No. CA004826
Vancouver Registry

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE LOCKE PRONOUNCED THE 18th DAY OF SEPTEMBER, A.D. 1985.

IN THE MATTER OF AN APPEAL BY WAY OF STATED CASE BY THE HONOURABLE THE ATTORNEY GENERAL OF BRITISH COLUMBIA

AND

IN THE MATTER OF A CASE STATED BY HER HONOUR JUDGE JANE AUXIER OF THE PROVINCIAL COURT OF BRITISH COLUMBIA, PURSUANT TO THE PROVISIONS OF THE OFFENCE ACT, R.S.B.C. 1979, CHAPTER 305, AND SECTION 12 OF THE CHILD PATERNITY AND SUPPORT ACT, R.S.B.C. 1979, CHAPTER 49, FOR THE CONSIDERATION OF THE SUPREME COURT OF BRITISH COLUMBIA, THE CHIEF JUSTICE AND THE JUDGES THEREOF

BETWEEN:		
	VICKI LOUISE SHEWCHUK	COMPLAINANT
AND:		
	JERRY RICARD	RESPONDENT (APPELLANT)
AND:		
	ATTORNEY-GENERAL OF BRITISH COLUMBIA	RESPONDENT (INTERVENOR)
AND:		
	BRITISH COLUMBIA ASSOCIATION OF SOCIAL WORKERS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, FEDERATED ANTI-POVERTY GROUPS OF B.C., VANCOUVER STATUS OF WOMEN, WEST COAST LEAF ASSOCIATION	INTERVENORS

INTERVENORS FACTUM

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PART 1

STATEMENT OF FACTS

(1) The Intervenors in this case are:

(a) British Columbia Association of Social Workers
(b) British Columbia Civil Liberties Association
(c) Federated Anti-Poverty Groups of B.C.
(d) Vancouver Status of Women
(e) West Coast LEAF Association (affiliated with the Women's Legal Education and Action Fund of Canada).

(2) The five Intervenors are all non-profit corporate entities. They were granted leave to intervene by order of The Honourable Mr. Justice Taggart on December 18, 1985. They are all groups which are concerned about the general issue of the effectiveness of the equality rights provisions under the Canadian Charter of Rights and Freedoms, and about the particular problems of low-income women and single mothers.

(3) The Intervenors adopt the statement of facts of the Appellant.

(4) The questions in the Stated Case and the answers given by the learned Chambers Judge are:

1. Did I exceed my jurisdiction in making a declaration that the Child Paternity and Support Act (the Act) was of no force and effect?

   - No, if limited to the particular case at bar and not treated as a general declaration.

2. Did I err in law in holding that the Act discriminates on the basis of sex so as to violate Sec. 15(1) of the Charter of Rights and Freedoms?

   - Yes.

3. Did I err in law in holding that the provisions of the Act do not constitute a law having as its object the amelioration of conditions of disadvantaged individuals (the newborn) and are not saved by Sec. 15(2) of the Charter of Rights and Freedoms?

   - Yes.

4. Did I err in law in holding that the Act was not demonstrably justifiable as a reasonable limit prescribed by law in a free and democratic society?

   - Yes.

(5) A declaration that the Child Paternity and Support Act, R.S.B.C. 1979, chap. 305 (the "CPSA") is of no force and effect would penalize mothers who are dependent on CPSA payments, including mothers who receive Social Assistance. They are permitted an exemption under the Guaranteed Available Income for Need Act (GAIN) and may keep up to $100 per month from CPSA payments, without deduction from their GAIN payments. However, the exemption for CPSA payments applies only during a month when maintenance is actually received.

Guaranteed Available Income for Need Act, R.S.B.C. 1979, chap. 158, Regulations, Schedule B, s. 14

Affidavit of Christopher Walmsley, filed February 7, 1986 with Notice of Motion for leave to lead evidence returnable March 20, 1986

(6) The amount of money paid under CPSA orders was over $700,000 in 1983-84.

Affidavit of Christopher Walmsley, supra, para (6)

PART 2

ERRORS IN JUDGMENT

(1) It is respectfully submitted that the learned Chambers Judge erred in law in concluding that the provisions of the Child Paternity and Support Act (the "CPSA") do not infringe section 15(1) of the Canadian Charter of Rights and Freedoms (the "Charter").

(2) It is respectfully submitted that the learned Chambers Judge erred in law in concluding that the provisions of the CPSA fall within the scope of section 15(2) of the Charter.

