IN THE SUPREME COURT OF CANADA
(Appeal from the Federal Court of Appeal)

BETWEEN:

HER MAJESTY THE QUEEN and
CANADA EMPLOYMENT AND IMMIGRATION COMMISSION

Appellants
(Defendants)

- and -

SHALOM SCHACHTER

Respondent
(Plaintiff)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Respondent
(Intervenor)

FACTUM OF THE RESPONDENT/INTERVENOR
WOMEN'S LEGAL EDUCATION AND ACTION FUND

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Table Of Contents

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Part I - Facts

1. The Women's Legal Education and Action Fund ("LEAF") accepts the statement of facts contained in the factum of the appellant and relies, in addition, upon the following facts.

The Claims in this Case

2. In his original statement of claim, Mr. Schachter challenged as unconstitutional the provisions of section 30 of the Unemployment Insurance Act (the "Act"), which provides for 15 weeks of paid leave for the biological mother of a child who meets the eligibility criteria, as well as section 32 of the Act which provides for parental leave for an adoptive father or mother. In that challenge, he alleged that, as a biological father, he was similarly situate to the biological mother, and to adoptive parents, and he claimed that failure to accord him a comparable

opportunity for leave violated his right to equality under section 15 of the Charter. He sought either to have the mother's leave struck out, or to require that the 15 week period be shared in some fashion with the father.

> *Unemployment Insurance Act, 1971*, S.C. 1970-72-72, c. 48, s. 30 (R.S.C. 1985, c. U-1, s. 18)
>
> Statement of Claim, paras. 13-17 Appendix "B"

3. This claim about the biological mother's benefits relied on the "similarly situate" reasoning which in *Andrews* this Honourable Court refused to follow. However, even that reasoning should not have produced a result favourable to the plaintiff: although the mother and father have in common that they are biological parents, they experience pregnancy and birth very differently. The trial judge concluded that section 30 of the *Act* was structured to benefit "pregnant women and pregnant women only", and only "incidentally" assist the woman in "whatever care of the baby she is able to provide" before expiry of the leave. In arriving at this view, he relied on expert evidence that "underlined the physical demands placed on pregnant women and new mothers, which demands of themselves justify a period of at least fifteen weeks free from outside paid employment". These demands include the possibility of difficult labour (20% of the deliveries in Canada today are by caesarian section), physical and hormonal changes, loss of sleep, and the special role of breast feeding. In fact, the learned trial judge found that the 15 week period was actually insufficient to accommodate the needs of the biological mother. These findings of fact were not challenged on the appeal.

> Reasons for Judgment of Strayer, J., *Case on Appeal*, pp. 98-99
>
> *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143, at 178-183
>
> Affidavit of Karyn Kaufman and Murray Enkin sworn April 14, 1998, *Appeal Book*, Federal Court of Appeal, Vol. 11, p. 1581

4. The plaintiff later amended his statement of claim to claim benefits under the *Act* in respect of his newborn child on the same terms, at the same rate, and to the same extent as benefits are payable under section 32 of the *Act* to an eligible adoptive parent. What the biological father has in common with the adoptive parent (whether father or mother) is the desire

to care for the child; none of these three undergoes the particular experience of childbearing, childbirth, and recovery from childbirth or establishment of breast feeding which is the domain of the biological mother.

Amended Statement of Claim, paras. 13-20, *Case on Appeal*, pp. 3-6

5. This amended claim of the father revealed two ways in which the *Act* was underinclusive. As he pleaded, it did not include "childcare" or "parenting" leave to biological fathers (leaving them as the only ones of the four parents in the *Act* without leave of any sort in connection with the arrival of a child). However, the *Act* also failed to provide a period of parenting leave for biological mothers, an omission significant in view of the trial judge's finding that the purpose of the section 30 pregnancy leave was to accommodate the physiological needs of the woman, with provision of care to the child merely "incidental". The combined effect of these two instances of underinclusiveness was to deny parenting leave to the biological parents, while making it available to adoptive parents.

6. LEAF was granted leave to intervene as a party to the action by the order of the Federal Court Trial Division dated June 30, 1987 and this order was confirmed by an order of this Honourable Court dated March 14, 1991.

Order of Federal Court Trial Division, dated June 30,1987, *Case on Appeal*, p. 15

Order of S.C.C. dated March 14, 1991, *Case on Appeal*, p. 73

7. At trial, Mr. Schachter and LEAF challenged both aspects of the Act's underinclusiveness described in paragraph 5 herein. As to section 15 of the Charter, the defendants argued unsuccessfully that the biological father and the adoptive parent were not in the same circumstances, but they did not put forward any argument of justification under section 1 of the Charter.

Reasons for Judgment of Strayer J., *Case on Appeal*, p. 91

Findings of Federal Court, Trial Division

8. As stated above at paragraph 3, the trial judge found that the primary purpose of the section 30 benefit is to meet the physiological needs of the mother before, during and after childbirth, with only incidental relevance to child care. In fact, the trial judge found that the evidence suggested that 15 weeks are not sufficient for both maternity and infant care.

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 99-100

9. Benefits are provided to adoptive parents under section 32 of the *Act* for a period of up to 15 weeks on the placement of a child in their home for the purpose of adoption where it is reasonable for one of them to remain at home. The trial judge found that the purpose of the benefits for adoptive parents is an opportunity for parents to establish a relationship with the child when it is first placed in their home, a rationale equally applicable to childcare leave for the biological parents. The trial judge found it to be "obvious" that section 32 had "nothing to do with the particular pre-natal or post-natal needs and role of the natural mother herself".

Unemployment Insurance Act, 1971, s. 32 (R.S.C. 1986, c. U-1, s. 20)

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 94, 98- 99

10. The trial judge held that the adoptive leave provisions in section 32 of the *Act* are inconsistent with the guarantee of equality in section 15 of the Charter. He found that the *Act* discriminates against natural parents because, unlike adoptive parents, they are not given a choice as to which parent will stay home and receive benefits after the birth of a child; natural fathers have no right to benefits after the introduction of a new-born child into the home; and there is no recognition in the *Act* of the need for natural parents to establish a relationship with a new-born child apart from the recognition of the physiological demands of pregnancy for the natural mother.

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 98-99, 108

11. It was found that this distinction violated the section 15(1) guarantee of equality without discrimination based on sex and based on the ground of differences between natural and adoptive parents. The distinctions in the *Act* were rooted in sexual stereotyping of the respective roles of

the father and mother generally, and specifically in relation to their new-born biological child:

> ...this approach is predicated on the belief that, upon the birth of a baby, its natural mother is the natural and inevitable care-giver and that the father is the natural breadwinner.

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 92-93

12. Having found that section 32 violated the *Charter*, the trial judge considered that the court could either declare section 32 to be invalid or declare that natural parents are entitled to benefits equal to those provided to adoptive parents.

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 101-102

13. A declaration of invalidity was found not to be "appropriate and just in the circumstances" because it would deprive of adoption leave benefits those persons qualified to receive them under section 32. The trial judge considered that where a statute granting social service or income insurance benefits is inconsistent with the *Charter* because it does not extend those benefits far enough, the remedy of invalidating the underextensive provision would rarely, if ever, be just.

Reasons for Judgment of Strayer J., *Case on Appeal*, p. 102 14.

14. A number of alternative remedies were considered, including striking out various sections of the existing provisions in order to extend child care benefits to natural parents. However, the trial judge rejected these alternatives because none of them was an adequate remedy for the unequal provision of benefits under the legislation.

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 101-107

15. The learned trial judge considered unsuitable a declaration that natural fathers should be entitled to share the section 30 pregnancy benefits under the *Act*, because the effect of such a declaration would be to deprive mothers of benefits, which, it had been found, answered the physiological needs of natural mothers and were not related to child care.

Reasons for Judgment of Strayer J., *Case on Appeal*, p. 105

16. The learned trial judge also rejected the possibility of striking out certain words in section 32 to extend that section to natural parents. He held that while it was possible to strike out portions of a legislative provision so that the remainder would be consistent with the *Charter*, to do so in this case would not extend to natural parents the same benefits as adoptive parents because the word "placement" in section 32 could not be interpreted to mean the birth of a child.

Reasons for Judgment of Strayer J., *Case on Appeal*, p. 104

17. The learned trial judge also rejected the alternative of striking out the limiting words in the section 32.1 added to the *Act* in 1988 to provide benefits to natural fathers in extreme circumstances like maternal death or disability. This remedy would have extended benefits to natural fathers but would not have treated natural parents equally with adoptive parents.

Reasons for Judgment of Strayer J., *Case on Appeal*, p. 105

Act to Amend the Unemployment Insurance Act, S.C. 1988, c. 8, ss. 2 and 3

18. Having considered the possible remedies, the trial judge concluded that under section 24 of the *Charter* the only remedy which was "appropriate and just in the circumstances" and which would adequately protect the right to equality in section 15(1) of the *Charter* was the extension to natural parents of the childcare benefits in section 32, and he therefore issued a declaration that a natural father or mother of a new-born child was entitled to benefits under the *Act* on the same terms and conditions as adoptive parents.

