Falkiner et al. v. Director, Income Maintenance Branch, Ministry of Community and Social Services et al.; Canadian Civil Liberties Association et al., Intervenors*

Thomas v. Director of Income and Maintenance Branch of the Ministry of Community and Social Services

[Indexed as: Falkiner v. Ontario (Ministry of Community and Social Services)]

59 O.R. (3d) 481
[2002] O.J. No. 1771
Docket Nos. C35052 and C34983

Court of Appeal for Ontario,
Osborne A.C.J.O.,** Laskin and Feldman JJ.A.
May 13, 2002

* Application for leave to appeal to the Supreme Court of Canada was granted with costs March 20, 2003 (McLachlin C.J., Bastarache and Deschamps JJ.). S.C.C. File No. 29294. S.C.C. Bulletin, 2003, p. 441.

** Note: Osborne A.C.J.O. did not take part in this decision.

Charter of Rights and Freedoms -- Equality rights -- Discrimination -- Enumerated and analogous grounds -- Receipt of social assistance constituting analogous ground of discrimination under s. 15(1) of Charter -- Canadian Charter of Rights and Freedoms, s. 15(1).

Charter of Rights and Freedoms -- Equality rights -- Social assistance -- Definition of spouse in Regulation under Family Benefits Act capturing relationships that are not spousal -- Definition discriminating on grounds of sex, marital status and receipt of social assistance -- Violation of s. 15 of Charter

not justified under s. 1 of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Family Benefits Act, R.S.O. 1990, c. F.2 -- R.R.O. 1990, Reg. 366, s. 1(1)(d).

Social assistance -- Interpretation -- "Spouse" -- Disabled recipient of benefits under Family Benefits Act living with friend of opposite sex -- Social Assistance Review Board erring in finding that relationship between recipient and his friend amounted to cohabitation for purposes of definition of "spouse" in Regulation under Family Benefits Act -- Board erring in focusing on amount of time recipient and friend spent together and in failing to consider whether relationship was truly marriage-like -- Board also erring in failing to consider whether recipient's disability explained why he and friend spent so much time together -- Family Benefits Act, R.S.O. 1990, c. F.2 -- R.R.O. 1990, Reg. 366, s. 1(1)(d).

Between 1987 and 1995, the definition of "spouse" in the Regulations under the Family Benefits Act mirrored the definition of "spouse" under the Family Law Act, R.S.O. 1990, c. F.3. Persons were deemed to be spouses if they had lived together continuously for at least three years. In 1995, the definition of spouse in s. 1(1)(d) of Regulation 366 under the Family Benefits Act was amended. The amendment defined spouse to include persons of the opposite sex living in the same place who had "a mutual agreement or arrangement regarding their financial affairs" and a relationship that amounted to cohabitation. Under this amended definition, once persons of the opposite sex began living together, they were presumed to be spouses unless they provided evidence to the contrary. Each of the respondents in the F appeal was an unmarried woman with a dependent child or children and was in a "try on" relationship with a man with whom she had lived for less than a year. Each respondent had rec eived social assistance until the 1995 definition of "spouse" came [page482] into effect, whereupon the Director of the Income Maintenance Branch of the Ministry of Community and Social Services reclassified each respondent as a spouse, and each respondent lost her eligibility to receive family benefits as a "sole support parent". The respondents' appeal to the Social Assistance Review Board was allowed. The Board held that the 1995

definition of spouse infringed s. 15 of the Canadian Charter of Rights and Freedoms and could not be justified under s. 1. The Divisional Court affirmed that decision. The Director and the Attorney General appealed.

In the related T appeal, T was mentally disabled and permanently unemployable. He lived with a woman, P, whom he called a friend and caregiver. They shared some expenses, but did not have any agreement to support each other. The Director concluded that T and P were spouses and that he was ineligible for benefits under the Act because of P's assets. The Board dismissed T's appeal, concluding that he and P had a mutual arrangement regarding their financial affairs and that, since they spent almost all their time together, their relationship amounted to cohabitation. The Divisional Court dismissed T's appeal. T appealed.

Held, the F appeal should be dismissed; the T appeal should be allowed.

In T's case, the Board erred in concluding that T's relationship with P amounted to cohabitation. For the purpose of determining whether a relationship is spousal, cohabitation must mean more than spending time together. In focusing on the amount of time T and P spent together as the principal indicator of whether they had a spousal relationship, the Board erroneously failed to consider whether they interrelated as a couple, that is, whether their relationship was truly marriage-like. The Board also erred in its interpretation of cohabitation in that it did not adequately take account of whether T's disability explained why he and P spent so much time together. The evidence before the Board suggested that T needed a caregiver and could not live on his own. The Board's errors amounted to errors of law in the interpretation of "spouse". As the Divisional Court did no more than affirm the Board's conclusion on cohabitation, the decision of the Divisional Court could not stand.

The definition of "spouse" in s. 1(1)(d) of the Regulation captures relationships that are not spousal or marriage-like. The definition captures relationships lacking in the

permanence, the commitment, the legal obligation to support, the legal right to claim support, even the meaningful actual support that characterizes spousal or marriage-like relationships. The economic interdependence called for by the definition, that is, "a mutual agreement or arrangement regarding . . . financial affairs", is not strong enough to make the definition a reasonably accurate proxy for a spousal relationship. The definition is overly broad.

The respondents in the F appeal received differential treatment on the basis of sex, an enumerated ground of discrimination under s. 15(1) of the Charter, and marital status, an analogous ground. They also received differential treatment on the basis of receipt of social assistance, which should be recognized as an analogous ground of discrimination under s. 15(1). The effect of the differential treatment amounted to discrimination. The distinction reflects and reinforces existing disadvantages, stereotypes and prejudice. Social assistance recipients are an historically disadvantaged group, and the definition of spouse in s. 1(1)(d) of the Regulation perpetuates this historical disadvantage. It creates financial stress from the beginning of the relationship, reinforces the stereotypical assumption that a woman will be supported by the man with whom she cohabits and will have access to his resources, and devalues women's desire for financial independence. This is not a situation where the differential treatment is necessary to achieve equality. The impugned definition of spouse is not excused merely because it occurs within an otherwise ameliorative program. To the extent that the impugned definition of [page483] spouse has a chilling effect on relationship formation, it interferes with the respondents' highly personal choices and affects interests that go to the core of their human dignity. Finally, the administration of the definition is highly intrusive of the privacy of single persons on social assistance. The 1995 definition of "spouse" in s. 1(1)(d)(iii) of Regulation 366 violates s. 15 of the Charter.