(3) It is respectfully submitted that the learned Chambers Judge erred in law in concluding that, if the provisions of the CPSA do infringe section 15(1) and are not saved by section 15(2) of the Charter, they constitute reasonable limitations which are prescribed by law and demonstrably justified in a free and democratic society pursuant to section 1 of the Charter.

(4) It is respectfully submitted that the learned Chambers Judge erred in law in failing to grant the remedy of extension so that the CPSA applies equally to fathers and mothers.

PART 3

ARGUMENT

I. INTRODUCTION

(1) The Intervenors submit that, although the Child Paternity and Support Act (the "CPSA") is unconstitutional by reason of section 15 of the Canadian Charter of Rights and Freedoms (the "Charter"), the Court should not declare the CPSA to be of no force and effect. Rather, the appropriate remedy is to extend the legislation to apply to both sexes equally.

(2) The Intervenors submit that, although there are other aspects of the CPSA which may give rise to constitutional challenges in the future (such as section 7 of the CPSA, setting a one-year limitation period for maintenance claims on behalf of children born out of wedlock), those other aspects are not at issue in this case. The issue in this case is whether the CPSA should be struck down or extended, given its denial of equality to men.

II. CONSTITUTIONALITY OF THE CHILD PATERNITY AND SUPPORT ACT

A. The legislation is inconsistent with sections 15(1) and 28 of the Canadian Charter of Rights and Freedoms.

(1) The CPSA permits only mothers of children born out of wedlock

to seek affiliation orders regarding parenthood and consequential maintenance orders against fathers. Mothers may be ordered to pay maintenance under the CPSA only when they themselves (or other persons on their behalf) have initiated proceedings for affiliation orders against fathers. Fathers who have custody of their children born out of wedlock are precluded from initiating proceedings under the Act because of its wording.

CPSA sections 3, 6, 7, 8 and 9

(2) It is neither improbable nor logically impossible that there are men who require maintenance for the support of out-of-wedlock children. It is submitted that the number of men in this category is irrelevant in assessing the constitutional validity of the CPSA.

Shewchuk v. Ricard [1985] 6 W.W.R. 436 at 456-457 (B.C.S.C.)

Shewchuk v. Ricard, [1985] 6 W.W.R. 426 (Prov. Ct.)

Reference re s. 94(2) Motor Vehicle Act, unreported, Supreme Court of Canada, December 17, 1985, at 42-43

(3) The Intervenors submit that the preclusion of fathers from initiating proceedings under the CPSA is inconsistent with sections 15(1) and 28 of the Charter.

(4) The Supreme Court of Canada has said that the courts must take a purposive approach to the interpretation of Charter rights and freedoms.

Reference re section 94(2), Motor Vehicle Act, supra, para (2), at 11-12

The Queen v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at 344

(5) It is submitted that the following comments by Professor Noel Lyon are relevant when considering the purpose of section 15:

> Equality rights will be difficult to define because we are all trained to organize our knowledge of the world in categories. As we perceive reality, we impose on it the abstractions that reflect our understanding of differences that matter: men, women, old people, children, black people, Catholics, Jews, handicapped people, Orientals. These are the categories that have led us to do many things that violate what Dr. Corry has called the democratic ultimate: respect for the human personality. Now the Constitution, in s. 15 of the Charter, prohibits disadvantaging people simply because they fit into one of these categories. Until this section takes effect on April 17, 1985, this new constitutional ethic of equality will depend for its effectiveness on political sanctions and on existing legislation that anticipated it. [...portion omitted...]
>
> Whereas much of today's dialogue is directed at the evil of discrimination, Tawney's eye [in Equality] was clearly on the affirmative value of equality, not just to individuals, but to society as a whole:
>
> > So to criticize inequality and to desire equality is not, as is sometimes suggested, to cherish the romantic illusion that men are equal in character and intelligence. It is to hold that, while their natural endowments differ profoundly, it is the mark of a civilized society to aim at eliminating such inequalities as have their source, not in individual differences, but in its own organization, and that individual differences, which are a source of social energy, are more likely to ripen and find expression if social inequalities are, as far as practicable, diminished. And the obstacle to the progress of equality is something simpler and more potent than finds expression in the familiar truism that men vary in their mental and moral, as well as in their physical characteristics, important and valuable though that truism is as a reminder that different individuals require different types of provision. It is the habit of mind which thinks it, not regrettable, but natural and desirable, that different sections of a community should be distinguished from each other by sharp differences of

> economic status, of environment, of education and culture and habit of life. It is the temper which regards with approval the social institutions and economic arrangements by which such differences are emphasized and enhanced, and feels distrust and apprehension at all attempts to diminish them. ("The Charter as a Mandate for New Ways of Thinking about Law", (1984) 9 Queen's Law Jo. 241)

(6) The tenor of these comments applies particularly to gender-based discrimination, which historically has been justified by reference to customs, habits of mind, and existing social institutions and institutional arrangements.