Reasons for Judgment of Strayer J., *Case on Appeal*, p. 104

19. Section 22(3)(a) of the *Act* provides that the total benefit period for reasons of pregnancy, placement of a child or children for the purpose of adoption, prescribed illness, injury or quarantine, or for any combination of these reasons may not exceed 15 weeks. The trial judge held that these provisions should not preclude the natural mother from receiving benefits during the parenting leave period, even though she had received benefits during the pregnancy leave period, because of his finding that section 30 benefits are essentially for pregnancy and cannot be regarded as of more than incidental use for childcare purposes.

Unemployment Insurance Act, 1971, s. 22(3) R.S.C. 1985, c. U-1, s.11(3)

Reasons for Judgment of Strayer J., *Case on Appeal*, pp. 103-104

20. Although the learned trial judge issued a declaration that the biological parents were entitled to benefits under the *Act*, he also ordered that the judgment be suspended until the time provided for appeal and, if an appeal were taken, until the final determination of the appeal. Such a suspensive order was consistent with his use of the declaratory power, which he described as follows:

> ...I consider it appropriate and just to make a declaration as to the entitlement of others to the same benefits and leave it to Parliament to remedy the situation in accordance with the *Charter*, either by extending similar benefits to natural parents, or by eliminating the benefits given to adoptive parents, or by some provision of more limited benefits on an equal basis to both adoptive and natural parents in respect of child-care. I am not in effect telling Parliament that it must follow one route or the other: all I am determining is that if it is going to provide such benefits it must provide them on a non-discriminatory basis. I am prepared to assume at this stage that Parliament will take the necessary action to render equal a system of benefits found by this Court to be unequal.

Judgment of Strayer, J., *Case on Appeal*, p. 110

Reasons of Strayer, J., *Case on Appeal*, p. 102

Finding of the Federal Court of Appeal

21. On appeal to the Federal Court of Appeal, the appellants accepted the learned trial judge's finding that section 32 of the *Act* is inconsistent with section 15(1) of the *Charter*. As the appellant had not submitted at trial any justification under section 1 of the *Charter* for the legislative distinction, there were no substantive issues at stake on the appeal. Rather, the appeal dealt solely with the relief granted by the learned trial judge, with the justices noting the appellant's concession that, assuming a court had the jurisdiction to grant it, the remedy devised by the trial judge was just and appropriate in the circumstances.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 114

Reasons for Judgment of Mahoney J.A., *Case on Appeal*, p. 135

22. The main issue raised on the appeal to the Federal Court of Appeal involved the question of whether the Court had jurisdiction under section 24(1) of the *Charter* to grant the remedy of extending the benefit in section 32 of the *Act* to natural parents or whether, having found that the legislation violated the *Charter*, the Court was bound to declare it to be of no force and effect pursuant to section 52(1) of the Constitution *Act*, 1982. The appellants also raised the issue of whether the remedy constituted an improper amendment of legislation by the Court and whether it was impermissible because it resulted in an appropriation of public monies for a purpose not authorized by Parliament.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 113

Reasons for Judgment of Mahoney J.A., *Case on Appeal*, pp. 134-135

23. The majority of the appellate court dismissed the appeal and held that a remedy was available in these circumstances under section 24 of the *Charter* and that the appropriate and just remedy was to extend the benefits in section 32 of the *Act* to natural parents, as the learned trial judge had done.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 132

24. They held that where an individual's rights have been infringed by unconstitutional legislation a declaration of invalidity pursuant to section 52 is not the only remedy available. Rather, where the manner in which the substantive right was infringed makes it appropriate to do so, a court may grant a remedy under section 24.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 114-116

25. Moreover, they found that because what was omitted from section 32 of the *Act* (rather than what it contained) rendered it unconstitutional, it was permissible to grant a remedy under section 24, rather than declaring the section to be unconstitutional.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 116

26. The majority also held that the remedy under section 24 of the *Charter* should be one which adequately protects the *Charter* right which has been infringed. Where the right to equality in section 15 is infringed by underinclusive legislation, a mere declaration of invalidity is inadequate because it does not guarantee the positive right conferred by the section. The positive right could only be guaranteed by a positive remedy.

Reasons for Judgment of Heald J., *Case on Appeal*, p. 121

27. With respect to the Court's jurisdiction to grant a remedy which extends a benefit granted by legislation, the majority found that the *Charter* empowered the Court to grant such a remedy and that in doing so it does not in any way impinge on Parliament's prerogative to choose amongst constitutionally valid policy options in enacting legislation which conforms to the requirements of the *Charter*. Because the remedy is a temporary one, the Court is still leaving it to Parliament to extend similar benefits to natural parents or to eliminate the benefits altogether or to choose some other alternative to ensure that its legislation conforms with the *Charter*.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 130-131

28. The majority also held that section 24 of the *Charter* empowers the Court to extend benefits to groups aggrieved by an exclusion from benefits. Such an extension was found to be permissible even though the remedy granted results in an appropriation of funds not authorized by Parliament. The Court held that this result had occurred in previous cases, and did not make the remedy granted by the trial judge impermissible.

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 132

29. The Court concluded that the extension of benefits is the only remedy which respects the purposive nature of the *Charter* and gives effect to the equality rights enshrined in section 15 and therefore is the only remedy which is "appropriate and just".

Reasons for Judgment of Heald J.A., *Case on Appeal*, p. 132

30. Mahoney J.A., in his dissenting reasons, stated that the validity of the purposive approach to remedies is not open to question. He also accepted the "logic and force of the practical considerations", which he described as follows:

> Parliament can effectively act if it is not content with the remedy; a stay of the remedy can be ordered should the court consider it unduly disruptive, as in the Manitoba Language Right Reference, [1985] 1 S.C.R. 721, and the remedy granted probably comes closer to the attainment of Parliament's real intentions than would a bare declaration of invalidity. They suggest that persons whose equality rights are violated by legislative underinclusion ought not be put in the "dog in the manger" position of seeking, as the only available remedy, to deprive others of some advantage and ask, if that is the necessary result, why any right-minded person would undertake such a *Charter* challenge. Persons ought not be deterred from asserting their rights. A declaration of invalidity does nothing to promote equality; equal access to nothing is not equality.
>
> Reasons for Judgment of Mahoney, J.A., *Case on Appeal*, p. 139

31. He stated that if the learned trial judge had the power to grant the remedy he did, he would not disturb it, because:

> I do think that it does best fulfil a purposive approach to remedy; it does promote equality while a declaration of invalidity cannot, except in sterile formality.
>
> Reasons for Judgment of Mahoney, J.A., *Case on Appeal*, p. 139

32. However, he stated that the constitution does not permit the remedy crafted by the learned trial judge. Section 52(1) does not provide a remedy in any real sense of that word, but "states a constitutional fact which no court can ignore". Moreover, whatever remedial scope section 24(1) might offer the court in circumstances which do not entail the appropriation of public monies, it does not authorize "a judicial appropriation of funds within the exclusive control of a sovereign Parliament or legislature".

> Reasons for Judgment of Mahoney, J., *Case on Appeal*, p. 146

33. This holding was, in turn, based on the learned justice's understanding that the remedy fashioned by the trial judge would offend the "firmly established", "fundamental" principle of the British constitution (originally expressed in the Bill of Right of 1688 and incorporated into Canada by means of the preamble to the Constitution *Act*, 1867):

> That levying Money for or to the Use of the Crown, by Pretence of Prerogative, without Grant of Parliament, for longer Time, or in other Manner than the same is or shall be granted, is illegal.
>
> Reasons for Judgment of Mahoney, J.A., *Case on Appeal*, p. 144

34. Citing the principle that "no money can be taken out of the Consolidated Revenue Fund ... excepting under a distinct authorization from Parliament itself", Mr. Justice Mahoney went on to say, "The appropriation of public monies by a court is as offensive to that principle as is its appropriation by prerogative".

Reasons for Judgment of Mahoney, J., *Case on Appeal*, pp. 144-145

Part II - Points in Issue

35. LEAF submits that the issues on this appeal may be described as follows:

(a) What guidance can this Honourable Court offer with respect to the considerations which affect the determination of remedy where underinclusive legislation is found to violate an individual's rights?

(b) Does a court have jurisdiction under the *Charter* to make an order which extends the application of a law or results in an expenditure of public money?

36. In the context of this case these issues might be simply described as:

(a) in what circumstances, for what reasons, and subject to what guidelines should the Court use what has been described as the remedy of "extension"?; and

(b) Does the Court have the authority under our constitution to use the extension remedy?

The questions are posed in this order because, LEAF submits, the answer to the first has a bearing on the interpretation of constitutional instruments which will answer the second. Consideration of the purpose and effects of a proposed extension may make it clear that it is institutionally appropriate for the courts to grant it within certain principled limits flowing from the *Charter* itself and the purpose of constitutional instruments like the *Charter*.

Part III - Argument

A. CONSIDERATIONS AFFECTING THE USE OF THE EXTENSION REMEDY

(a) Nature of the Right at Issue

37. A remedy under the *Charter* must be effective in light of the right in question and the manner in which it is infringed. As indicated by the topic headings within the *Charter* itself, it encompasses legal, political and egalitarian rights. Where legal rights involving the freedom from government action are at stake, striking down is an effective remedy because it ensures individuals' freedom from government intrusion.