The government's two stated objectives in passing s. 1(1)(d) of the Regulation are to treat married and unmarried couples alike and to allocate public funds to those most in need by

ensuring that individuals use private resources before resorting to social assistance. These objectives are pressing and substantial. However, the government's justification of the definition fails on the proportionality branch of the s. 1 test. Given its overbreadth, the definition of spouse is not rationally connected to the government's objective of treating married and unmarried spouses alike. Because the definition is overly broad, it does not satisfy the minimal impairment component of the s. 1 test. Finally, the negative effects of the definition outweigh its positive effects. The s. 15 violation is not justified under s. 1 of the Charter.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, 236 N.R. 1, 60 C.R.R. (2d) 1, 43 C.C.E.L. (2d) 49, apld

Other cases referred to

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289, 36 C.R.R. 193, 25 C.C.E.L. 255; Corbiere v. Canada (Minister of Indian and Northern Affairs) (1999), 163 F.T.R. 284n, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1, 239 N.R. 1, 61 C.R.R. (2d) 189 (sub nom. Batchewana Indian Band (Non-Resident Members) v. Batchewana Indian Band); Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 119 N.S.R. (2d) 91, 101 D.L.R. (4th) 224, 330 A.P.R. 91, 30 R.P.R. (2d) 146 (C.A.); Falkiner v. Ontario (1996), 140 D.L.R. (4th) 115, 40 C.R.R. (2d) 316 (Ont. Div. Ct.); Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1, 253 N.R. 329, 74 C.R.R. (2d) 1, 50 C.C.E.L. (2d) 177; Lovelace v. Ontario, [2000] 1 S.C.R. 950, 48 O.R. (3d) 735n, 188 D.L.R. (4th) 193, 255 N.R. 1, 75 C.R.R. (2d) 189 (sub nom. Ardoch Algonquin First Nation v. Ontario); M. v. H., [1999] 2 S.C.R. 3, 43 O.R. (3d) 254n, 171 D.L.R. (4th) 577, 238 N.R. 179, 62 C.R.R. (2d) 1, 46 R.F.L. (4th) 32; Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20, 35 C.R.R. (2d) 44 (Ont. Div. Ct.) [Leave to appeal to S.C.C. refused (1996), 39 C.R.R. (2d) 375n]; Miron v. Trudel, [1995] 2 S.C.R. 418, 23 O.R.

(3d) 160n, 124 D.L.R. (4th) 693, 181 N.R. 253, 29 C.R.R. (2d) 189, [1995] I.L.R. 1-3185, 10 M.V.R. (3d) 151, 13 R.F.L. (4th) 1; R. v. Oakes, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719n, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 65 N.R. 87, 19 C.R.R. 308, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1; R. v. Rehberg (1994), 127 N.S.R. (2d) 331, 111 D.L.R. (4th) 336, 355 A.P.R. 331, 19 C.R.R. (2d) 242 (S.C.); Schachter v. R., [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, 139 N.R. 1, 10 C.R.R. (2d) 1, 92 C.L.L.C. 14,036 (sub nom. ubSchachter v. Canada, Schachter v. Canada)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15
Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 10
Family Benefits Act, R.S.O. 1990, c. F.2, s. 15(1)
Family Law Act, R.S.O. 1990, c. F.3, s. 29
General Welfare Assistance Act, R.S.O. 1990, c. G.6
Human Rights Act, R.S.N.S. 1989, c. 214, s. 5(1)(t)
Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d)
Human Rights Code, R.S.N. 1990, c. H-14, ss. 6(1), 7(1), 8, 9, 12, 14
Human Rights Code, R.S.O. 1990, c. H.19, s. 2(1), (2) [page484]
Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14, ss. 3(1), 4, 5, 7(1), 8(1), 9
Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sch. B
Ontario Works Act, 1997, S.O. 1997, c. 25, Sch. A
Social Assistance Reform Act, 1997, S.O. 1997, c. 25
The Human Rights Code, C.C.S.M., c. H175, s. 9(2)(j)
The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 2(1)(m.01)

Rules and regulations referred to

O. Reg. 134/98 ("Ontario Works Act, 1997"), s. 1(1)(d)
O. Reg. 222/98 ("Ontario Disability Support Program Act, 1997"), s. 1(1)(d)
R.R.O. 1990, Reg. 366, s. 1, 3(2)(c)

APPEAL by Ontario from a judgment of the Divisional Court

(Lane, Haley and Belleghem JJ.) (2000), 188 D.L.R. (4th) 52, 75 C.R.R. (2d) 1 affirming decisions of the Social Assistance Review Board; APPEAL by an individual from a judgment of the Divisional Court affirming a decision of the Social Assistance Review Board.

Janet E. Minor and Sarah Kraicer, for appellants.
Raj Anand, M. Kate Stephenson and Chantal Tie, for respondents in appeal.
Martin Doane, for the Canadian Civil Liberties Association.
Fay Faraday and Kerri Froc, for the Women's Legal Education and Action Fund.
Charlotte McQuade, for appellant.
Rebecca J. Givens, for respondent.

The judgment of the court was delivered by

LASKIN J.A.: --

A. INTRODUCTION

[1] These two appeals concern the interpretation and constitutional validity of the definition of "spouse" under Ontario's social assistance legislation.

[2] Between 1987 and 1995, the definition of spouse in the Regulations under the Family Benefits Act [See Note 1 at end of document] mirrored the definition of spouse under the Family Law Act. [See Note 2 at end of document] Persons were deemed to be spouses if they had lived together continuously for at least three years. In 1995, however, the definition of spouse in s. 1(1)(d) of Regulation 366 [See Note 3 at end of document] under the Family Benefits Act was amended. [page485] The amendment defined spouse to include persons of the opposite sex living in the same place who had "a mutual agreement or arrangement regarding their financial affairs" and a relationship that amounted to "cohabitation". Under this amended definition, once persons of the opposite sex began living together they were presumed to be spouses unless they provided evidence to the

contrary. It is this 1995 definition of spouse that is in issue in these appeals. It is colloquially called the "spouse in the house" rule.

[3] In the Falkiner appeal, each of the respondents was an unmarried woman, had a dependent child or children, and was in a "try on" relationship with a man with whom she had lived for less than a year. Before 1995, each was receiving social assistance as a single mother. When the 1995 definition came into effect, the Director of the Income Maintenance Branch of the Ministry of Community and Social Services reclassified each respondent as a spouse. This reclassification meant that each respondent lost her eligibility to receive family benefits as a "sole support parent".

[4] The respondents in Falkiner appealed to the Social Assistance Review Board (the "Board"), which allowed their appeal, holding that the 1995 definition of spouse infringed ss. 7 and 15 of the Canadian Charter of Rights and Freedoms and could not be justified under s. 1. The Director and the Attorney General of Ontario's appeal to the Divisional Court was dismissed. The majority of the Divisional Court concluded that the definition of spouse infringed the equality rights of women and sole support mothers on social assistance contrary to s. 15(1) of the Charter and could not be saved under s. 1. The Director and the Attorney General now appeal to this court. Their motion to stay the decision of the Divisional Court pending their appeal was granted on terms by Osborne A.C.J.O. but later set aside on review by a panel of this court.