> Mary Eberts, "Sex Discrimination and the Charter", in Anne F. Bayefsky and Mary Eberts (eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (1985)
>
> Anne E. Freedman, "Sex Equality, Sex Differences and the Supreme Court" (1983) 92 Yale L.J. 913

(7) The Intervenors submit that the purpose of the equality rights provisions in general is to put a burden of justification upon the government when it makes distinctions affecting equality before and under the law, particularly where those distinctions relate to the named grounds in section 15(1). The purpose of including "sex" in section 15(1) as a named ground, and of enacting section 28 of the Charter, is to make it clear that the burden of justification of sex-based distinctions is a very heavy one. The Intervenors are in agreement with the Appellant's argument set out on pages 6-10 of his Factum.

(8) With respect, the Intervenors submit that the learned Chambers Judge erred in reading section 15(1) as if it applies only to those

inequalities which fail to pass a test similar to that applied under section 1(b) of the Canadian Bill of Rights.

Shewchuk v. Ricard, supra, para (2) at 447-456

(9) Such a reading of section 15(1) may be consistent with the jurisprudence under section 1(b) of the Canadian Bill of Rights, but it is not consistent with the purpose or orientation of the equality rights provisions of the Charter.

Peter W. Hogg, Constitutional Law of Canada (2d ed., 1985) at 799-801

Anne F. Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts, supra, para (6) at 1-38

(10) The jurisprudence under Bill of Rights does not constrain the courts in construing and applying the provisions of the Charter, which form part of a new and entrenched Constitution.

Reference re Section 94(2) of the Motor Vehicle Act, supra, para (2), at 28-31

(11) In particular, the wording of section 15(1) of the Charter is designed specifically to depart from the jurisprudence under section 1(b) of the Bill of Rights and to create more meaningful and effective equality rights.

Anne F. Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts, supra, para (6) at 3-38

Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Supreme Ct. L.Rev. 131 at 135-153

Professor Walter S. Tarnopolsky (as he then was), "The Equality Rights in the Canadian Charter of Rights and Freedoms", (1983) 61 Can. Bar Rev. 242 at 247-255

(12) The Intervenors submit that the consideration of legislation under section 15 of the Charter should proceed in two stages: first, deciding whether there is a prima facie limitation or infringement of section 15(1), and whether section 15(2) applies to exempt the legislation; and second, deciding whether the provisions of section 1 nevertheless permit the limitation or infringement to exist.

R. v. LeGallant, (1985) 47 C.R. (3d) 170 (B.C.S.C.) at 182-185

R. v. Lucas, unreported, Ontario District Court (Kent, J.), May 24, 1985

Peter W. Hogg, supra, para (9), at 799-801

Anne F. Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts; supra, para (6), at 69-79

(13) A similar two-stage method has been adopted under other sections of the Charter where the wording of the guarantee of the right or freedom, like section 15, does not include limiting terms such as "reasonable".

Hoogbruin and Raffa v. A.G.-B.C., unreported, British Columbia Court of Appeal, December 9, 1985, at 4-5

Reference re section 94(2) of the Motor Vehicle Act, supra, para (2) at 44-46

(14) To find that a prima facie case has been made under section 15(1), a court must be satisfied that:

(a) the impugned legislation relates to one of the kinds of equality referred to (such as equality in the protection of the law;

(b) the legislation results in a distinction which affects an "individual" within the meaning of that term;

taking into account both purpose and effects as directed by the Supreme Court of Canada in R. v. Big M Drug Mart Ltd. The Intervenors submit that it is not necessary, at the stage of making a prima facie case, for the party asserting that section 15(1) has been infringed to show that there has been an unjustifiable, unreasonable or unacceptable inequality. Those considerations should arise only at the second stage, under section 1.