For example, *Hunter v Southam*, [1984] 2 S.C.R. 145, at 148

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at 313

R. v. Morgenthaler, [1988]1 S.C.R. 30, at 80

38. On the other hand, positive rights, including political and egalitarian rights, call for positive remedies. It would seriously undermine the practical value of constitutionally entrenched rights if the court's discretion regarding remedies under the *Charter* were constrained in such a way as to mean that effective remedies are available only for one group of *Charter* rights. Where the right is an affirmative one, such as the right to vote or the right to equal benefit of the law, a remedy extending the benefit is particularly appropriate.

Hoogbruin and Raffa v. A.G.B.C. (1985), 70 B.C.L.R. 1 (C.A.), at 6

Marchand v. Simcoe County Board of Education (1986), 55 O.R. (2d) 638 (H.C.J.), at 661-663

Mahe v. Alberta, [1990] 1 S.C.R. 342, at 394-395

(b) The Purposive Approach to Remedies

39. It has been held that with respect to remedies, as well as substantive rights, the *Charter* should be given a generous and purposive interpretation. In selecting the appropriate remedy, the court should consider what best achieves the purpose of section 15(1) of the *Charter*, which has been found to be to promote equality and to alleviate the effects of disadvantage, not merely to create sameness or to eliminate distinctions. The structure of the *Charter* itself makes it clear that equality is to be promoted and disadvantage alleviated both by the *Charter* and in legislation. The trial judge and all justices of the Court of Appeal who heard this matter agreed with the purposive approach to *Charter* remedies.

Charter, s. 32(2)

R. v. Gamble, [1988] 2 S.C.R. 595, at 641

Osborne et al. v. Canada (1991), 125 N.R. 252 (S.C.C.), at 280

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at 170-172

Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219, at 1238

McKinney v. University of Guelph (1990), 76 D.L.R. (4th) 545 (S.C.C.), at 607-610, *per* Wilson J., dissenting on other grounds, and at 646, per La Forest J.

40. The court's approach to remedies should be consistent with the Supreme Court of Canada's recognition that the *Charter* should not be used as an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

> In interpreting and applying the *Charter*, I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

Edwards Books and Art Ltd. et al. v. The Queen, [1986] 2 S.C.R. 713, at 779

41. If the advantaged cannot use the *Charter* to roll back legislation intended to improve the condition of the disadvantaged, it follows that the courts should not devise an approach to remedies that means that genuine efforts by the disadvantaged to enforce their rights under the

Charter would result in other (or the same) disadvantaged persons losing their rights under legislation.

42. Ensuring that groups or individuals have the same entitlement to no benefits is contrary to the purpose of the equality guarantee in section 15, and produces only sameness not equality. The majority in the Federal Court of Appeal agreed with the proposition put forward in oral argument by counsel for LEAF that such a result amounted to "equality with a vengeance" because of the punitive aspect of the result. The dissenting justice also accepted the logic and force of the "practical" consideration that "equal access to nothing is not equality".

Reasons for Judgment of Heald J., *Case on Appeal*, p. 125

Reasons for Judgment of Mahoney J., *Case on Appeal*, p. 139

43. The principle that equality cannot be achieved by reducing existing benefits has also been recognized in legislation.

Pay Equity Act, 1987, S.O. 1987, c. 34, s. 9(1)

Employment Standard Act, R.S.O. 1980, c. 137, s. 33

Canadian Human Rights Act, R.S.C. 1985, c. 33, s. 11

British Columbia Human Rights Code, R.S.B.C. 1979, c. 186, s. 6

Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 6

Labour Standards Act, R.S.S. 1978, Ch. L-I, s. 17

(c) Access to *Charter* Guarantees

44. If the only result of a challenge to underinclusive legislation is to deprive others of the benefits granted by the legislation, individuals who are members of disadvantaged minorities and others who fear this result will hesitate to enforce their rights under section 15 of the *Charter*. Such a chilling effect on equality litigation will exacerbate the trend, already documented, of the *Charter* being used primarily as an "instrument of better-situated individuals", a result which this Court sought to avoid in its interpretation of equality rights in *Andrews*. The logic and force of this consideration were recognized by Mahoney .J A. in his dissenting reasons in the Federal Court of Appeal.

Reasons for Judgment of Mahoney J.A., *Case on Appeal*, p. 139

Brodsky and Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (Ottawa: Canadian Advisory Council on the Status of Women, 1989), at 56, 117-119 and 137-140

45. Such a result would have the effect of inhibiting access by the disadvantaged to constitutional guarantees meant to alleviate their disadvantage. It would run counter to the strong interest in access to the *Charter* which has been shown by this Honourable Court:

> Earlier sections of the *Charter* assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights of utmost importance to each and every Canadian. And what happens if those rights or freedoms are denied? Section 24(1) provides the answer - any one whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The rights and freedom are guaranteed by the *Charter* and the courts are directed to provide a remedy in the event of infringement ... it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantee, that is, access to a court.

B.C.G.E.U v. A.-G. B.C., [1988] 2 S.C.R. 214, at 229

These declarations emerged in a case dealing with lack of physical access to a court, but apply with equal, if not more, force to a case where the adverse results of attempts to enforce *Charter* guarantees have a chilling effect on future attempts at access.

(d) Role of the Legislature and of the Court in Protecting the Disadvantaged

46. An important reason for judicial deference to Parliament is the belief that the legislature is the better forum for balancing different interests and making decisions about allocation of resources amongst contending policies. One of the reasons for this view is the belief that the legislature is a representative institution.

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and

> differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature' representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy." (*Edwards Books and Art Ltd.*)
>
> *Irwin Toy Ltd v. Quebec* (A.G.), [1989]1 S.C.R. 927, at 993-994

47. However, it is now recognized that while legislatures may be "representative" institutions in the sense that they are popularly elected, they may not be representative in other important ways. Traditional ideas of who should be able to vote or to run for office, reflected in legislation, have meant that until comparatively recently, women, members of certain visible minority groups, aboriginal people and persons with certain disabilities, were formally excluded from a role in our democracy. In spite of legislative or judicial alleviation of these exclusions, it cannot be said that these groups are now well-represented in democratic institutions. Their relationship to legislatures is still, most frequently, that of petitioners from outside, rather than full participants within.

> Peter Hogg *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), at 723
>
> *Provincial Elections Act*, S.B.C. 1939, c. 16, ss. 2-5, as amended by S.B.C. 1945, c. 26, s. 2 and S.B.C. 1947, c. 28, ss. 5-14A
>
> *Canadian Disability Rights Council v. Canada* (1988), 21 F.T.R. 268 (F.C.T.D.)
>
> Sylvia B. Bashevkin, *Toeing the Lines: Women and Party Politics in English Canada* (University of Toronto Press, 1986), at 70-79

48. Indeed, the representativeness of the modern democratic state has been trenchantly criticized:

> What the system...does not ensure is the effective protection of minorities whose interests differ from most of the rest of us. For if it is not the "many" who are being treated unreasonably but rather

> only some minority, the situation will not be so comfortably amenable to political correction. Indeed there may be political pressures to encourage our representatives to pass laws that treat the majority coalition on whose continual support they depend in one way, and one or more minorities whose backing they don't need less favourably. (emphasis in original)
>
> John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980), at 78

49. Equality cases under section 15 of the *Charter* involve claims by the disadvantaged, members of "discrete and insular minorities." Their lack of influence on the legislative process has contributed to the historical disadvantage they have suffered. The purpose of section 15 is to overcome the effects of this disadvantage.

R. v. Turpin, [1989]1 S.C.R. 1296, at 1332

Ely, supra, at 151-153,160-161

Andrews, supra, at 183

50. A remedy which deprives such disadvantaged groups of existing benefits is likely to be particularly devastating because of their inability to mobilize the legislative process to restore what the Court has taken away in the name of someone else's rights. The Court should hesitate, then, to select a remedy that would leave the disadvantaged dependent on the actions of a majoritarian legislature to restore to them benefits which fulfil a constitutional purpose and are deficient only in that they are underinclusive.

51. The adoption of the phrase "discrete and insular minorities" from the *Caroline Products* case to describe those who may claim the benefit of section 15 of the *Charter* is instructive in considering the role of the court (as opposed to the legislature) in defending the interests of such minorities. Ely says, of the origins of the term, that its author (Justice Stone of the U.S. Supreme Court) was referring:

> ... to the sort of "pluralist" wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests, and [it] constituted an attempt to denote those minorities for which such a system of "mutual defense

pacts" will prove recurrently unavailing.

Ely, supra, at 151

52. Of this approach, he says:

> The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.

Ely, supra, at 151

(e) An Approach to the Extension Remedy

53. Because of the adverse consequences to the disadvantaged of having their court proceedings in search of equality result in the elimination of their statutory rights, or those of others equally or more disadvantaged, in circumstances where their powerlessness bodes ill for the prospects of restoring those rights through legislative action, LEAF proposes that a provision which itself promotes the equality of a disadvantaged group should not be struck down in the name of the equality of another disadvantaged group unless to do so would promote, or safeguard, the equality of both groups without resorting to further legislative action. Where it cannot be said that striking down would promote the substantive equality of both groups, then another alternative should be sought, and can be sought, given the provisions of section 24 of the *Charter*.