[5] The Falkiner appeal raises questions of both statutory interpretation and constitutionality, and focuses on the phrase "a mutual agreement or arrangement regarding their financial affairs" in the definition of spouse. At bottom, the Ontario Government contends that the 1995 definition was intended to legislate equality between married and common law couples and to allocate social assistance to those most in need. They submit that the definition promotes -- not undermines -- equality.

[6] The respondents in Falkiner and the intervenors claim

that the government's approach fails to take account of the respondents' perspective or of the effect of the definition. They say that the definition captures many relationships that are not spousal. They submit that the definition distinguishes between social assistance recipients and all others, and between women and single mothers on social assistance and others on social [page486] assistance. These distinctions, they contend, discriminate on the enumerated ground of sex and also impose special burdens on two groups whose personal characteristics constitute analogous grounds: social assistance recipients generally and single mothers on social assistance more particularly. According to the respondents, the definition is discriminatory because it reinforces stereotypes against women, especially single mothers on social assistance, and perpetuates their pre-existing disadvantage.

[7] In the related Thomas appeal, Mr. Thomas is mentally disabled and permanently unemployable. For ten years he has lived with Lucy Papizzo, whom he calls a friend and caregiver. The Director concluded that he and Ms. Papizzo were spouses and that he was ineligible for benefits under the Family Benefits Act because of Ms. Papizzo's assets. Mr. Thomas' appeal to the Board was dismissed, as was his further appeal to the Divisional Court. He now appeals to this court.

[8] The Thomas appeal raises only an issue of statutory interpretation and focuses on the meaning of "cohabitation" in the definition of spouse. Mr. Thomas argues that the Board and the Divisional Court erred in their interpretation of cohabitation, particularly because their interpretation did not take account of his disability. The government responds by submitting that on the facts found by the Board, Mr. Thomas and Ms. Papizzo were cohabiting.

[9] Before addressing the argument in these two appeals, I will briefly review the legislative and regulatory regime.

B. THE LEGISLATIVE AND REGULATORY REGIME

1. Legislative History

[10] At all relevant times, the regulation in issue on these appeals, Regulation 366 under the Family Benefits Act, governed social assistance in Ontario for specific categories of persons in need, including single parents and their children, the aged, the disabled and the permanently unemployable. The General Welfare Assistance Act [See Note 4 at end of document] provided social assistance to persons not within the categories set out in Regulation 366. Although the Family Benefits Act and Regulation 366 are still in force, the General Welfare Assistance Act has been repealed and new social assistance legislation was introduced in 1998. The new legislation uses substantially the same definition of "spouse" as the Family Benefits Act.

[11] Social assistance is last resort funding to persons "in need". The determination of who was a person "in need" was similar under [page487] the Family Benefits Act and the General Welfare Assistance Act. Essentially, a person in need had budgetary requirements exceeding his or her income and was not otherwise ineligible. A couple or family was ineligible for social assistance if one of the adults was a student, was self-employed or did not fulfill the regulatory requirements, for example, by failing to make complete financial disclosure.

[12] Social assistance was delivered to individuals or to couples. Individuals who were co-residing but not in a spousal relationship -- for example roommates, boarders and lodgers -- had their needs and means assessed individually, though the financial contributions of the co-resident were taken into account. If two persons were in a spousal relationship, their entitlement to social assistance depended on whether they as a couple were "in need". Their means and needs were assessed together. The use of a couple in a spousal relationship as a benefit unit to deliver social assistance is not disputed in these appeals. What is disputed is whether the definition of spouse captures relationships that are not spousal.

2. The Definition of Spouse

[13] Up until 1986, the definition of spouse under social assistance legislation required a determination of whether

opposite sex co-residents were living together as "husband and wife". A Charter challenge to this definition prompted the government to bring in an interim definition in 1986 and a new definition in 1987. The 1987 definition provided that a person was a spouse where he or she self-declared, was required by order or agreement to support the social assistance applicant or recipient, had an obligation to support the applicant or recipient under the Family Law Act despite any agreement to the contrary, or, importantly, was "a person of the opposite sex to the applicant or recipient who has resided continuously with the applicant or recipient for a period of not less than three years". This so-called "three-year rule" paralleled s. 29 of the Family Law Act, which recognizes as spouses unmarried couples who have cohabited for at least three years.

[14] Thus, under the 1987 definition, an individual welfare recipient cohabiting with a person of the opposite sex had a grace period of up to three years before being considered a spouse. After three years, to maintain an individual entitlement to social assistance, the recipient had to produce evidence to show that the social, familial and economic aspects of the relationship did not amount to cohabitation. No legal challenge was made to the 1987 definition.

[15] In 1995, the Ontario government replaced the 1987 definition of spouse with a new definition in s. 1(1) of Regulation 366. Under the 1995 definition, a person could be a spouse in one of four ways. Three of those ways were similar to the previous [page488] definition: a person could be a spouse by self-declaration, by being required to pay support under a court order or domestic contract, and by having a support obligation under the Family Law Act. But in s. 1(1)(d) -- the fourth way a person could be a spouse and the provision in issue in these appeals -- the Ontario government defined spouse more expansively than it had in the past:

> 1(1) . . . "spouse" means,
>
> . . . . .
>
> (d) a person of the opposite sex to the applicant or

recipient who is residing in the same dwelling place as the applicant or recipient if,

(i) the person is providing financial support to the applicant or recipient,

(ii) the applicant or recipient is providing financial support to the person, or

(iii) the person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs, and

the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation.

[16] This 1995 definition remains in force in substantially the same form. [See Note 5 at end of document] It has also been substantially adopted in subsequently enacted social assistance legislation. [See Note 6 at end of document] [page489]

[17] The three parts of s. 1(1)(d) are disjunctive and in each case must be accompanied by a relationship amounting to cohabitation. The respondents in Falkiner largely accept that s. 1(1)(d)(i) and (ii) capture only spousal relationships. But they contend that though they each cohabit, s. 1(1)(d)(iii) captures relationships like their own, which are not spousal. Mr. Thomas, on the other hand, contends that he does not cohabit with Ms. Papizzo.

[18] In addition to the spousal definition itself, two other parts of the 1995 version of Regulation 366 are material to these appeals. Under s. 1(2), as in previous definitions since 1986, sexual factors were not to be considered in determining whether a person was a spouse. Under s. 1(3), once two persons of the opposite sex began living together they were presumed to be spouses unless they provided evidence to the contrary. Subsection 1(3) was revoked in 2000, but s. 1(2) remains in force. These two subsections provided in full:

1(2) In determining whether or not a person is a spouse within the meaning of this Regulation, sexual factors shall not be investigated or considered.

