R.S.O. 1980, c. 137, ss. 17, 23, 25, 27

17. Thus, domestics, who are often required to work far longer than 44 hours in a week, are greatly disadvantaged by not receiving all of the benefits and protections of the Employment Standards Act granted to other workers in Ontario.

18. Domestic workers who are not "live-in" employees are similarly excluded by ss. 3 and 6 of Regulation 283 from the benefits and protections which are granted to other workers in Ontario in regard to the hours of work, minimum wage, overtime pay, and premium holiday pay provisions of the Employment Standards Act. S. 5a of Regulation 283 does provide that domestics who do not live-in be paid a minimum wage for 44 hours of work a week and an overtime wage for hours worked in excess of 44 per week.

R.R.O. 1980, Reg. 283, s. 5a

19. "Domestic servants" (defined in Reg. 285 s. 1(b)) are in a similar position to domestics. They are excluded from the benefits and protections of the Employment Standards Act regarding hours of work, minimum wages, overtime pay, public holiday pay and vacation pay. There is no statutory minimum wage in any form granted to domestic servants.

R.R.O. 1980, Reg. 285, ss. 1(b) and 3(f) as amended

20. "Homemakers" (defined in eg. 285, ss. 14(1)) and persons employed "to perform homework" (undefined in the Regulation) are also

similarly disadvantaged positions. Both are excluded from, amongst others, the benefits and protections of the Employment Standards Act, regarding hours of work and overtime pay.

R.R.O. 1980, Reg. 285, ss. 1(b) and 3(f) as amended

B. Denial of Equality Rights Guaranteed by s. 15 of The Charter

21. S. 15(1) of the Charter guarantees to every individual the "right to the equal protection and equal benefit of the law without discrimination".

22. Domestics do not receive the equal protection and equal benefit of the law because Regulation 283 excludes domestics from legal benefits and protections which are given to other workers in Ontario.

23. It is submitted that the exclusion of domestics from the aforementioned benefits and protections of the Employment Standards Act cannot be justified when these benefits and protections are granted to other similarly situated workers in Ontario.

24. It is further submitted that this exclusion constitutes discrimination within the meaning of s. 15, and specifically, that it is discrimination based upon:

(i) the unenumerated ground of occupational group,

(ii) the enumerated grounds of sex and national origin.

(i) Discrimination Based Upon the Unenumerated Ground of Occupational Group

25. Discrimination based upon an unenumerated ground, such as the category of the occupational group "domestic", is prohibited by s. 15 of the Charter.

R. v. Hamilton (1986) 57 O.R. (2d) 412 at 431 (C.A.)

Andrews v. The Law Society of British Columbia (1986), 27 D.L.R. (4th) 600

26. It is submitted that the impugned sections of Regulations 283 are contrary to s. 15 of the Charter because: a) s. 15 prohibits discrimination based upon an unenumerated ground such as the occupational category of domestic, and b) the impugned sections discriminate against domestics in that they deny domestics, without justification, the benefits and protections of the law granted to other, similarly situated workers in Ontario.

Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (C.A.)

Re McDonald and the Queen (1985), 51 O.R. (2d) 745 (C.A.)

R. v. R.L. (1986) 26 C.C.C. (3d) 417 (C.A.)

Reference re An Act to Amend the Education Act (1986), 53 O.R. (2d) 513 at 552-557 (C.A.)

Century 21 Ramos Realty Inc. v. The Queen (Feb. 27, 1987) (C.A.)

27. It is further submitted that there is a similarity between the categories listed under s. 15 and the unenumerated ground of "domestic worker" so that if, in the alternative, such a similarity must be shown before the protection of s. 15 is accorded to an unenumerated ground, this can be demonstrated.

Andrews v. Law Society of British Columbia, supra

Smith, Kline and French Laboratories v. A.G. Can. (1986), 12 C.P.R. (3d) 385 (F.C.A.)

28. It is submitted that the listed grounds under s. 15 evidence an underlying concern in the Charter to protect groups that have historically been discriminated against, which are relatively politically powerless, and whose defining characteristic the individual has little control over.

Smith, Kline and French Laboratories v. A.G. Can., supra, p. 391

M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Supreme Ct. L.R. 131 at p. 144.