54. In considering which alternative to striking down it should implement, the court has several options: striking down with a suspensive provision, a mere declaration, various structural remedies, and extension.

> *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (striking down with a suspensive provision)
>
> *Philips and Lynch v. A.G.N.S.* (1986), 27 D.L.R. (4th) 156 (N.S.S.C.T.D.); aff'd (1986), 34 D.L.R. (4th) 633 (N.S.C.A.) (mere declaration)
>
> *Marchand v. Simcoe County Board of Education, supra*, (structural remedy)

55. In selecting the remedy, the court should have regard to the principle enunciated in paragraph 52, namely, that the result should promote, or sustain, the equality of both the plaintiff (who has successfully established entitlement to *Charter* guarantees) and the group protected by the legislation. In fashioning the remedy, the court should also set against its traditional respect for legislative balancing of interests the realization that the *Charter* clearly mandates a role for the judiciary in safeguarding the interests of discrete and insular minorities. While the court may incline toward caution in reconciling its own role in vindicating minority interests with the role of Parliament in balancing a plurality of interests, LEAF submits that the *Charter* signals that such caution should not prevent performance of an appropriate judicial role. In particular, should Parliament itself consider that the court has gone too far in the protection of the disadvantaged, it may use the override provided in section 33 to reassert its majoritarian preferences.

56. Even though the biological father is not usually considered a disadvantaged person, LEAF submits that the principles outlined in paragraph 55 are relevant to the analysis of this case. The father here is challenging the stereotype that the mother should be the primary, if not exclusive, caregiver to infants and young children. Success of his argument could promote the equality of women by engaging the participation of fathers in childcare. If the remedy fashioned by the learned trial judge and approved by the majority of the Federal Court of Appeal were affirmed by this Court, the father's success in the section 15 argument would promote the equality of women (a disadvantaged group) by promoting the participation of fathers in childcare without sacrificing measures aimed at benefitting the adoptive parents. The remedy at trial also demonstrates appropriate deference to the role of Parliament, and proceeds from a sophisticated analysis of a complete trial record, which judges are particularly well suited to perform.

57. The provision of leave to adoptive parents may itself be seen to further the equality-promoting purposes underlying section 15. Facilitating adoption is of benefit not only to those who do not have biological children, but also to the children who might not otherwise enjoy a stable family life and who obviously lack a political voice. Offering paid leave from work to

adoptive parents may make adoption possible for families where both parents need to be in the paid labour force, thus keeping adoption from being a privilege afforded only to the well-to-do.

58. The option offered in the adoption context to either the mother or the father addresses the stereotype that only women do or should parent on a full-time basis. Women's traditional role as primary care-takers of children has been a barrier to their full participation in the workforce and public sphere. Women have traditionally been disadvantaged by being required to bear a disproportionate burden of the costs associated with procreation. As the trial judge recognized, the benefits contained in the *Act* contribute, to some degree, to the amelioration of disadvantages historically suffered by women with respect to childbirth and child care.

Judgment of Strayer, J., *Case on Appeal*, p. 92

Brooks v. Canada Safeway, supra, at 1237-1239

Re Mabel P. French (1905), 37 N.B.R. 359 (N.B.S.C.), at 365-366

59. Striking down the adoptive leave provision in the interests of the biological father's equality would thus deprive adoptive parents of benefits which promote equality. It would also leave the father with no leave and create a situation where the only one of the four parents in this analysis with any leave at all would be the biological mother. Thus the "remedy" of striking down would reinforce the stereotypical position that, as between the biological mother and father, the biological mother should undertake child care (doing it in a period which the Court held was primarily to attend to her physiological circumstances), and reinforcing the position that it is primarily couples who can afford to have one stay out of the workforce altogether who are able to adopt children.

60. The remedy of extension in these circumstances preserves the equality-promoting benefit of the adoptive parents, and promotes the equality of both the biological parents. As Mr. Justice Strayer found, making parenting leave available to either biological parent would undercut the old stereotype that only the biological mother is a suitable caretaker for the child. By creating an environment where those biological fathers who are willing to depart from the stereotype are not penalized for doing so, and which recognizes the biological mother's unique interest in both

physiological recovery and the possibility of choosing an extended parenting leave, the solution of extension realizes in this case the optimal expression of these parents' rights to equality on the basis of gender.

61. The evidentiary record before the trial court contained detailed evidence concerning the interest in parenting of all four kinds of parents affected by the decision, as well as the biological mother's unique physical circumstances; the trial judge commented on its high quality. The record also presented a full history of the legislation, outlining not only the changes to the provisions at issue, but also the rationale for these changes; it emerged that the rationale underlying the present configuration of the benefits may have failed to take into account important evidence concerning the use to which the pregnancy benefits were put. Thus, in this case, as in perhaps few others, this Honourable Court may be able to conclude that the trial judge was making his remedial selection in adequate possession of the adjudicative and legislative facts bearing on the issue.

(f) Deference to Parliament

62. The remedy selected by the learned trial judge is extension, with a form of suspensive provision: while setting out that the *Charter* requires extension rather than striking down, he also afforded to Parliament an opportunity to consider what action it wished to take in light of the constitutional principles he had laid down. In this respect, the remedy resembled that of this Court in the Manitoba Language Reference.

63. It is submitted that the remedy granted by the trial judge in this case does not interfere any more with Parliamentary authority then would a declaration striking down this section. To deprive adoptive parents of the child care benefits granted to them pursuant to section 32 of the *Act* would be just as much a judicial amendment of the legislation enacted by Parliament as the extension of benefits granted by the trial judge. The remedy extending benefits does not impinge upon Parliament's prerogative to chose amongst constitutionally valid policy options by enacting new legislation.

Reasons for Judgment of Heald J. A., *Case on Appeal*, pp. 130-131

64. While setting out that the *Charter* requires extension rather than striking down, the trial judge's remedy affords Parliament an opportunity to act in accordance with the constitutional principles laid down in the judgment. The Court's remedy in effect establishes the state of the law pending such action by Parliament. Where a case involves benefits to a disadvantaged group protected by section 15, the court should avoid creating a legislative vacuum during this period. There is no certainty that Parliament will take any action. The group in question is disadvantaged in the sense that it has the least access to the legislative process. It is precisely in these circumstances that the court plays an important role in preserving and promoting equality in accordance with the *Charter*.

65. In the choice of remedy, the trial judge indicated his regard for the role of Parliament while at the same time attending to a problem that has a particularly harsh effect on the disadvantaged, although it is not confined to them: the problem of turning a court judgment into a practical reality. Mere declaratory relief requires follow-up either with the legislature, or program administrators, or both, that may simply be beyond the means of the disadvantaged. By providing a remedy in default of legislative action, the Court assisted the plaintiff and others in his situation in getting the legislature and administrators to take an interest in implementing constitutional behaviour.

66. It is submitted that this case does not raise questions of whether a court can legislate by proclaiming legislation in force in a province or determining the specific details of legislation. Those are the issues raised in the cases cited by the appellants as indicative of uncertainty with respect to the issue of the courts' power to legislate.

> *R. v. Van Vliet* (1988), 45 C.C.C. (3d) 481 (B.C.C.A.) Leave to appeal to S.C.C. refused 56 C.C.C. (3d) vi (S.C.C.)
>
> *R. v. Varga* (1985), 48 C.C.C. (3d) 281 (B.C.C.A.)
>
> *R v. Hamilton* (1986), 57 O.R. (2d) 412 (C.A.). Leave to Appeal to S.C.C. refused (S.C.C., April 9, 1987).
>
> *R. v. Paquette*, [1988] 2 W.W.R. 44 (Alta.C. A.) Leave to appeal to S.C.C. refused (1988), 85 A.R. 235n (S.C.C.)

67. It is submitted that the remedy granted by the trial judge in the present case does not involve this type of legislative decision-making because it merely extends an existing legislative benefit to a group required by the *Charter* to be covered.

68. Courts in the United States have considered that a remedy extending benefits constitutes a lesser interference with legislative intent than eliminating a valid and important policy clearly embodied in legislation. It is submitted that this approach does not involve a court in speculating as to Parliament's hypothetical intent.

> *Welsh v. United State*, 398 U.S. 333 (1970), at 354-356 Califano v. Westcott, 443 U.S. 76 (1979), at 90

(g) Consistency with Canadian and U.S. approaches to Remedy

69. It is submitted that in exercising the broad discretion granted to them by section 24(1) of the *Charter*, Canadian courts can properly look to the approach taken by courts in the United States in similar circumstances. A remedy extending benefits has been granted under the U.S. Constitution where a law is found to be invalid not because its substance is impermissible but because it is underinclusive. This remedy has quite explicitly been adopted to extend benefits to fathers as a corrective to sex-discrimination patterns affecting women.

> *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), at 641-42, 651-53 (gender based distinction in social security benefits contrary to Due Process Clause in Fifth Amendment)
>
> *Califano v. Westcott, supra* (gender based distinction in social security benefits violates Fifth and Fourteenth Amendments)
>
> *Heckler v. Mathews*, 464 U.S. 728 (1984) (pension benefits not extended equally contrary to Due Process Clause of Fifth Amendment)
>
> *Welsh v. United States, supra*, at 361-365 per Harlan J., concurring in the result (exemption from military service found not to extend to conscientious objectors violated First Amendment)

70. The remedial route adopted by the trial judge is consistent with other cases where legislation has been found to be inconsistent with section 15(1) because benefits accorded to one

group are denied to another and courts have granted remedies extending the benefit to both groups. Such an interpretation renders the legislation consistent with the *Charter* and avoids the necessity of striking down the legislation, thereby depriving everyone of the benefits.