R. v. LeGallant, supra, para (12)

R. v. Big M Drug Mart Ltd., supra, para (4) at 331-336

(15) Therefore, the Intervenors submit that "discrimination" in section 15(1) should be read in a neutral sense, as referring to any "distinction". This reading is most consistent with the purpose and structure of the equality rights provisions and the Charter as a whole. Although the use of "discrimination" in anti-discrimination statutes has been taken to connote the drawing of unacceptable distinctions through prejudice or bias, the more recent jurisprudence has widened the scope of the term. The reading of "discrimination" as "distinction" is open both on the basis of the jurisprudence and ordinary language.

R. v. LeGallant, supra, para (12) at 183

R. v. Neely, unreported, Ontario District Court (Killeen, J.), September 6, 1985

R. v. McDonald (1985) 51 O.R. 745 (C.A.) at 763-764

Saskatchewan Human Rights Commission et al. and Canadian Odeon Theatres Ltd. [1985] 3 W.W.R. 717 (Sask. C.A.), leave to appeal refused June 3, 1985

Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., unreported, Supreme Court of Canada, December 17, 1985

(16) The existence of section 1 in the Charter permits the Canadian courts to give broad and generous interpretations to the specific rights and freedoms, in contrast with the position of the courts of the United States in construing the provisions of their Bill of Rights, which includes no limiting section or equivalent to section 1.

Reference re Section 94(2) Motor Vehicle Act, supra, para (2), at 10

R. v. Robson (1985) 19 D.L.R. (4th) 112 (B.C.C.A.), Reasons of Esson, J.A. at 120

Re Retail, Wholesale & Department Store Union and Government of Saskatchewan (1985) 19 D.L.R. (4th) 609 (Sask. C.A.), Reasons of Cameron, J.A. at 638

(17) Alternatively, if "discrimination" is read to connote some element of unjustifiability, or if in some other way section 15(1) is read as applying only to unwarranted or unacceptable distinctions, the existence of an express distinction based on one of the named categories under section 15(1) should be enough to establish a prima facie case under section 15(1). Any doubt about this proposition with

respect to distinctions based on sex is removed by section 28. While section 28 does not guarantee substantive rights independent of section 15, it adds resonance to the guarantee of sexual equality.

> R. v. Red Hot Video, (1985) 18 C.C.C. (3d) 1 (B.C.C.A.), Reasons of Anderson, J.A. at 23
>
> R. v. Lucas, supra, para (12) at 9
>
> Katherine J. deJong, "Sexual Inequality: Interpreting Section 28", in Bayefsky and Eberts, supra, para (6), at 493

(18) It is further submitted that if this alternative approach is taken, section 1 should be read as if part of section 15, so that section 15 incorporates section 1 standards of review and placement of the burden of justification.

(19) Reference to the legislative history of sections 15(1) and 28 confirms that their purpose is to put into effect strong and positive equality rights between the sexes rendering prima facie unconstitutional all distinctions based on sex. Thus, all such distinctions should be unconstitutional unless justified according to rigorous standards whether under section 1 or otherwise.

> Mary Eberts, "Sex-Based Discrimination and the Charter", supra, para (6) at 199-211
>
> Walter S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms", supra, para (11) at 254-55

(20) The CPSA makes express distinctions based on sex through its use of the terms "father" and "mother" instead of "parent", and the distinctions which it makes deny fathers of children born out of

wedlock a statutory remedy which is available to mothers. It is submitted that the CPSA thereby denies equality under the law and the equal protection and benefit of the law to male persons.

B. Section 15(2) does not apply to the legislation in question.

(21) The purpose of section 15(2) is to save legislation which would otherwise be unconstitutional because of its prima facie denial of equality rights.

(22) Here, the feature of the CPSA which renders it prima facie unconstitutional is the exclusion of men from applying for a statutory remedy under it.

(23) The issue is, therefore, whether that feature (not the CPSA as a whole) constitutes a law, program or activity which has as its object the amelioration of conditions of disadvantaged individuals or groups.

(24) The only group possibly benefitted by the impugned provisions of the CPSA (the provisions excluding fathers from applying) is the group consisting of mothers who leave children born out of wedlock with the fathers of those children. Those mothers may escape liability for the payment of maintenance for their children under the CPSA.

(25) There is no evidence that that group of mothers is disadvantaged within the meaning of section 15(2), nor that the

government intended to benefit its members through the drafting of the CPSA.

(26) Section 15(2) is not designed to provide a general exception from section 15(1) for all legislation which might conceivably benefit someone. It is submitted with respect that the learned Chambers Judge erred in construing section 15(2) in that way.