29. The category of "domestics" shares these three characteristics.

30. The history of the treatment of domestics in our society shows patterns of discrimination.

> **G. Leslie, "Domestic Servants in Canada" in J. Acton et al, ed., Women at Work 1850 - 1930 (Toronto: Canadian Women's Educational Press, 1974)**

31. Domestics are and have been a disadvantaged and powerless group in Ontario. A number of factors contribute to this position of disadvantage and lack of influence:

(a) Both economically and socially domestics are accorded little respect.

(b) The overwhelming majority of domestics are immigrants from countries dissimilar to Canada, and most are working on temporary visas.

(c) Thus, domestics are unfamiliar with Canadian society, unsure of their position, and hesitant to assert themselves given their lack of established status. This vulnerability is magnified by the isolated environments in which they work. Domestics are unable to gain support and influence from association with other domestics.

> There are, in turn, a number of factors contributing to the vulnerability of the foreign domestic employee. She usually works by herself in a private home, often with few opportunities to socialize. This isolation and her temporary status

> offer virtually no opportunities for collective action with others similarly situated. She depends on her employer not only for her wage, but also for her dwelling place and continued stay in the country."
>
> "Domestic workers on Employment Authorizations", Report of The Task Force on Immigration Practices and Procedures, Edward Ratushny, Chairman, Ottawa, Office of the Minister of Employment and Immigration, 1980, at p. 12

(d) Domestics in Ontario are almost exclusively female, and females have traditionally had little political influence in Canada.

(e) Because the majority of domestics are in Ontario on temporary work visas, which they could only obtain by virtue of accepting a particular job offer, their economic options are extremely limited.

> R. Epstein, "West Indian Domestics Working on Employment Visas: I Thought There Was No More Slavery in Canada" (1980) Vol. 2, # 1 Canadian Women's Studies.
>
> R. Ng & T. DasGupta, "Nation Builders? The Captive Labour Force of Non-English Speaking Immigrant Women" (1981) Vol. 3, # 1 Canadian Women's Studies 83.
>
> L. Bahnen, "Report on Domestic Workers" (1973) (unpublished).
>
> A. Estable, "Immigrant Women in Canada" (1986) Background Paper for Canadian Advisory Council on Status of Women 1986.
>
> "Overview of Domestic Workers in Ontario" (1976) Women's Bureau of Ontario Ministry of Labour 1976.

32. The defining characteristic of this group - their occupation - is one which the individuals have little control over. Because of economic factors, lack of education and experience, unfamiliarity with Canada, and the fact that most are on temporary work visas, domestics have little option but to continue working as domestic workers.

> Senior immigration officials say privately that this policy of employment authorizations was introduced because women will work as live-in domestics only if they have no choice.
>
> **S. Arnapoulos, Problems of Immigrant Women in the Canadian Labour Force (1979), at p. 25, quoted in Report of The Task Force on Immigration Practices and Procedures, supra, at p. 55**

33. It is submitted that the aforementioned factors all support the conclusion that the category "domestic" constitutes an unenumerated ground similar in kind to the listed grounds under s. 15 and thus should be given similar protection under s. 15.

(ii) Discrimination Based Upon the Grounds of Sex And National Origin

(a) The Grounds - Sex and National Origin

34. Ontario domestic workers are almost exclusively females and s. 15 of the Charter prohibits discrimination based upon the ground of sex.

35. Ontario domestic workers are nearly all of non-Canadian national origins and s. 15 of the Charter prohibits discrimination based upon the ground of national origin.

36. It is submitted that discrimination which is based upon the ground of "non-Canadian" national origin is prohibited by s. 15 in the same way that discrimination against a specific national origin is prohibited. The essence of discrimination based upon national origin is not simply discrimination against a particular origin, but is discrimination based upon the notion of national origin. Legislation which discriminates against "all others" in favour of a specific national origin is as discriminatory as legislation which discriminates only against a single national origin. Whether it is based upon inclusive or exclusive categorization, discrimination is equally offensive.

37. It is therefore submitted that the common characteristics of domestics with respect to sex and national origin fall within the corresponding listed rounds under s. 15, upon which the basing of discrimination is prohibited.