See, for e.g., *Addy v. The Queen in Right of Canada* (1985), 22 D.L.R. (4th) 52 (F.C.T.D.)

R. v. Punch (1985), 22 C.C.C. (3d) 289 (N.W.T.S.C.)

R. v. Hamilton; R v. Asselin; R v. McCullagh (1986), 57 O.R. (2d) 412 (C. A.). Leave to Appeal to S.C.C. denied (1987) 59 O.R. (2d) 399n (S.C.C.)

Tetrault-Gadoury v. Canadian Employment and Immigration Commission (1991), 126 N.R. 1 (S.C.C.)

71. Courts interpreting section 15 of the *Charter* have granted remedies which have, in fact, extended benefits; this result has been achieved by striking out a provision which makes an exception to or an exclusion from the benefit of the law.

Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (C.A.), at 531-533. Leave to Appeal to Supreme Court of Canada denied 58 O.R. (2d) 274 (S.C.C.)

Silano v. British Columbia, [1987] 5 W.W.R. 739 (B.C.S.C.), at 755

Hebb v. R. (1989), 69 C.R. (3d) 1 (N.S.S.C.T.D.), at 20-23

72. It is submitted that the availability of such an extension of rights should not depend on whether the obstacle to extension is a specific limitation on the one hand or legislative silence on the other. Most legislation was drafted without the possibility of this effect in mind. As a result, there is no predictable pattern in statutory construction: sometimes a benefit is withheld by means of an explicit limitation and sometimes by silence. The availability of an effective remedy should not depend upon such accidents of drafting.

Hoogbruin and Raffa v. A.G.B.C., *supra*, at 5-6

Dixon v. A.G.B.C., [1989] 4 W.W.R. 393 (B.C.S.C.), at 427-429

Knodel v. British Columbia (unreported, August 30, 1991, B.C.S.C.)

B. DOES THE COURT HAVE THE POWER TO GRANT THE REMEDY OF EXTENSION?

1. Relationship of Sections 24 and 52 of the *Charter*

73. Where *Charter* rights are infringed by legislation neither section 24 nor section 52 of the *Constitution Act*, 1982 provides the sole remedial route. Although legislation which is inconsistent with the *Charter* is of no force or effect pursuant to section 52 it is submitted that nothing in that section or in the constitution establishes that this is the exclusive remedy. An individual whose rights have been infringed is entitled to a remedy which is appropriate and just in the circumstances.

R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at 313

Harbhajan Singh et al. v. M.E.I., [1985] 1 S.C.R. 177, at 221

Jones v. The Queen, [1986] 2 S.C.R. 284, at 323

B.C.G.E.U v. B.C. (A.-G.), *supra*, at 229

Second Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, 1978 ("Second Report") reproduced in Bayefsky, *Canada's Constitution Act, 1982 and Amendments, a Documentary History*, Vol I, at 420-423

74. It has been recognized that where, as here, legislation is inconsistent with the rights under the *Charter* not because of what it contains but because it fails to extend far enough, or because officials have failed to take the appropriate steps under it, the courts are not required to strike down the legislation under section 52 but, rather, should grant a remedy under section 24.

Mahe v. Alberta, [1990]1 S.C.R. 342, at 392

75. Section 24(1) of the *Charter* grants to the courts a wide and unfettered discretion to fashion remedies which are appropriate and just in the circumstances of any particular case. In determining what remedy is most appropriate a court should consider the right in question, the manner in which it was infringed, and the adequacy of any alternative remedies.

Mills v. The Queen, [1986]1 S.C.R. 863, at 965

R. v. Big M Drug Mart Ltd., *supra*, at 313

R. v. Gamble, [1988] 2 S.C.R. 595, at 641

Rahey v. The Queen, [1987] 1 S.C.R. 588, at 648

Dixon v. A.G.B.C., supra, at 427-8

76. It has been held that the effect of the court's broad remedial power under section 24 is not merely that an appropriate remedy is available for the violation of a *Charter* right but that the court is able to grant a remedy which constitutes the "best possible solution". It is submitted that as the review of alternative remedies above indicates, the remedy granted by the trial division in this case is the "best possible" because it is the only one which effectively remedies the wrong and is consistent with the purpose of the right in question.

Re Kodellas et al. and Saskatchewan Human Rights Commission (1989), 60 D.L.R. (4th) 143, at 201 (Sask. C. A.)

See Paragraphs 13 to 18, above

77. It is submitted that the legislative history of sections 24(1) and 52(1) does not support the conclusion that where a law is inconsistent with the *Charter* there is no role for section 24(1). The Special Joint Committee of the Senate and the House of Commons recommended in its Second Report (October 10, 1978) that the Constitutional Amendment Bill contain a provision clearly establishing the supremacy of the *Charter* over all other laws to ensure that the *Charter* would be interpreted as an overriding statute. Such a provision was, arguably, necessary to signal a clear departure from the principle of the supremacy of Parliament, and from the deference to that principle which had been embodied in the *Canadian Bill of Rights*.

Second Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, 1978, ("Second Report") reproduced in Bayefsky, Canada's Constitution Act 1982 and Amendments, A Documentary History. Vol. I pp. 420-423

Canadian Bill of Rights, s. 2

78. The Committee also recommended that the *Charter* contain a provision by which effective remedies would be made available where rights were infringed.

In effect, the courts should have the power to grant whatever

> remedy may be appropriate in the circumstances, including pecuniary damages, to enforce the protected rights and freedoms. ... Moreover, the courts should have the specific obligation placed upon them to grant an effective remedy where a denial of rights has occurred. They must not be allowed to decline to intervene.
>
> *Second Report*, reproduced in Bayefsky, *supra*, at 423

79. Section 52 of the *Charter* is, to some extent, a legacy of the division of powers conflict that characterized constitutional law before the advent of the *Charter*. Invalidating ultra vires legislation, a solution to disputes between governments, can in many cases be suitably transposed to the context of a dispute under the *Charter* between an individual and one level of government. However, the *Charter* specifically contemplates that invalidation will not be a suitable remedy in all such cases. Section 24(1) of the *Charter* is based on the premise that the *Charter* gives rights to individuals, not governments, and that the creation of new rights for individuals vis-à-vis the state requires the creation of remedies over and above those which were developed to deal with the jurisdictional disputes of government actors.

80. Remedy has been defined to be a means of providing "reparation, redress, relief". In medicine, it is something which "alleviates pain and promotes restoration to good health". This plain English meaning of the term used in section 24 is inconsistent with the idea that violation of the *Charter* must in all or most cases result in invalidation under section 52, without more.

Shorter Oxford English Dictionary, 3rd Ed., at 1791

81. It is also clear that the new approach to defining substantive rights in the *Charter* (as distinct from the Canadian Bill of Rights) requires that section 24 be given the interpretation contended for by LEAF. For example, that the scope of the equality guarantees in section 15 was specifically intended to eliminate the problems of the old "equality before the law" definition has been recognized by this Court. The conceptual change wrought by the changed definition has already been signalled by this Court.

It is readily apparent that the language of section 15 was

> deliberately chosen in order to remedy some of the perceived defects under the Canadian Bill of Rights.
>
> It is clear that the purpose of section 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.
>
> *Andrews v. Law Society of B.C., supra,* at 170-171
>
> *Brooks v. Canada Safeway Limited, supra,* at 1243-1245
>
> *Bliss v. A.G. Canada,* [1979]1 S.C.R. 183, at 191-192

82. It is submitted that the language of section 24(1) clearly requires that a remedy be available where *Charter* rights have been infringed or denied, whether the infringement arises because of a statute or because of the actions of government officials. It would seriously diminish the effectiveness of the *Charter* guarantees if courts were restricted under section 24 of the *Charter* to the remedial approach developed in relation to the division of powers under the Constitution.

> Rogerson, C. "The Judicial Search for Appropriate Remedies under the *Charter*: The Examples of Overbreadth and Vagueness" in Sharpe, R.J., ed. *Charter Litigation* (Toronto, 1986), at 285-87, 305-6

83. In the present case, the effect of imposing such a limitation on the scope of section 24(1) is to deny any remedy whatsoever to Mr. Schachter, to reaffirm that the task of childcare is primarily that of the biological mother and at the same time to eradicate the vested rights of others, which, because they are promoting equality, are consistent with the *Charter*+s equality guarantees. Such a result is contrary to the clearly expressed intention in section 24 that a remedy should be available for an infringement of rights, and contrary to the purpose of the *Charter's* equality guarantees - which the Court has found, in a judgment not being appealed, to have been infringed by the legislation at issue here.

84. Finally, section 24 of the *Charter* accords to a trial court a wide discretion to grant an appropriate and just remedy. In the context of remedies under subsection 24(2) it has been held that an appeal court should not lightly interfere with the trial court's opinion. It is submitted that similar deference should be shown with respect to a trial court's exercise of the broad discretion under section 24(1) to fashion and remedy which is appropriate and just in the circumstances.