Shewchuk v. Ricard, supra, para (2) at 456-457

(27) Section 15(2) applies only to "affirmative action programs" designed to benefit disadvantaged groups, as suggested by its heading. The Intervenors adopt the definition of "affirmative action provision" quoted by the Appellant at page 15 of his Factum.

Law Society of Upper Canada v. Skapinker, (1984) 9 D.L.R. (4th) 161 (S.C.C.)

C. The exclusion of fathers from applying for a remedy under the CPSA is not a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.

(28) The burden of satisfying the court that the conditions of section 1 have been met is on the government or other defender of the legislation.

Hoogbruin and Raffa v. A.G.-B.C., supra, para (13)

Reference re section 94(2) MVA, supra, para (2) at 45-46

(29) The assessment must relate to the sections or features of the legislation which have been found to be prima facie unconstitutional,

not to the legislation as a whole. In other words, the particular limit on a constitutional right must be justified. The Intervenors submit that in the assessment, a series of questions must be addressed.

(30) Is the limitation or infringement "prescribed by law"? There could be no doubt that the limitation in the instant case is prescribed by law.

(31) Is the limitation or infringement "reasonable"? The Intervenors submit that the term "reasonable limits" in section 1 summarizes the subsequent requirement that the limit be demonstrably justified in a free and democratic society.

(32) Is the limitation or infringement demonstrably justified in a free and democratic society? The seriousness of the infringement should be weighed against the importance of the governmental purpose, in the manner described below.

> The Queen v. Big M Drug Mart Ltd., supra, para (4) at 352
>
> Anne F. Bayefksy, "Defining Equality Rights", supra, para (6)

(33) How serious is the infringement? There are two important factors to consider in the context of section 15 infringements, namely, the basis on which the distinction is made and the nature of the individual's interest that is affected.

> Anne F. Bayefsky, "Defining Equality Rights", supra, para (6)

(34) The CPSA distinction is made on the basis of sex. Sex is not only one of the enumerated factors in section 15, but also it is specified in section 28 in a "notwithstanding" clause. The Intervenors submit that therefore legislative distinctions made on the basis of sex are to be impermissible under section 1 except in the rarest of circumstances, i.e. when directly related and necessary to account for the biological and reproductive functions. Here, there is no direct relationship or necessary connection between biological or reproductive functions and the distinction. Either women or men may have custody of out-of-wedlock children and require assistance for their maintenance.

> Mary Eberts, "Sex Discrimination and the Charter", supra, para (6)

(35) As to the nature of the interest that is affected, here it is the access to a statutory remedy. While it may be true that only in very rare cases would a male person need to invoke the provisions of the CPSA, the principle remains the same: an individual is being denied a remedy on the basis of sex where others similarly situated can seek it. Further, the particular remedy relates to the maintenance of children by their parents, and in a direct way to the ability of the natural parents of children to retain custody and care for them. Access to the courts and the continuance of family relationships are both highly valued interests in Canadian society.

(36) Upon what purposes does the government rely in support of the infringement? The learned Chambers Judge found that the legislation:

> provides relief for the disadvantaged classes of unwed mothers and 'foundlings', but it is in the last analysis

> an Act carpentered to collect money for a mother and for the state from the person 'responsible' because the mother would, of course, look to the state for the support not otherwise extended. ...I do not think this Act was passed to collect money from men as opposed to women but to collect money from one class of people who could probably pay (putative fathers) rather than one which could not, or would in effect be useless to pursue (mothers).
>
> Shewchuk v. Ricard, supra, para (2) at 455-456

(37) It is submitted with respect that there is nothing in this passage or in any passage in the Reasons for Judgment to suggest any governmental purpose for the infringement (the exclusion of men from applying under the Act).

(38) The Intervenors submit that the government has completely failed to meet the burden of justifying the infringement and that, in such a case, the legislation must either be declared unconstitutional and of no force and effect, or extended.

Charter, s. 52 and s. 24(1)

(39) In the alternative, if the Court should find that the analysis under section 1 should proceed further, the Intervenors submit that the legislation as a whole is needlessly underinclusive. The core purpose of the CPSA is to provide a source of maintenance for children born out of wedlock from both their parents. This purpose would be better furthered if the legislation permitted applications from both male and female parents. The legislation inaccurately uses "mother" as a proxy for "impecunious custodial parent" and "father" as a proxy for "non-custodial parent with means". The American equal protection

jurisprudence shows that such use of inaccurate proxies should be unconstitutional.