(3) For the purposes of clause (d) of the definition of "spouse" in subsection (1), unless the applicant or recipient provides evidence to satisfy the Director to the contrary, it is presumed that if a person of the opposite sex to the applicant or recipient is residing in the same dwelling place as the applicant or recipient, the person is the spouse of the applicant or recipient.

Because of the presumption in s. 1(3), each of the respondents in Falkiner was deemed to be a spouse instead of a sole support parent when the 1995 spousal definition came into effect.

3. Administration of the Social Assistance Regime

[19] The Family Benefits Act was administered by the Ministry of Community and Social Services through the Director of the Income Maintenance Branch; the General Welfare Assistance Act [page490] was administered by municipalities through municipal welfare administrators. Under the Family Benefits Act, the Director determined whether a person applying for an allowance was a spouse. Persons co-residing were asked to fill out a detailed questionnaire aimed at determining whether and to what extent certain residential, social, economic, and familial factors were present in a relationship. Ministry guidelines, directives and training materials required that co-residents have economic or financial interdependence, hold themselves out as a couple and function like a family to be called spouses. The Ministry maintains that it interpreted the economic criteria and the definition of spouse to require interdependence that was more than trivial. The appellants claim in their factum that two persons living together who shared expenses in accordance with their consumption -- that is who "fair shared" -- had no financial interdependence and would not be considered spouses.

[20] But the appellants also emphasize that persons who shared expenses equally might still be determined to be

spouses. Indeed, one of the Ministry's witnesses seemed to indicate in cross-examination that fair sharing arrangements could be caught by the definition. In all cases, determinations are made by caseworkers and reviewed by supervisors. When the 1995 definition took effect, persons aggrieved by a Ministry determination had a right of appeal to the Social Assistance Review Board and a further right of appeal to the Divisional Court. [See Note 7 at end of document]

4. The Current Social Assistance Regime

[21] In 1998, the Ontario government implemented far-reaching changes to the social assistance regime. The Social Assistance Reform Act, 1997 [See Note 8 at end of document] provides for the repeal of the Family Benefits Act and the General Welfare Assistance Act and the enactment of the Ontario Works Act, 1997 [See Note 9 at end of document] and the Ontario Disability Support Program Act, 1997. [See Note 10 at end of document] Both new Acts have come into force but only the General Welfare Assistance Act has been repealed. As I indicated above, both new Acts use substantially the same definition of spouse as the one in issue on these appeals. The regulations under the new Acts and Regulation 366 under the Family Benefits Act [page491] were amended in 2000 to include a definition of "same sex partner" paralleling the definition of spouse.

[22] I turn now to the two appeals. Because the Thomas appeal is narrower in scope, I will deal with it first.

C. THE THOMAS APPEAL

[23] The respondent Director concluded that Mr. Thomas is "permanently unemployable", as that term is defined in s. 1(5) of Regulation 366 under the Family Benefits Act. He is "a person who is unable to engage in remunerative employment for a prolonged period of time as verified by objective medical findings accepted by the medical advisory board". A permanently unemployable person is eligible for an allowance under the Act if he or she is a person in need. But, under s. 3(2)(c) of Regulation 366, an applicant is not eligible for an allowance if he or she is "a person who resides in the same dwelling

place as his or her spouse and has liquid assets that together with the liquid assets of his or her spouse exceed $5,500 in value". Both the Board and the Divisional Court concluded that Mr. Thomas and Ms. Papizzo were "spouses" and that he was ineligible for an allowance because she had assets exceeding the allowable amount.

[24] Mr. Thomas submits that the Board erred in its interpretation of cohabitation, especially because its interpretation failed to take account of his disability. He also submits that the Divisional Court perpetuated the Board's error by wrongly concluding that the meaning of cohabitation was not in dispute. The respondent Director contends that the Board's finding that Mr. Thomas and Ms. Papizzo cohabited and were therefore spouses was amply supported by the evidence. The Director acknowledges that cohabitation was not conceded before the Divisional Court but says that the Board's finding was, nonetheless, unassailable.

[25] Whether Mr. Thomas is in a spousal relationship with Ms. Papizzo and is thus ineligible for an allowance turns on the part of the definition of spouse in s. 1(1)(d)(iii) of Regulation 366. This part of the definition has three components. Mr. Thomas and Ms. Papizzo must be residing in the same dwelling place, they must have a mutual agreement or arrangement regarding their financial affairs, and the social and familial aspects of the relationship must amount to cohabitation.

[26] The first component was unquestionably met. Mr. Thomas and Ms. Papizzo were living in the same house. On the financial component, the evidence before the Board was that in 1988 Ms. [page492] Papizzo invited Mr. Thomas to share her house because she needed help with the rent. Except for a two-month period, they lived together continuously for ten years. They do not, however, have any agreement to support each other. Indeed, Ms. Papizzo testified that she felt responsible for Mr. Thomas as a friend but would not live with him if she had to support him.

[27] Still Mr. Thomas paid for half the rent and utilities.

And although they kept their finances separate, and for example did not have a joint bank account or credit card, they shared gas and repair expenses for a truck owned by Mr. Thomas' parents and used by both Mr. Thomas and Ms. Papizzo.

[28] The Board rejected the view put forward by Mr. Thomas' representative that the economic component contained in s. 1(1)(d)(iii) requires economic interdependence that is more than trivial. Instead, the Board concluded that any agreement or arrangement between the parties regarding their financial affairs satisfies this economic component. On the evidence, the Board concluded that Mr. Thomas and Ms. Papizzo had a mutual agreement or arrangement regarding their financial affairs.

[29] The Divisional Court agreed. Whether or not the economic interdependence required by the definition of spouse had to be more than trivial -- a divergence of view reflected in some Board decisions -- the Divisional Court held that it existed in this case. Mr. Thomas accepts that on any test for economic interdependence, he and Ms. Papizzo have a mutual arrangement regarding their financial affairs that satisfies the definition of spouse. Moreover, unlike the respondents in Falkiner, he does not challenge the constitutionality of the definition.

[30] He does, however, challenge the finding of the Board and the Divisional Court on the cohabitation component of the definition. The evidence before the Board disclosed that Mr. Thomas and Ms. Papizzo spent almost all of their free time together. They ate together, they did their grocery shopping together, they vacationed together, they visited mutual friends together and they visited each other's families. Also, Ms. Papizzo did Mr. Thomas' laundry. In concluding that their relationship amounted to cohabitation, the Board [made] this key finding:

> The Board considers that while the appellant's disabilities explain the reasons why his roommate shops and cleans for him, it remains clear that they spend most or all of their spare time together which describes the relationship of spouses rather than roommates.