R. v. Dugay, [1989]1 S.C.R. 93, at 98

2. Impact on the Spending Power

85. It is submitted that the remedy granted by the trial judge in this case does not constitute an improper interference with Parliament's authority over spending because that power is, like all exercises of governmental power, subject to the *Charter*. There is no basis in the Constitution for finding that the *Charter* has a limited extent which does not reach to all exercises of government authority. The executive branch of government has been found to have a duty to act in accordance with the dictates of the *Charter*.

Operation Dismantle Inc v. The Queen, [1985] 1 S.C.R. 441, at 463-4

R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at 598-99

86. While the courts have recognized that, as a matter of constitutional law, they do not have authority to require a Minister of the Crown to make a specific expenditure, they have done so where there is no legislation requiring the expenditure and no other provisions of the Constitution are involved.

Reference re Constitution Question Act (1991), 127 N.R. 161 (S.C.C.), at 202-207

Hamilton-Wentworth v. Ministry of Transportation (1991), 2 O.R. (3d) 716 (Div. Ct.), at 732

87. In this case, the general language of both the *Unemployment Insurance Act* and the *Financial Administration Act*, referred to by Mahoney, J.A., is broad enough to include expenditures that might be required as a result of judicial consideration of the provisions of the *Unemployment Insurance Act*, whether pursuant to the *Charter* or to the Court's general power of construing statutes.

Judgment of Mahoney, J., *Case on Appeal*, pp. 143-145

McLeod v. Egan, [1975]1 S.C.R. 517, at 519

88. In the *Charter* context, this Court has recognized that although Parliament requires flexibility in choosing alternatives it must comply with the *Charter* when granting benefits under the *Unemployment Insurance Act*, 1977.

> Even allowing the government a healthy measure of flexibility in legislating in this area, the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives....

Tetrault-Gadoury, supra, at 26

89. The historical roots of Parliament's exclusive jurisdiction over spending are found in the context of restraints on arbitrary exercises of power by the executive branch of government. Parliamentary authority in this area was originally a countervail to the exercise of despotic power by the Crown.

90. Mahoney, J.A. relies in his judgment on the long-standing principle of constitutional government that only Parliament (and not the executive) may authorize expenditures of public monies, and then purports to extend that principle to the relationship between the judiciary and Parliament.

Paragraphs 32 and 33, *supra*

91. It is respectfully submitted that what Mahoney, J.A. was referring to in his invocation of the *Bill of Rights of 1688* and the long-standing principle concerning Parliamentary control over spending was a constitutional convention dealing with the relations between the two Houses of Parliament and between Parliament and the executive. In Canada, that convention is given expression, to a certain extent, in the provisions of sections 53 and 54 of the *Constitution Act, 1867.*

DeSmith and Brazier, *Constitutional and Administrative Law*, 6th ed. (Penguin Books, 1989), at 28

92. It is further respectfully submitted that it is not appropriate to extend that convention, without more, to include the relationship of the judiciary to Parliament, as the learned justice purported to do in his reasons. The convention which has traditionally governed the relations between the judiciary and the legislature is that of Parliamentary sovereignty, which is the source of virtually complete judicial deference to legislative choices in a legal and political system that does not have entrenched guarantees of rights to which legislatures themselves are subject, and which are interpreted by the courts.

93. Accordingly, it is suggested that one must look not to the implications of the "spending" convention for guidance as to the appropriate role of the court in this instance, but rather to the implications of the tradition of Parliamentary sovereignty and its modification by the fundamental guarantees of the *Charter*.

94. In the United Kingdom, the need to ensure that national law conforms with the law of the European Community has modified the doctrine of Parliamentary sovereignty. In the case of conflict between domestic law and the higher, or supreme, law of the Community the doctrine of Parliamentary sovereignty must give way and Community law prevails.

R. v. Secretary of State for Transport, ex. p. Factortame Ltd., [1990] 2 A.C. 85

Wade, H.W.R., "Notes: What has Happened to the Sovereignty of Parliament?" (1991) 107 L.Q.R. 1

95. It is submitted that, similarly, in Canada the constitution, the supreme law, takes precedence over other legislation. While this may be an incursion into the authority of Parliament, it is clearly called for by the *Constitution Act, 1982*.

Constitution Act, 1982, s. 52

96. On the other hand, if this Honourable Court is of the view that the "spending" convention is relevant to the relations between Parliament and the courts, it is submitted that that convention is neither immutable nor the exclusive source of wisdom on the appropriate relationship between the two institutions.

DeSmith, supra, at 43-44

97. For example, Parliament itself has had to legislate in the area of control over money bills, in order to refresh its traditional supremacy vis-à-vis the House of Lords.

Parliament Act, 1911, 1 & 2 Geo. V, c. 13

DeSmith, supra, at 36

98. It has been held by this Honourable Court that the purpose of constitutional conventions is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period".

Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, at 880

99. It would be inconsistent with this approach to allow a convention developed in the heyday of Parliamentary sovereignty (now limited by the *Charter*) to prevent judicial fashioning of remedies consistent with the *Charter's* equality guarantees.

DeSmith, supra, at 35, 37

100. In determining both the force and applicability of a constitutional convention, the crucial questions must always be whether or not a particular class of action is likely to destroy respect for the established distribution of authority and whether or not it is likely to maintain respect for the constitutional system by changing (or sustaining) the distribution of authority. This distribution of authority implies the maintenance of limited monarchy, representative government, responsible government and efficient government; it implies also that constitutional rules must be comparable with the realities of practical politics.

DeSmith, supra, at 46

101. On this test, it is suggested that the remedy of extension, granted in the circumstances above, actually fosters respect for basic constitutional values and representative institutions by providing for the protection of vulnerable minorities through the proper and effective interplay of court and legislature.

102. In fact, it is submitted that the entrenchment of rights and freedoms in the *Charter*, and the courts' role in ensuring that governments respect those rights, are in keeping with that spirit of resistance to arbitrary exercises of power by the dominant which is at the root of Parliament's original assertion of its authority over spending vis-à-vis the monarch.

103. It is also consistent with the relationship between reviewing courts and legislatures which has evolved over the years. For example, in non-*Charter* adjudication the courts have traditionally made orders which affect, directly or indirectly, Parliament's authority over spending and the allocation of governmental resources. Where the Crown has been found liable for breach of trust and breach of fiduciary duty, for example, courts have made damage awards against the Crown. The Crown is not excused from paying such awards on the basis that they have not been authorized by Parliament.

Miller v. The King, [1950] S.C.R. 168

Guerin v. The Queen, [1984] 2 S.C.R. 335

104. In the development of the fairness doctrine in administrative law it has been accepted that the courts' decisions would require resources to be allocated to provide the procedures necessary for fair process. These decisions involve the courts in their traditional role of developing the law and, although they may have had a significant impact on legislative or parliamentary decisions about spending, were not considered to usurp the spending power.

For example, Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311

105. In cases where legislation has been reviewed on federalism grounds the courts have granted remedies which have the result of requiring an expenditure of public funds. While Parliament's power over revenues is constitutionally entrenched, its exercise of that power must comply with the Constitution and is subject to review by the courts.

Reference re Employment and Social Insurance Act, 1935, [1937] 1 D.L.R. 684 (P.C.)

106. In the case of *Prior v. Canada*, on which the applicants rely, by contrast, it was the very power to raise money through income taxes which was called into question. The Federal Court of Appeal in that case found that it did not have jurisdiction to interfere with that power. However, the court did not conclude that it would lack jurisdiction to determine whether or not the exercise of that power in a specific piece of legislation was in conformity with the *Charter*. Indeed, the courts have always taken jurisdiction to consider whether legislation regulating taxation was validly enacted pursuant to the powers in the Constitution, and it has been stated in a decision of this Honourable Court that "action taken under the *Constitution Act, 1867* is of course subject to *Charter* review" in order "to supervise and on a proper occasion curtail the exercise of a power to legislate".

Prior v. Canada (1989), 101 N.R. 401 (Fed. C.A.), at 404

British Columbia Electric Railway v. The King, [1946] A.C. 527

Simpson-Sears Ltd. v. New Brunswick (Provincial Secretary), [1978] 2 S.C.R. 869

Reference Re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 2 S.C.R. 1148, at 1206-07

107. In cases decided under the *Charter* expense has been held not to justify limitation on rights under section 1 of the *Charter*. As in the administrative law area, courts have made rulings regarding fair procedure which may have a significant effect on public spending and on the allocation of funds. It is submitted that just as financial consequences are not an obstacle to the courts' ability to fashion effective remedies for the right to trial within a reasonable time and the right to counsel, they should not prevent courts from granting effective remedies where equality rights are at stake.

Singh v. MEI, supra, at 218

Askov et al. v. The Queen, [1990] 2 S.C.R. 1199

108. It has also been held that a lack of funds or resources do not justify discrimination under section 15 of the *Charter* and cannot be used as a basis for rendering *Charter* rights meaningless.

Leroux v. Co-operators General Insurance Co. (1990), 65 D.L.R. (4th) 702, at 715-17; (Ont.H.C.J.) rev+d on other grounds (unreported, September 16,1991, Ont. C.A.)