CPSA, ss. 3(1), 8(2)(5), 9(1)(c)

Craig v. Boren, 429 U.S. 190, (1976) at 198-199

Orr v. Orr, 440 U.S. 268 (1979) at 279-283

(40) The government, with respect to the legislation as a whole, should have the burden under section 1 of satisfying the court that there is no sex-neutral method of achieving its purpose.

The Queen v. Big M. Drug Mart, supra, para (4) at 352

(41) There is no reason why the remedy under the CPSA could not be made available to both sexes, as it has been in some other provinces. There would be no significant increased cost to the government in making the legislation available to both sexes and in fact there may be some financial benefit. Most importantly, it would be in the best interests of the children who need the maintenance, and whose interests are presumably of paramount importance in this context.

Shewchuk v. Ricard, supra, para (2) at 449

(42) Is the infringement warranted, given its seriousness and the governmental purpose for it, in a society which aspires to be free and democratic and to respect to a maximum extent the rights and freedoms in the Charter? It is submitted that this is the final question which must be answered under section 1, and that the answer is "no".

(43) Therefore, it is submitted, the CPSA must either be declared to be of no force and effect or extended.

III. THE REMEDY OF EXTENSION

A. Introduction

(44) The position of the Intervenors is that if the Child Paternity and Support Act is unconstitutional for the reasons stated, then this Court should not strike down the legislation but should extend its operation to apply equally to both mothers and fathers. The Court has the authority to do this pursuant to s. 24(1) of the Charter.

B. Orr v. Orr

(45) An American example of the use of extension as a remedy for unconstitutional legislation is Orr v. Orr. An Alabama law allowing wives but not husbands to sue for alimony, was reviewed by the United States Supreme Court under the equal protection clause of the Fourteenth Amendment at the request of the alimony-paying husband. The Court held that the law was discriminatory and violated the equal protection clause. The Court remanded the case back to the state court "to consider whether Mr. Orr's stipulated agreement to pay alimony or other grounds of gender neutral state law bind him to continue his alimony payments."

Orr v. Orr, 440 U.S. 268 (1979) at 284

For terms of the Statute, see footnote 1 at 270.

(46) On the remand from the U.S. Supreme Court, Mr. Justice Holmes of the Alabama Supreme Court Civil Division, speaking for the majority, stated:

> Our alimony statutes were found to be constitutionally impermissible for the reason that they are underinclusive; that is, they improperly exclude statutory benefits from a class of individuals on the basis of sex ....
>
> (2) Where a statute is constitutionally infirm on the basis of underinclusiveness, a court may satisfy the Constitution's commands by either extending benefits to those excluded from the scope of its coverage or by invalidation of the statute in its entirety. Orr, supra; Welsh v. U.S., 398 U.S. 333, 90 S. Ct. 1792, 26 L.Ed. 2d 308 (1970). In Welsh, supra, the Supreme Court stated:
>
> > Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion .... (Citations omitted) 398 U.S. at 361, 90 S. Ct. at 1807-1808, Harlan, J., concurring.
>
> (3) The choice between invalidation of a statute or expansion of the scope of its applicability requires, of necessity, an ascertainment of the predominant legislative purpose underlying the statute's enactment. Beal, supra. That is to say, given the nature and substance of the statute, its relevant economic, social and historical implications, can it be concluded that benefits should be terminated to the class of persons whom the legislature intended to benefit. In this instance, we think not.
>
> ... As a matter of predominant legislative purpose then, we are not prepared to eliminate the current statutory benefits available to needy females inasmuch as we are of the opinion that the legislature would not do so. We are in agreement with the Supreme Court of Maine, in Beal, supra, which, in its resolution of the issue of whether to extend or eliminate the benefits of its original alimony statute concluded:
>
> > (A)s between abolishing alimony and making it available to husbands in appropriate cases, (the legislature) would choose the latter. We conclude that the dominant legislative purpose of the alimony statute, as it stood when this action was brought, is

> correctly served by treating it as extending eligibility to men as well as women .... 388 A. 2d at 76.
>
> (5) Because we here respond to reversal by neutrally extending alimony rights to needy husbands we well as wives, we hold that the wife's motion to affirm the judgment rendered below is due to be granted.
>
> ... Unless we take appropriate measures, Alabama will be without an alimony statute. The legislature has not had ample opportunity to respond to this void; it therefore becomes our duty to fill that void by the application of appropriate legal principles.
>
> Orr v. Orr, 374 So. 2d 895, at 896-897 (edited and emphasis added)