[31] I agree with Mr. Thomas that this finding reflects a misinterpretation of cohabitation in the definition of spouse. In my view, the Board's interpretation is wrong in two related ways. [page493] First, it is wrong because for the purpose of determining whether a relationship is spousal, cohabitation must mean more than spending time together. It must include interrelating with each other and with family, friends and the community as a couple. Second, it is wrong because for Mr. Thomas -- and others like him -- the interpretation of cohabitation must take account of his disability.

[32] Both Mr. Thomas and the Director accept the definition of a relationship amounting to cohabitation used by the Board in its decision P1032-22:

> The concept of circumstances that "amount to cohabitation" includes circumstances that show the relationship to be marriage-like. The Board's interpretation is that the social and familial aspects amount to cohabitation if there is evidence that, on the whole, the co-residents live and interrelate with family, friends and community as a couple rather than as two individuals sharing a residence.

[33] I accept this statement as a reasonable working definition of cohabitation, while acknowledging that its generality will likely produce some hard cases at the margins. At least this definition reflects a level of commitment that is inherent in a marriage-like relationship but is not present when two people simply spend a lot of time together. Indeed, two people may live together and spend nearly all of their time together for many reasons other than because they are spouses. Some of these reasons might be close friendship, economics or simply a lack of alternatives.

[34] In focusing on the amount of time Mr. Thomas and Ms. Papizzo spent together as the principal indicator of whether they had a spousal relationship, the Board erroneously failed to consider whether they interrelated as a couple -- in other words, whether their relationship was truly marriage-like. The line between what amounts to cohabitation under the definition and what is no more than close friendship may be difficult to

draw in some cases, especially as the Director is precluded for reasons of privacy from investigating or considering sexual factors. But the difficulty of drawing the distinction is not an excuse for ignoring it. The Board did ignore the distinction in this case and it was wrong to do so.

[35] The Board erred in its interpretation of cohabitation in a second way. It did not adequately take account of whether Mr. Thomas' disability explained [page494] why he and Ms. Papizzo spent so much time together. The Board did make passing reference to Mr. Thomas' disability. But, in its view, his disability explained only why Ms. Papizzo shopped and cleaned for him. The Board did not consider at all whether Mr. Thomas' disability explained why he and Ms. Papizzo -- in the words of the Board -- "spend most or all of their spare time together".

[36] Certainly persons with disabilities are capable of forming spousal relationships and capable of doing so with persons who are not disabled. But the Board should have considered whether Mr. Thomas' disability explained the social and familial aspects of his relationship with Ms. Papizzo, aspects that in another context might well amount to cohabitation. The evidence before the Board suggested that Mr. Thomas needed a caregiver and that he could not live on his own. Either may have provided a plausible alternative explanation for why he and Ms. Papizzo were together all the time. The Board never considered these alternatives. Nor did the Board consider the evidence of the parties themselves, which eloquently described not a spousal relationship but one based on friendship and need. Both Mr. Thomas and Ms. Papizzo testified before the Board and a Board member took notes on their testimony. These notes record the following words of Mr. Thomas:

> I have no friends. Just family -- brothers, parents. Holiday at parents' places -- She's just my friend. I need her. Would be in jail or on street. Can't wash clothes. Family lives close to Cobourg. Brother in Oshawa. Lucy the only one who helps me out.

The notes also record the following testimony from Ms. Papizzo:

> I feel responsible for him as a friend -- 10 years. I wouldn't live with him if I had to support him. When he moved out because I couldn't take it I remained friends & said come back. Ridiculous. I have to make sure he stays clean & doesn't get mixed up with drunks or I couldn't be friends.

[37] In my view, the Board's errors amounted to errors in law in the interpretation of the definition of spouse. Under s. 15(1) of the Family Benefits Act, Mr. Thomas had a right of appeal to the Divisional Court on "a question that is not a question of fact alone". Therefore, the Divisional Court had jurisdiction to consider his appeal. That court, however, dismissed Mr. Thomas' submission on the cohabitation component of the definition of spouse in two sentences:

> The evidence before the Board was that the appellant had lived with a person of the opposite sex for at least ten years in circumstances which clearly warranted the finding of the Board that their relationship amounted to cohabitation. That is not in dispute.

[38] Mr. Thomas claims that the Divisional Court erroneously thought he was not challenging the Board's finding of cohabitation, when, in fact, he was indeed challenging it. The Director maintains that when the Divisional Court used the words "That is not in dispute", it was merely emphasizing that the Board's [page495] finding was unassailable. On either view, the Divisional Court did no more than affirm the Board's conclusion on cohabitation. Just as the Board's conclusion cannot stand, neither can the Divisional Court's conclusion.

[39] I would therefore set aside the order of the Divisional Court and the decision of the Board. I would remit to the Director Mr. Thomas' application for an allowance under the Family Benefits Act as a single "permanently unemployable person", effective October 1, 1996, with the direction that his application be reconsidered in the light of my reasons.

D. THE FALKINER APPEAL

1. Background

[40] As I said in the introduction, the Falkiner appeal raises both statutory interpretation and constitutional issues. The statutory interpretation issue centres on whether the definition of spouse in s. 1(1)(d) of Regulation 366 under the Family Benefits Act captures only marriage-like relationships, as the Attorney General contends. The respondents contend that the definition includes relationships that are not functionally spousal and not characterized by economic interdependence: relationships, like theirs, best characterized as casual boyfriend-girlfriend or "try on". The constitutional issue centres on whether the definition of spouse violates the respondents' equality rights either on the enumerated ground of sex or on one or more analogous grounds. The parties have raised four possible analogous grounds: marital status, receipt of social assistance, single mothers and single mothers on social assistance. A second constitutional question is whether any infringement of s. 15(1) of the Charter can be justified under s. 1. A subsidiary constitutional issue is whether the definition of spouse violates s. 7 of the Charter.

[41] For convenience, I reproduce s. 1(1)(d) of Regulation 366:

> 1(1) . . . "spouse" means,
>
> . . . . .
>
> (d) a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient if,
>
> (i) the person is providing financial support to the applicant or recipient,
>
> (ii) the applicant or recipient is providing financial support to the person, or
>
> (iii) the person and the applicant or recipient have a mutual agreement or arrangement regarding

their financial affairs, and [page496]

> the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation.

[42] To put the competing positions on the interpretation and constitutionality of the definition of spouse in context, I will briefly summarize the factual background and the decisions of the Board and the Divisional Court.

[43] The relevant facts pertaining to each respondent are similar. Each respondent had experienced a close family or intimate relationship with an alcoholic or abusive man. Each was the sole support of a child or children, and before the 1995 definition of spouse, each was receiving social assistance as a single mother.

[44] In the year before the 1995 definition came into effect, each respondent began residing with a man. Each respondent considered her male co-resident a boyfriend. Some hoped for a long-term relationship. Ms. Falkiner, for example, began living with her co-resident as an "experiment", hoping it would lead to a permanent relationship in the future. All of the respondents acknowledged that the social and familial aspects of their relationships amounted to cohabitation. But none of the respondents considered that she was in a spousal relationship with her co-resident.