(b) The Discriminatory Character of the Legislation

38. The differential treatment of domestics under the Employment Standards Act constitutes discrimination, based upon sex and national

origin, for either, or both, of two reasons:

(1) the discriminary impact of the legislation

(2) the legislation was influenced by discriminatory attitudes.

(1) Discriminatory Impact

39. The harmful effects of Regulation 283 are felt almost exclusively by women, and by women of similar national origins.

40. The regulation harms not only women of similar national origins who are working as domestics, but also harms the group of immigrant women as a whole. Future domestics will be drawn from this group and therefore Regulation 283 has an impact upon this group as a whole.

41. The group of persons which is harmed by Regulation 283 is one which, historically, has been disadvantaged in our society. This Regulation serves to deepen and perpetuate the disadvantaged position of this group.

42. Thus, it is submitted, Regulation 283 runs counter to one of the purposes of s. 15 of the Charter. This purpose, as evidenced by the list of enumerated grounds and by the existence of s. 15(2) - the affirmative action provision - is to protect and promote the position of persons who, historically, have been disadvantaged in our society.

43. It is therefore submitted that Regulation 283 is discriminatory, contrary to s. 15 because of its discriminatory impact upon this group of persons.

44. It is further submitted that characterization of the Regulations as discriminatory within the meaning of s. 15, because of their discriminatory impact, is consistent with the courts' appreciation of the importance of considering "effects" when interpreting the Charter and provincial anti-discrimination legislation.

R. v. Big M Drug Mart (1985) 18 D.L.R. (4th) 321 (S.C.C.)

Re Southam Inc. and The Queen (No. 1) (1983) 41 O.R. (2d) 113 (C.A.)

R. v. Videoflicks (1984) 48 O.R. (2d) 395 (C.A.)

Re Bhinder and Canadian National Railway Co. (1985) 23 D.L.R. (3d) (S.C.C.)

(2) Discriminatory Attitudes

45. It is submitted that, in addition to being discriminatory because of its discriminatory impact, Regulation 283 is also discriminatory because it is a result of discriminatory stereotypes or prejudicial attitudes towards domestic work as "women's work" and, in particular, as work for women of similar national origin.

46. It is submitted that at least one of the reasons for the exclusion of domestics from certain protections of the Employment Standards Act is that in the drafting of the legislation "domestic work", as the paradigmatic immigrant females' job, was implicitly accorded less respect than other jobs.

47. Work performed by women, and work performed by immigrants has historically been accorded low respect in our society. In regards to domestic work - which is identified with, and constituted by immigrant women - these two facts combine to produce the likelihood of a prejudicial attitude toward this type of employment.

48. Furthermore, domestic work is functionally similar to housework, which has traditionally been considered the classic female job. Attitudes towards housework influence attitudes towards domestic work, and housework, as a female job, has historically been accorded little recognition in our society.

> ...a problem in recruiting Canadian workers is that domestic work is not highly valued in our society. Even when such work is done by the traditional wife and mother, it has not been accorded much economic recognition, for example, when the marriage dissolves. It is not surprising that someone who substitutes for the under valued housewife is herself undervalued in economic terms.
>
> **Report of Task Force on Immigration Practices and Procedures, supra, at p. 58.**

49. This inequity, and the fact that it ought to be remedied, has recently been recognized by the Ontario Legislature in the realm of family law, as demonstrated by s. 5(7) of the Family Law Act.

Family Law Act, S.O. 1985, s. 5(7)

50. In addition to the effects of a prejudicial perception of the value of domestic work, this job may also be given less recognition because of the political powerlessness of the group of persons who are identified with the job. Women and immigrants have traditionally had little political influence in Ontario.

51. In sum, it is submitted that it cannot be considered coincidental that this exclusionary Regulation applies to a job which is identified with and constituted by a group whose work has traditionally been given little recognition and whose political position is relatively powerless.

52. It is submitted that in characterizing Regulation 283 as evidence of discriminatory attitudes or stereotypes the court will be following established jurisprudence in looking at the operation of a law to characterize its true nature.