C. Recent U.S. Decisions

(47) In Heckler v. Mathews, the U.S. Supreme Court reaffirmed the doctrine of extension. Although the Court found no violation of equal protection, Mr. Justice Brennan, speaking for the whole Court, stated:

> (5a) ... we have noted that a court sustaining such a claim faces "two remedial alternatives: (it) may either declare (the statute) a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." Welsh v. United States, 398 U.S. 333, 361, 26 L. Ed. 2d 308, 90 S. Ct. 1792 (1970) (Harlan, J., concurring in the result). See Califano v. Westcott, 443 U.S. 76, 89-91, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979).
>
> Heckler v. Mathews, 79 L. Ed. 2d 646 (1984) at 656

D. Other Extension Examples

(48) The doctrine of extension is not limited to sexual inequality. Moritz v. Commissioner is a case in point. There the Court extended an exemption to include bachelors in a class of persons entitled to tax deductions for the care of dependents living in home.

Moritz v. Commissioner, 469 Fd. 2d 466 (10 Cir. 1972), cert. denied 412 U.S. 906 (1973)

E. U.S. Legal Literature

(49) There are two major American articles on the Constitutional doctrine of extension:

a) Ruth Bader Ginsburg (now a U.S. judge), wrote "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation", 28 Cleveland State Law Review 301 (hereinafter referred to as "the Ginsburg article");

b) Deborah Beers, "Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative", 12 Colum. J.L. and Soc. Prob. 115 (1975) (hereinafter referred to as "the Beers article").

The Court's attention is drawn to pages 313-314, 318, 320, 323, and 324 of the Ginsburg article and 144 (bottom) to 145 of the Beers article.

F. Public Policy Arguments

(50) It is submitted to the Court that severability and extension are very similar remedies. Both legislate to the same degree. This can be shown by example.

Suppose the CPSA said:

1. An unmarried parent may sue the other unmarried parent for the maintenance of their child.
2) Section 1 does not permit an unmarried father to sue an unmarried mother for the maintenance of their child.
3) A court making an order under section 1 may require the plaintiff parent to contribute to the maintenance of the child.

(51) With such drafting, there would be no problem in enforcing section 15 of the Charter. Section 2 of the hypothetical CPSA could be severed and existing maintenance orders sustained. Of course, the severance would be "legislating a little", in Ginsburg's terms.

Ginsburg, supra, para (49) at 324

(52) The existing CPSA provisions at issue in this case cannot be severed. It is respectfully submitted that the Court will therefore be driven to section 15(2) and section 1 of the Charter in order to preserve the legislation. It is respectfully submitted that this approach would be a misuse of those sections. Extension, like severability, avoids this error. They both are useful to enforce section 15 and yet preserve the dominant purpose of the legislature. Extension is legislating to the same degree as severability.

G. Reasons for Extension

(53) It is submitted that the legislature would want this court to extend and not invalidate the CPSA for the following reasons:

(a) the core policy of the CPSA, that is, to provide maintenance from both parents for children born out of wedlock, is best served by extension and not invalidation. The extension would be that mothers could be sued under the CPSA and that fathers could bring applications;

(b) the legislative history has shown that the legislature is committed to assisting children born out of wedlock. This Act, in various forms, has been part of the law of B.C. for

many years: Shewchuk v. Ricard [1985] 6 W.W.R. 436 at 453-455.

(c) few fathers would take advantage of this extension and correspondingly a new burden would be put on few mothers;

(d) invalidation would cause a great deal of social disruption (see next paragraphs);

(e) extension could decrease the state welfare cost while invalidation would increase welfare costs;

(f) section 28(2) of the Interpretation Act, which says male words include female words and vice versa, shows a general legislative intent to have mothers and fathers treated equally. Interpretation Act, R.S.B.C. 1979, chap. 206.

(54) Under the Guaranteed Available Income for Need Act, unwed mothers on welfare are able to keep up to $100 per month paid by putative fathers without this affecting their welfare rates.

Guaranteed Available Income for Need Act, R.S.B.C. 1979 chap. 158, Regulations Schedule B, s. 14.