[45] Each of the respondents, however, had a financial arrangement with her co-resident, with the latter paying a portion of the rent, food and other household expenses. But each respondent maintained her financial independence as much as possible. And none of the male co-residents had a legal obligation to support either the respondent he was living with or her children.

[46] When the 1995 definition of spouse came into effect, the Director reclassified each respondent as a spouse, forcing each to rely on her co-resident for financial support if she wanted to continue the relationship. The respondents appealed the

Director's reclassifications to the Board and also sought judicial review of the new definition of spouse, contending that it was unconstitutional. The Divisional Court dismissed the judicial review application as premature because the respondents had not exhausted their appeal rights. See Falkiner v. Ontario (1996), 140 D.L.R. (4th) 115, 40 C.R.R. (2d) 316 (Ont. Div. Ct.).

[47] On the appeal, the Board bifurcated its proceedings into non-Charter hearings and a consolidated Charter hearing. In its non-Charter decisions, the Board concluded that each respondent was a spouse under the 1995 definition. In so concluding, the Board gave its interpretation of the financial component of the definition. The majority held that "a mutual agreement or [page497] arrangement regarding their financial affairs" in s. 1(1)(d)(iii) of the definition requires "economic interdependence between the parties" that is "more than trivial". In the majority's view,

> Economic interdependence covers financial arrangements which go beyond what would be normal in a simple roommate-type relationship. It includes the pooling of money or assets, cross-subsidization and other kinds of indirect support between the parties.

[48] In a concurring opinion, one Board member took a slightly different view, a view similar to that of the Board in Thomas. She held that clause (iii) of s. 1(1)(d) meant simply an agreement about money:

> If the legislature intended that the provision of financial support or an agreement about money between co-residents meant "economic subsidization or interdependence that is more than trivial", then the legislature could have clearly and explicitly said this in its laws. In this Board member's view, it did not do so.

[49] In its Charter hearing, the Board concluded that the 1995 definition of spouse infringed both s. 15(1) and s. 7 of the Charter and was not justified under s. 1. The Board found that the definition discriminated against sole support parents

on social assistance, an analogous ground under s. 15(1), and that the definition violated the respondents' s. 7 rights to personal autonomy and freedom from state-imposed psychological stress, contrary to the principles of fundamental justice because of its over-breadth. The Board therefore held that s. 1(1)(d) of Regulation 366 should not be applied to the three respondents.

[50] Neither side appealed the Board's interpretation of the definition of spouse. The Divisional Court accepted that the financial component of the definition in clause (iii) required economic interdependence that was more than trivial. In this court, the appellants urged us to accept the interpretation given by the majority of the Board. While the respondents question whether s. 1(1)(d) requires economic interdependence that is more than trivial, they submit that even if this interpretation is adopted, the threshold level of economic interaction is very low.

[51] The real dispute between the parties concerns the Board's Charter decision, which the Director and the Attorney General appealed to the Divisional Court. The majority, Lane and Haley JJ., dismissed the appeal but for reasons that differed from those of the Board. The majority concluded that the definition of spouse in s. 1(1)(d) infringed s. 15(1) of the Charter because it discriminated on the enumerated ground of sex and the analogous ground of sole support mothers on social assistance. The infringement could not be justified under s. 1. Because the [page498] majority found a violation of s. 15, it chose not to consider s. 7 of the Charter. Belleghem J., in dissent, would have found no constitutional violation.

[52] The government appeals from the judgment of the Divisional Court. I turn now to the issues in this appeal.

2. The Interpretation of Spouse

[53] In broad terms, the Board made two decisions: one on the interpretation of the definition of spouse; the other on the constitutionality of the definition. The Ontario government appealed the latter decision but not the former. Nonetheless,

it seems to me that its constitutional appeal depends critically on the meaning of spouse, on the reach of the definition. The respondents acknowledge that the government is legally entitled to deliver social assistance benefits to an individual or to a couple, that is, a spousal benefit unit. Therefore, if the definition of spouse captures only co-residency relationships that are functionally similar to a marriage, that are truly spousal or marriage-like, then I do not see how it can be constitutionally vulnerable. If, on the other hand, the definition embraces relationships that are not marriage-like, it may well be constitutionally infirm.

[54] As with any question of statutory interpretation, the court must interpret the provision in issue in its total context. The court's interpretation should comply with the legislative text and promote the legislative purpose. The purpose of the definition is to capture spousal relationships. The interpretation issue is whether the definition as written fulfills this purpose by drawing a reasonably accurate distinction between spousal or marriage-like relationships and other relationships.

[55] Any definition of a spousal relationship should take into account -- as s. 1(1)(d) does -- social, familial and economic factors. The provision in issue in this appeal is the economic component of the definition of spouse in clause (iii) of s. 1(1)(d) of Regulation 366: "The person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs." Although the economic component is only one aspect of a spousal relationship, that component is crucial in this case because the consequences of being categorized as a spouse are economic in nature. Thus, the definition of spouse cannot be said to capture spousal relationships reasonably accurately if it embraces many relationships that are not marriage-like in their economic component.

[56] The economic component of a spousal relationship is generally characterized by support or a support obligation, or by [page499] financial interdependence. See M. v. H., [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 and Miron v. Trudel, [1995] 2

S.C.R. 418, 124 D.L.R. (4th) 693. Other parts of the definition of spouse in s. 1(1) reasonably accurately capture spousal relationships in which actual support or support obligations exist. The question here is whether clause (iii) reasonably accurately captures relationships in which financial interdependence exists.

[57] As I said earlier, the majority of [the] Board in the Falkiner case interpreted this clause to require economic interdependence that is more than trivial. By contrast, the Board in Thomas interpreted the clause to mean what it says: any agreement or arrangement regarding financial affairs, which presumably would include an agreement in which financial interdependence is trivial or non-existent.

[58] The Board's view in Thomas is more faithful to the words used in the regulation. But even accepting the purposive view adopted by the Board in Falkiner -- that a mutual agreement or arrangement requires more than trivial economic interdependence -- the threshold for the economic component is so low that the definition will capture many relationships that are not spousal or marriage-like. In short, the definition will include many relationships that lack the meaningful financial interdependence characteristic of a spousal relationship.

[59] It will include a try-on relationship like Ms. Falkiner's, where her co-resident contributed to rent and a few other expenses, or a boyfriend and girlfriend who have decided to cohabit and share expenses equally, or potentially even a casual cohabitation arrangement where the couple "fair share" expenses but each maintains financial independence. The definition will thus capture relationships lacking in the permanence, the commitment, the legal obligation to support, the legal right to claim support, even the meaningful actual support that characterizes spousal or marriage-like relationships. Even accepting the Board's interpretation in Falkiner, the economic interdependence called for by clause (iii) is not strong enough to make the definition a reasonably accurate proxy for a spousal relationship. Thus, clause (iii) makes the definition of spouse overly broad.