Big M Drug Mart, supra

Re Southam, supra

A.G. Alta. v. A.G. Can. (Bank Taxation) [1939] A.C. 117

Grigs v. Duke Power Co. 401 U.S. 424 (1971)

C. The Situation of Domestics Who Do Not Live-In

53. Invalidating ss. 3 and 6 of Regulation 283 will also have the effect of granting certain previously denied benefits and protections of the Employment Standards Act to domestic workers who do not live-in. The change will not be as great as for live-in domestics, however, since, by virtue of s. 5a of Regulation 283, workers who do not live-in are presently given minimum wage and overtime wage protections are not granted to live-in domestics (see paragraph 16).

54. It is submitted that insofar as striking down ss. 3 and 6 of Regulation 283 does extend benefits and protections to these domestic workers, this extension is justified for the same reasons that it is justified in the case of live-in domestics.

D Regulation 285, ss. 3(f), 4(f), 6(e), 7(d) and 14 Are Contrary to s. 15 of the Charter

55. It is submitted that the previous arguments with respect to the invalidity of the Regulation excluding domestics from certain provisions of the Employment Standards Act also apply to the sections 3(f), 4(f), 6(e), 7(d) and 14 of Regulation 285 which exclude "domestic servants", "homemakers", and "houseworkers" from certain benefits and

protections of the Employment Standards Act, and thus that these sections are inconsistent with s. 15 of the Charter.

E No Justification Under s. 1 of the Charter

56. Once a prima facie violation of a Charter right has been established, the onus shifts to those seeking to uphold the impugned legislation under s. 1 of the Charter.

57. The shift in onus resulting from the infringement of a Charter right is a heavy one; requiring that the limitations on that right be necessary to the achievement of some significant government interest, that the means chosen to achieve this objective be proportional, and that they impair as little as possible the prohibited right.

Big M Drug Mart, supra

R. v. Oakes (1986), 26 D.L.R. (4th) 200 (S.C.C.)

58. It is submitted that the impugned sections of Regulations 283 and 285, which infringe s. 15 of the Charter, cannot be justified so as to satisfy this standard under s. 1 of the Charter.

PART IV - ORDER REQUESTED

59. The plaintiffs therefore ask this Honourable Court to grant an order of judicial review declaring the following Regulations, enacted pursuant to the Employment Standards Act, to be of no force or effect pursuant to ss. 15 and 52 of the Charter of Rights and Freedoms: R.R.O. 1980, Reg. 283, ss. 3 and 6 as amended with the exception of that part of s. 6 which excludes domestics and nannies from the provisions of clauses 26(1)(b), (c) and (d) of the Employment Standards Act, R.S.O. 1980, c. 137; and R.R.O. 1980, Reg. 285, ss. 3(f), 4(f), 6(e), 7(d) and 14:

All of which is respectfully submitted.

Robert J. Sharpe

Counsel for the Applicants

SCHEDULE A

LIST OF AUTHORITIES

1. R. v. Hamilton (1986) 57 O.R. (2d) 412 at 431 (C.A.)
2. Andrews v. The Law Society of British Columbia (1986), 27 D .L.R. (4th) 600
3. Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (C.A.)
4. Re McDonald and the Queen (1985), 51 O.R. (2d) 745 (C.A.)
5. R. v. R.L. (1986) 26 C.C.C. (3d) 417 (C.A.)
6. Reference re An Act to Amend the Education Act (1986), 53 O.R. (2d) 513 at 552-557 (C.A.)
7. Century 21 Ramos Realty Inc. v. The Queen (Feb. 27, 1987) (C.A.)
8. Smith, Kline and French Laboratories v. A.G. Can. (1986), 12 C.P.R. (3d) 385 (F.C.A.)
9. R. v. Big M Drug Mart (1985) 18 D.L.R. (4th) 321 (S.C.C.)
10. Re Southam Inc. and The Queen (No. 1) (1983) 41 O.R. (2d) 113 (C.A.)
11. R. v. Videoflicks (1984) 48 O.R. (2d) 395 (Ont. C.A.)
12. Re Bhinder and Canadian National Railway Co. (1985) 23 D.L.R. (3d) S.C.C.)
13. A.G. Alta. v. A.G. Can. (Bank Taxation) [1939] A.C. 117
14. Griggs v. Duke Power Co. 401 U.S. 424 (1971)
15. R. v. Oakes (1986), 26 D.L.R. (4th) 200 (S.C.C.)

SCHEDULE B

STATUTES

Charter of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Equality Rights

Equality before and under law and equal protection and benefit of law

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

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.