R. v. Rowbotham et al. (1988), 25 O.A.C. 321 (C.A.)

109. Where a *Charter* right imposes a positive obligation on government, the court may order that public funds must be spent. Under section 23 of the *Charter* it has been held that the government must do whatever is necessary to discharge its obligation to provide minority language education, including providing public funding that is adequate for the purpose. The framers must be taken to have intended the foreseeable financial consequence of the enactment of the Constitution *Act*, 1982.

Mahe, supra, at 393-5

Marchand, supra, at 661-62

110. It is submitted that there is nothing in the *Constitution Act* precluding a court from granting a remedy that results in an expenditure of public funds not specifically authorized by Parliament where that remedy is appropriate and just in the circumstances. This is particularly noticeable in the case of section 15. Section 32(2), postponing the coming into force of section 15 for three years after proclamation of the *Charter*, was meant to give governments time to bring their legislation and practices into conformity with the equality guarantee. Had the framers of the *Constitution Act, 1982* not wanted this compliance effort (or any other, future, compliance effort) to affect government spending priorities, they might have so specified.

Proposed Resolution Respecting the Constitution of Canada, October 6, 1980, reproduced in Bayefsky, *supra*, at 751

111. It is therefore submitted that the decision of the Federal Court of Appeal does not usurp the functions of Parliament, carve out a new legislative role for the courts or interfere with Parliamentary authority over revenue and expenditures. On the contrary, the decision accurately applies the following well-established principles: it takes a purposive approach to *Charter* rights, it grants the remedy which is most appropriate and just in the circumstances and which is consistent with the purpose of the *Charter*, it carries out the purpose of alleviating disadvantage as opposed to rolling back the gains made in legislation, it respects the principle that administrative cost and inconvenience do not justify the infringement of rights and it does not

interfere with Parliament's authority to choose among various policy options and enact legislation which conforms to the *Charter*.

112. It is further submitted that the decision of the Federal Court of Appeal is correct in holding that a remedy is available under section 24 of the *Charter* and that the remedy granted by the trial judge is the most appropriate and just in the circumstances.

Part IV - Relief Requested

113. It is respectfully requested that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Mary Eberts

Jenifer Aitken

Of Counsel for the Respondent/Intervenor,
Women's Legal Education and Action Fund

Part V - Table Of Authorities Authority

APPENDIX "A"

STATUTES

Constitution Act, 1982

s. 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.

s. 24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

s. 26 The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exists in Canada

s. 32 (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section come into force.

s. 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Unemployment Insurance Act, 1971, s. 30

(l) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves her pregnancy.

(2) Subject to subsection 22(3), initial benefit is payable to a major attachment claimant under this section for each week of unemployment in the period

(a) that begins

(i) eight weeks before the week in which her confinement is expected, or

(ii) with the week in which her confinement occurs, whichever is the earlier; and

(b) that ends

(i) with a week immediately preceding the first week for which benefit is claimed and payable pursuant to another section of this Part, or

(ii) seventeen weeks after the later of
(A) the week in which her confinement is expected, and
(B) the week in which her confinement occurs, whichever is the earlier.

(3) When benefits are payable to a claimant in respect of unemployment caused by pregnancy and any allowances, monies or other benefits are payable in respect of that pregnancy to the claimant under a provincial law, the benefits payable to the claimant under this Act shall be reduced or eliminated as prescribed.

(4) For purposes of section 23, the provisions of section 25 do not apply to the two week period that immediately precedes the period described in subsection (2).

(5) If benefit is payable to a major attachment claimant under this section and earnings are received by that claimant for any period that falls in a week in the period described in subsection (2), the provisions of subsection 26(2) do not apply and all such earnings shall be deducted from the benefit paid for that week.

Unemployment Insurance Act 1971 s. 32

(1) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

(2) Subject to subsection 22(3) initial benefit is payable under this section for each week of unemployment in the period

(a) that begins with the week in which the child or children are actually place with the major attachment claimant; and

(b) that ends

(i) seventeen weeks after the week in which the child or children are so placed

(ii) with the week in which it is no longer reasonable for that claimant to remain at home for the reason referred to in subsection (1), or

(iii) with the week immediately preceding the week for which benefit is claimed and payable pursuant to another section of this Part, whichever is the earliest.

(3) Where benefits are payable to a major attachment claimant under this section and earnings are received by that claimant for any period that falls in a week in the period described in subsection (2), the provisions of subsection 26(2) do not apply and all such earnings shall be deducted from the benefit payable for that week.

(4) Benefits shall not be paid pursuant to this section to more than one major attachment claimant in respect of a single placement of a child or children for the purpose of adoption.

(5) Where before any benefit has been paid to a major attachment claimant in respect of a single placement of a child or children for the purpose of adoption, two insured persons with whom the child or children are placed for the purpose of adoption claim benefit under this section, no benefit shall be paid under this section until one of such claims is withdrawn.

Canadian Bill of Rights

s. 2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel detention and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Employment Standards Act, R.S.O. 1980, c. 137, ss. 33(1) and (2)

PART IX

EQUAL PAY FOR EQUAL WORK

33.-(1) No employer or person acting on behalf of an employer shall differentiate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee or vice versa for substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions, except where such payment is made pursuant to

(a) a seniority system;

(b) a merit system;

(c) a system that measures earnings by quantity or quality of production; or

(d) a differential based on any factor other than sex.

(2) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1)

Canadian Human Rights Act, R.S. C. 1985, H-6, ss. 11(1) and (6)

11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

Individual's Rights Protection Act, R.S A. 1980, c. 1-2, ss. 6(1) and 6(5)

6(1) No employer shall

(a) employ a female employee for any work at a rate of pay that is less than the rate of pay at which a male employee is employed by that employer for similar or substantially similar work in the same establishment, or

(b) employ a male employee for any work at a rate of pay that is less than the rate of pay at which a female employee is employed by that employer for similar or substantially similar work in the same establishment.

(5) No employer shall reduce the rate of pay of a employee in order to comply with this section.

Labour Standards Act, R.S.S. 1978, Ch. L-1, s. 17

PART III

EQUAL PAY

17.-(1) No employer or person acting on behalf of an employer shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee, or vice versa, where such employees are employed by him for similar work which is performed in the same establishment under similar working conditions and the performance of which requires similar skill, effort and responsibility, except where such payment is made pursuant to a seniority system or merit system.

(2) No employer shall reduce the rate of pay to any of his employees in order to comply with this section.

(3) Where an employer has contravened subsection (1), he shall not thereafter be entitled to reduce the rate of pay to which an employee is entitled on the grounds that the work is subsequently performed only by employees of the same sex. 1976-77, c. 36 s. 17.

Pay Equity Act, 1987, S.O. 1987, c. 34, s. 9(1)

9.-(1) An employer shall not reduce the compensation payable to any employee or reduce the rate of compensation for any position in order to achieve pay equity.

British Columbia Human Rights Code, R.S.B.C. 1979, c. 186, ss. 6(1) and 6(4)

Discrimination in wages

6. (1) No employer shall discriminate between his male or female employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work.

(4) No employer shall reduce the rate of pay of an employee in order to comply with this section.

APPENDIX "B"

IN THE FEDERAL COURT OF CANADA TRIAL DIVISION

BETWEEN:

SHALOM SCHACHTER

Plaintiff

- and -

HER MAJESTY THE QUEEN and CANADA EMPLOYMENT AND IMMIGRATION COMMISSION

Defendents

STATEMENT OF CLAIM

Filed on the 22 day of October, 1986.

1. The Plaintiff is an arbitration officer employed by the Ontario Nurses Association, in the City of Toronto, in the Municipality of Metropolitan Toronto.

2. The Defendant Canada Employment and Immigration Commission (the "Commission") administers the material provisions of the **Unemployment Insurance Act**, 1971, S.C. 1970-71-72, c.48, as amended (the "Act") The Commission is for all purposes an agent of Her Majesty in right of Canada and its powers may be exercised only as agent of Her Majesty in such right.

3. On or about July 28, 1985, the Plaintiff's wife gave birth to a child by caesarian section and subsequently suffered post partum hemorrhage.

4. The Plaintiff assumed the primary responsibility for the care of the newborn child and took time off work, commencing July 28, 1985, in order to discharge his parental responsibilities.

5. On August 2, 1985, the Plaintiff applied to the Commission for unemployment insurance benefits and, accordingly, the Plaintiff's "benefit periods", as defined in section 2 of the Act, began on July 28, 1985.

6. At the time of the said application, the Plaintiff had been employed in "insurable employment", as defined in section 3 of the Act, for more than twenty weeks within the period of fifty-two weeks immediately preceding the commencement of his benefit period and the Plaintiff's earnings from employment had been interrupted. Accordingly, at the time of the said application, the Plaintiff qualified to receive unemployment insurance benefits under section 19 of the Act.

7. At the time of the said application, the Plaintiff advised the Commission of his wife's medical condition. The Plaintiff also disclosed to the Commission that he was taking time off work to care for his newborn child both because his wife needed time to recuperate and because the circumstances of his wife's employment made it difficult for her to remain off work for fifteen weeks, that is, the maximum number of weeks for which initial benefit, as defined in section 2 of the Act, is payable under the Act to a claimant by reason of her pregnancy. The Plaintiff also wished to remain at home to care for his newborn child in order to share the responsibility and experience of caring for that child, and to provide the child with paternal presence and care during this initial period. The Plaintiff states that it was reasonable for him to remain at home to care for his newborn child.