[60] Therefore, I agree with the majority of the Divisional Court that the definition wrongly "assumes equivalency between a co-habitant who has support obligations . . . and one who does not" and "does not distinguish between those financial arrangements that resemble marriage . . . and those that do not". The majority elaborated on this view in para. 69 of their reasons, which I endorse: [page500]

> The Regulation captures as part of a "couple", individuals who have not formed relationships of such relative permanence as to be comparable to marriage, whether formal or common law. It makes couples, or family units, out of individuals like the Respondents who have made no commitment to each other, with accompanying voluntary assumption of economic interdependence. There is all the difference in the world between a person, with her own money, sharing accommodation in the hope that an inchoate relationship may flourish, versus a person whose financial support is largely in the hands of her co-habitant who has no legal obligations towards her and her children.

[61] The government submits, however, that the 1995 definition is at least an improvement on its predecessor, which mirrored the three-year rule in the Family Law Act definition of spouse. The government points out that any time period will be arbitrary and that requiring a three-year cohabitation period to be a spouse gives unmarried couples a grace period unrelated to the actual circumstances of their relationship. Thus, the government says that the former definition created inequities between married and unmarried couples. That may be so. But while the three-year period was perhaps arbitrary, at least it was a bright line test that was easy to administer and generally accepted. I do not suggest that the Family Law Act model is the only solution to the government's drafting problem. I recognize that the purposes of the Family Law Act regime and the social assistance regime are different. These different purposes may argue for different definitions of a spousal relationship. I simply say that the current definition of spouse in s. 1(1)(d) of Regulation 366 under the Family Benefits Act is too broad to capture only spousal or marriage-like relationships.

3. The Definition of Spouse Violates Section 15(1) of the Charter

(a) The Law framework

[62] Section 15(1) of the Charter states:

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.

[63] In Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at pp. 548-49, 170 D.L.R. (4th) 1, a unanimous Supreme Court of Canada set out a three-step framework for analyzing a claim of discrimination under s. 15(1):

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively [page501] differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a

> human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[64] The Supreme Court has followed the framework it first set out in Law in several subsequent decisions: M. v. H., supra; Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1; Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1; Lovelace v. Ontario, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193. It is within this framework that the respondents' s. 15 claim must be assessed.

[65] The Supreme Court has also given extensive guidance on the application of this framework. Of particular relevance to this case are the following four principles of s. 15 analysis. First, the claim must be considered from the perspective of the claimant. The discrimination inquiry is both subjective and objective. As the Supreme Court affirmed in Law at p. 533 S.C.R., "the relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant". Second, the court must consider the effect of the challenged law in determining whether it violates s. 15. Thus, the court must determine not just the law's intended impact but also its actual impact on those subject to it and on those excluded from its application. Third, the three-step framework in Law must be applied in the light of the purpose of the equality guarantee in s. 15, which focuses on protecting human dignity. In the words of Iacobucci J. in Law at pp. 529-30 S.C.R.,

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration . . . Human dignity means that an individual or group feels self-respect and self-worth. [page502]

And fourth, the three-step framework offers guidelines for analysis, not a rigid test to be applied mechanically. As Iacobucci J. said in Law at p. 547 S.C.R., "these guidelines should not be seen as a strict test, but rather should be understood as points of reference".

[66] On the basis of the Law framework and these general principles, I will now consider whether the definition of spouse in s. 1(1)(d) offends s. 15(1).

(b) The definition of spouse differentiates between the respondents and others on the basis of one or more personal characteristics

[67] Under the first step of the Law framework, the court must determine whether the definition of spouse imposes differential treatment on the basis of one or more personal characteristics. Central to this determination is defining the comparator groups. This is not an easy task.

[68] The government submits that the appropriate comparison is between those who are included in the impugned definition of spouse and those who are excluded. According to the government, defining the comparator groups in this way accurately distinguishes between those who are and those who are not in spousal relationships. But I have already rejected this latter contention. I have found that the definition is overly broad and captures many relationships that are not spousal or marriage-like.

[69] Moreover, I do not think the comparator groups should be defined by reference to the formal distinction drawn by the definition of spouse in Regulation 366. Defining the comparison in this way would be inconsistent with the jurisprudence, which emphasizes that the s. 15(1) analysis must be considered from the perspective of the claimant and must take into account the effect of the legislation in question. Because differential treatment is a substantive notion, a formal legislative distinction may have to yield to the underlying differences imposed by the legislation. As Iacobucci J. said in Law at pp. 517-18 S.C.R.:

> The main consideration . . . must be the impact of the law upon the individual or group to whom it applies, as well as upon those whom it excludes from its application . . . Hence, equality in s. 15 must be viewed as a substantive concept. Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society.

(Emphasis in original) [page503]

[70] From the respondents' perspective, the comparison urged by the government does not accurately reflect the differential treatment imposed by clause (iii) of s. 1[(1)](d) and complained of in this case. The respondents contend that they have been subjected to differential treatment on the basis that they are single mothers on social assistance. That is the group with which they identify themselves. Put another way, the respondents share three relevant characteristics: they are women, they are single mothers solely responsible for the support of their children and they are social assistance recipients. They argue that the differential treatment imposed on them by the definition of spouse flows from these three characteristics.

[71] Because the respondents assert that they have been discriminated against on the basis of more than one personal characteristic, no single comparator group will capture all of the differential treatment complained of in this case. Instead, the respondents urge us to undertake a set of comparisons, each one bringing into focus a separate form of differential treatment. The respondents claim three forms of differential treatment and thus use three comparator groups. First, they compare themselves with persons who are not on social assistance. Second, they contrast the effect of the definition on women on social assistance and its effect on male social assistance recipients. Finally, they offer a variation on this latter comparison by contrasting the effect of the definition on single mothers on social assistance and its effect on other social assistance recipients.

[72] Because the respondents' equality claim alleges differential treatment on the basis of an interlocking set of personal characteristics, I think their general approach is appropriate. Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged. Even accepting this general approach, however, the court is still entitled to refine the complainants' chosen comparisons to more accurately reflect the subject-matter of the complaint. See Law at p. 532 S.C.R.; Granovsky, supra, at p. 730 S.C.R. As will become apparent, I think some refinement of the comparator groups is warranted in this case. I now deal with the alleged differential treatment.