(55) The Ministry of Human Resources does not allow the pro-rating of such exemptions or retroactive adjustment of welfare rates; this means that if a putative father is three months in arrears in his maintenance order pursuant to the CPSA, and if he pays $400 in the fourth month, the unwed mother and her children on welfare can keep only $100 of that amount. The exemption applies when the maintenance is received, not when it is payable. That means that retroactive amendment of the CPSA would not solve this problem.

Affidavit of Christopher Walmsley filed Feb. 7, 1986, and Notice of Motion for leave to lead evidence returnable March 20, 1986

(56) The striking down of the CPSA, like the striking down of the Alabama maintenance law, would cause hardship to many non-involved people, here children born out of wedlock. Over $700,000 was collected by the Ministry of Human Resources in 1983/84 for such children.

Affidavit of Christopher Walmsley, supra, para (55)

H. Canadian Precedents on Extension

(57) In Hoogbruin v. A-G this Court, considering section 24 of the Charter, took a wide view of the power of the court under that section:

> It would be anomalous indeed if such powers were reserved only for cases where limitations are expressly enacted and not for cases where an unconstitutional limitation results because of omission in a statute.
>
> Hoogbruin and Raffa v. A.G.-B.C., unreported, British Columbia Court of Appeal, December 9, 1985, at 7

(58) One impediment to the development of the constitutional doctrine of extension is the remarks of Dickson J. (as he then was) in Hunter et al. v. Southam Inc.:

> The appellants submit that, even if ss. 10(1) and 10(3) do not specify a standard consistent with s. 8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the Charter, but rather the appropriate standard should be read into these provisions.... In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disinclined to give effect to these submissions. While the court are guardians of the Constitution and of individuals' rights under it, it is the legislature's

> responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards, legislation authorizing search and seizure is inconsistent with s. 8 of the Charter.
> (Emphasis added.)
> (1984) 2 S.C.R. 145 at 168-169

(59) The above quotation is not applicable to the case at bar for four reasons:

a) The impugned subsections 10(1)(3) in Hunter v. Southam were devoid of a sufficient standard to be used for the purpose of reading down. This forms the ratio decidendi for not reading down. In contrast, at bar, the core policy of the CPSA (provision of maintenance from their parents for children born out of wedlock) can be used to ascertain the legislative intent.

b) The comments of Mr. Justice Dickson that he would not fill in the details are obiter dicta.

c) Obiter dicta statements by the Supreme Court of Canada in early Charter litigation should be adopted cautiously by lower courts. In particular, the above case was decided before section 15 came into force. Section 15 throws a different light on section 24(1) and the remedies that may be "appropriate and just."

d) Mr. Justice Dickson did not close the door on filling in details. He said, "I would be disinclined..." It is submitted that at its strongest, his statement creates a

prima facie presumption against reading down, rather than a prohibition.

I. Alternatives to Extension

(The Intervenors are not pressing these arguments)

(60) It is submitted that this Court could temporarily uphold the validity of the statute in the case of "necessity" as stated in Reference regarding Language Rights under the Manitoba Act [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

(61) It is submitted that this Court could use section 28(2) of the Interpretation Act to read "father" and "mother" interchangeably under the CPSA as a matter of pure statutory interpretation.

Interpretation Act s. 28(2), supra, para 53(f)

(62) It is submitted that this Court could temporarily extend the operation of the CPSA for a limited period in order to give Parliament some time to amend the Act. This is a hybrid position.

IV. CONCLUSION

(63) It is submitted that the most appropriate and just remedy in this case is for the Court to extend the CPSA so that it applies equally to mothers and fathers.

Part 4

NATURE OF ORDER SOUGHT

I. The Intervenors seek an order that the questions in the Stated Case should be answered as follows:

1. Question Two: No
2. Question Three: No
3. Question Four: No.

II. The Provincial Court should be directed to hear and determine the complaint as the constitutional defect in the Child Paternity and Support Act has been corrected by extension.

III. All parties to bear their own costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver, British Columbia, this _____ day of February, 1986.

C. LYNN SMITH and DAVID W. MOSSOP
Solicitors for the Intervenors

British Columbia Association of Social Workers
The British Columbia Civil Liberties Association
Federated Anti-Poverty Groups of B.C.
Vancouver Status of Women
West Coast LEAF Association

This factum is filed by C. Lynn Smith, and David W. Mossop of the Vancouver Community Legal Assistance Society, and the address of service for the Intervenors is c/o 257 East 11th Avenue, Vancouver, B.C., V5T 2C4 (872-0271).