9. By Notice of Disentitlement dated September 27, 1985, the Commission denied the Plaintiff's claim for unemployment insurance benefits. The said Notice of Disentitlement stated that the Plaintiff was not entitled to such benefits because the Plaintiff had not proven, in accordance with section 25 of the Act, that he was available for work.

10. The Plaintiff could not afford to remain at home to care for his newborn child unless benefits were paid to him by the Commission. Accordingly, the Plaintiff returned to work on or about August 19, 1986.

11. The Plaintiff's wife applied for benefits under the Act on or about July 7, 1985. As a consequence of the denial of benefits to the Plaintiff, the Plaintiff's wife continued to remain at home. The Plaintiff's wife received benefits under section 30 of the Act for the fifteen week

period commencing July 21, 1985 and ending November 1, 1985. During that period, the Commission paid benefits to the Plaintiff's wife at the rate of $208.00 per week.

12. If the Plaintiff's claim for benefits had been allowed, benefits would have been payable to him at the rate of $276.00 per week.

13. The denial by the Commission of the Plaintiff's claim for unemployment insurance benefits is contrary to sections 15 and 28 of the Canadian Charter of Rights and Freedoms, since:

(i) unemployment insurance benefits are available under section 30 of the Act to a natural mother who is a major attachment claimant and who, notwithstanding section 25 of the Act, proves her pregnancy;

(ii) unemployment insurance benefits are available under section 32 of the Act to an adoptive mother or father who is a major attachment claimant and who, notwithstanding section 25 of the Act, proves that it is reasonable for that claimant to remain at home by reason of the placement with the claimant of one or more children or the purpose of adoption; and

(iii) no unemployment insurance benefits are made available under the Act to a major attachment claimant, such as the Plaintiff, who

a) proves that he is the natural father of a newborn child and that he has remained at home to care for the newborn child or, in the alternative,

b) proves that he is the natural father of a newborn child and that it is reasonable for him to remain at home by reason of the birth of that child.

14. The Commission has denied the Plaintiff benefits on the basis of his sex and has differentiated claims for benefits adversely in relation to the Plaintiff on the basis of his sex, contrary to section 5 of the Canadian Human Rights Act, S.C. 1976-77, c. 3.

15. The decision of the Commission was confirmed by the Board of Referees on November 29, 1985.

16. The Plaintiff states that, pursuant to the Canadian Charter of Rights and Freedoms, he and his wife together are entitled to receive benefits under the Act in respect of the birth of their newborn child, provided that the aggregate of the benefits paid to both of them shall not exceed an amount equal to the greater of:

a) the amount of benefit that the Plaintiff would receive in respect of a period of fifteen weeks; or

b) the amount of benefit that the Plaintiff's wife would receive in respect of a period of fifteen week.

17. The Plaintiff claims as follows:

(I) a declaration, pursuant to sections 17 and 18 of the Federal Court Act and section 24 of the Canadian Charter of Rights and Freedoms, that unemployment insurance benefits are payable to a major attachment claimant who proves that he is the natural father of a newborn child and that he has remained at home to care for that child notwithstanding that the said claimant is not able to prove that he is available for work, provided that:

(A) the maximum number of weeks for which initial benefit, as defined in the Act, is payable to that claimant shall be the same as the maximum number of weeks for which initial benefit is payable to a claimant who proves her pregnancy or a claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with the claimant of one or more children for the purpose of adoption;

(B) subject to (A) above, initial benefit shall be payable to that claimant for each week of unemployment in the period

(i) that begins with the week in which the child is born; and

(ii) that ends

(a) seventeen weeks after the week in which the child is born,

(b) with the week in which that claimant ceases to remain at home for the purpose of caring for his newborn child, or

(c) with the week immediately preceding the week for which benefit is claimed and payable pursuant to another section of the Act, whichever is earliest;

(C) subject to (D) below, where benefits are payable to a claimant pursuant to this order and such earnings are received by that claimant for any period that falls in a week in the period described in (B) above, all such earnings shall be deducted from the benefit payable for that week;

(D) that portion of the income of a claimant that is derived from payments received under a private supplemental unemployment benefit plan shall not be earnings for the purpose of (C) above; and

(E) where benefit is payable under section 30 of the Act to a person who is the mother of the newborn child in respect of which benefit is payable to a claimant pursuant to this order, the aggregate of the benefits payable to that person and that claimant shall not exceed the amount of the maximum benefit payable to either that person or that claimant, whichever amount is greater;

(II) in the alternative, a declaration, pursuant to sections 17 and 18 of the Federal Court Act and section 24 of the Canadian Charter of Rights and Freedoms, that unemployment insurance benefits are payable to a major attachment claimant who proves that it is reasonable for him to remain at home to care for his newborn child, notwithstanding that the said claimant is not able to prove that he is available for work, provided that:

(A) the maximum number of weeks for which initial benefit, as defined in the Act, is payable to that claimant shall be the same as the maximum number of weeks for which initial benefit is payable to a claimant who proves her pregnancy or a claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with the claimant of one or more children for the purpose of adoption;

(B) subject to (A) above, initial benefit shall be payable to that claimant for each week of unemployment in the period

(i) that begins with the week in which the child is born; and

(ii) that ends

(a) seventeen weeks after the week in which the child is born,

(b) with the week in which that claimant ceases to remain at home for the purpose of caring for his newborn child, or

(c) with the week immediately preceding the week for which benefit is claimed and payable pursuant to another section of the Act,

whichever is earliest;

(C) subject to (D) below, where benefits are payable to a claimant pursuant to this order and earnings are received by that claimant for any period that falls in a week in the period described in (B) above, all such earnings shall be deducted from the benefit payable for that week; and

(D) that portion of the income of a claimant that is derived from payments received under a private supplemental unemployment benefit plan shall not be earnings for the purpose of (C) above; and

(E) where benefit is payable under section 30 of the Act to a person who is the mother of the newborn child in respect of which benefit is payable to a claimant pursuant to this order, the aggregate of the benefits payable to that person and that claimant shall not exceed the amount of the maximum benefit payable to either that person or that claimant, whichever amount is greater;

(III) an order, pursuant to sections 17 and 18 of the Federal Court Act and section 24 of the Canadian Charter of Rights and Freedoms, that the Defendants pay to the Plaintiff such unemployment benefits in respect of the benefit period commencing July 28, 1985, as the Plaintiff may be entitled to receive in accordance with the terms of the said declaration in (I) or (II) above;

(IV) in the alternative, a declaration, pursuant to sections 17 and 18 of the Federal Court Act and sections 24 and 52 of the Canadian Charter of Rights and Freedoms, that sections 30 and 32 of the Act are invalid and of no force and effect, provided that the said sections of the Act have and will continue to have the same force and affect they would have had if they were not inconsistent with the Canadian Charter of Rights and Freedoms from the date of judgment herein until the expiry of that period

of time which this Honourable Court considers is necessary for the Parliament and government of Canada to amend the Act or otherwise reenact the said sections in a form not inconsistent with the Canadian Charter of Rights and Freedoms;

(IV) in the alternative, a declaration, pursuant to sections 17 and 18 of the Federal Court Act and section 5c of the Canadian Charter of Rights and Freedoms, that sections 30 and 32 of the Act are invalid and of no force and effect;

(VI) a declaration, pursuant to section 17 and 18 of the Federal Court Act that the Commission's denial of benefits to the Plaintiff is a discriminatory practice contrary to section 5 of the Canadian Human Rights Act;

(VII) his costs of this action; and

(VIII) interest on the amount adjudged to be payable under (III) above, pursuant to section 18 of the Crown Liability Act and section 40 of the Federal Court Act; and

(IX) such further and other relief as this Honourable Court considers just.

DATED at Toronto, this 22nd day of October, 1986.

OSLER, HOSKIN & HARCOURT
P. O. Box 50
First Canadian Place
Toronto, Ontario
M5X 1B8

Brian Morgan
D. Aleck Dadson
(416) 362-2111

Solicitors for the Plaintiff

TO: Her Majesty The Queen
c/o Deputy Attorney General of Canada
Justice Building
Ottawa, Ontario

Notice to the Defendant

You are required to file in the Registry of the Federal Court of Canada, at the City of Ottawa or a local office, your defence to the within statement of claim or declaration within 30 days (or such other time as may be fixed by an order for service ex juris or other special order from the service thereof in accordance with the Rules of Court.

If you fail to file your defence within the time above limited, you will be subject to have such judgment given against you as the Court may think just upon the plaintiff's own showing.

Note:

(1) Copies of the Rules of Court, information concerning the local offices of the Court, and other necessary information may be obtained upon application to the Registry of this Court at Ottawa - telephone 992-4238 - or at any local office thereof.

(2) This statement of claim is filed by OSLER, HOSKIN & HARCOURT of P. O. Box 50, First Canadian Place, Toronto, Ontario, M5X 1B8 - telephone (416) 362-2111 - solicitors for the Plaintiff.