[73] First, the respondents allege that they have been treated unequally on the basis of the personal characteristic of being a social assistance recipient. As I stated above, the respondents urge a comparison between themselves and persons who are not on social assistance. In my view, the respondents' claim of differential treatment on the basis of being a social assistance recipient can best be assessed by comparing their treatment to the treatment of single persons not on social assistance. Framing the [page504] comparison in this way shows that the respondents have been treated unequally. They have suffered adverse state-imposed financial consequences because they began living in try-on relationships. By contrast, single people who are not on social assistance are free to have these relationships without attracting any kind of state-imposed financial consequences. These adverse consequences visited on the respondents represent one aspect of the differential treatment they have received.

[74] Second, the respondents allege that they have been treated differentially on the basis that they are women, and in particular single mothers. This alleged differential treatment on the basis of sex can best be assessed by comparing the impact of the definition of spouse on the respondents with its impact on single men on social assistance.

[75] Admittedly, the definition of spouse challenged in this case applies equally to men and women, to single fathers and

single mothers. It is neutral on its face. And even though more of those affected by the definition are women, that fact alone does not establish differential treatment on the basis of sex. But a facially neutral provision may still give rise to differential treatment on the basis of sex if the provision has a disproportionate adverse or negative effect on women. A disproportionate adverse effect is itself a form of differential treatment.

[76] Thus, the question is whether the definition of spouse disproportionately adversely affects women. The answer to that question depends on the statistics in the record on the effect of the definition. These statistics are found primarily in two exhibits to the affidavit of the respondents' witness Nancy Vander Plaats, a community legal worker with experience as a social assistance caseworker and as a member of a project team struck to advise the Minister on social assistance legislation. The Ministry compiled the statistics and both the appellants and the respondents rely upon them. Each side claims that the statistical evidence supports its position.

[77] In my view, the statistics unequivocally demonstrate that both women and single mothers are disproportionately adversely affected by the definition of spouse. The chart below makes this point by showing that although women accounted for only 54 per cent of those receiving social assistance and only 60 per cent of single persons receiving benefits, they accounted for nearly 90 per cent of those whose benefits were terminated by the definition of spouse. The corresponding figures for single mothers also show the definition's disproportionate impact on that group. [page505]

GROUP	Group as per cent of persons on social assistance	Group as per cent of single persons on social assistance	Group as per cent of person whose benefits were terminated by the definition of spouse
Women	54.2	60.2	88.8
Single			

mothers	27.7	33.1	76.0

The respondents have therefore been subjected to differential treatment on the basis of sex.

[78] Thus, I am satisfied that the respondents have established differential treatment on the basis of two of the personal characteristics on which they rely: receipt of social assistance and sex. But they also claim to have been subjected to a third form of differential treatment: differential treatment on the basis of being single mothers. This claim can be understood in two ways. Because single mothers are a subgroup of women, the respondents' assertion that they have been treated differentially on the basis that they are single mothers can be taken as a part of their claim of differential treatment on the basis of sex. The evidence showing the definition's differential treatment on the basis of sex also demonstrates the definition's disproportionate impact on single mothers. Alternatively, the respondents, as single mothers, can be viewed as having received differential treatment on the basis of the personal characteristic of marital status.

[79] Although the respondents did not frame their claim quite this way, I think it is appropriate to consider whether the respondents have received differential treatment on the basis of their marital status. Indeed, during oral argument the government candidly acknowledged that if we found, as I have, that the definition of spouse is overly broad because it includes relationships that are not spousal, then it would subject the respondents to differential treatment because of their marital status.

[80] Differential treatment on the basis of marital status can best be measured by comparing the respondents to married people on social assistance. Instead of limiting the spousal benefit unit to persons living in relationships of economic interdependence, clause (iii) of s. 1(1)(d) arbitrarily embraces under the umbrella of spouse individuals who are not economically interdependent. Thus, while married people on social assistance receive benefits in accordance with a benefit unit that reflects their actual economic position, the

definition of spouse puts the respondents and singles like them into a benefit unit that does not accurately reflect their economic situation. This comparison [page506] establishes that the definition treats the respondents differentially on the basis of their marital status.

[81] I believe that undertaking different comparisons to assess different forms of differential treatment is consistent with the Supreme Court's directive to apply the Law analysis flexibly. This flexible comparative approach reflects the complexity and context of the respondents' claim and captures the affront to their dignity, which lies at the heart of a s. 15 challenge. I have concluded that the respondents have received differential treatment on the basis of sex, marital status and receipt of social assistance. I now consider whether the differential treatment is based on prohibited grounds of discrimination.

(c) The respondents have received differential treatment on one or more enumerated and analogous grounds

[82] To make out a s. 15 violation, the differential treatment suffered by a claimant must be based on one or more prohibited grounds of discrimination. The grounds may either be enumerated in s. 15(1) or analogous to those that are enumerated.

[83] Sex is one of the prohibited grounds of discrimination enumerated under s. 15(1). And the Supreme Court of Canada recognized marital status as an analogous ground in Miron, supra. I therefore hold that the respondents have received differential treatment on two grounds of discrimination prohibited by s. 15(1): sex and marital status. This holding may well be sufficient to fulfill the second step in the Law framework.

[84] Additionally, however, I consider that the respondents have been subjected to differential treatment on the analogous ground of receipt of social assistance. Recognizing receipt of social assistance as an analogous ground of discrimination is controversial primarily because of concerns about singling out

the economically disadvantaged for Charter protection, about immutability and about lack of homogeneity. Because of these concerns, the Divisional Court concluded that receipt of social assistance is not an analogous ground under s. 15 in Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20, 35 C.R.R. (2d) 44 (Ont. Div. Ct.), leave to appeal denied without reasons, [1996] O.J. No. 1526 (C.A.); [1996] S.C.C.A. No. 373 (S.C.C.). These concerns have some validity but I think that recognizing receipt of social assistance as a ground of Charter protection under s. 15(1) is justified for several reasons.

[85] First, the main question in deciding whether a ground of discrimination should be recognized as analogous is whether its recognition would further the purpose of s. 15, the protection of [page507] human dignity. See Corbiere, supra. The nature of the group and Canadian society's treatment of that group must be considered. Relevant factors arguing for recognition include the group's historical disadvantage, lack of political power and vulnerability to having its interests disregarded. See Law, supra, and Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

[86] Here, the Divisional Court, relying on the record before the Board, found at para. 86 that there was "significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers". This evidence showed:

-- Single mothers make up one of the most economically disadvantaged groups in Canada.

-- Social assistance recipients have difficulty becoming self-sufficient, in part because of their limited education and lack of employability.

-- Social assistance recipients face resentment and anger from others in society, who see them as freeloading and lazy. They are therefore subject to stigma leading to social exclusion.

-- All sole support parents are subject to stigmatization, stereotyping and a history of offensive restrictions on their personal lives, and these disadvantages are particularly felt by sole support mothers.

-- Sole support parents on social assistance are politically powerless.

[87] These findings are reasonably supported by the evidence and I would not interfere with them. They support the conclusion that recognizing receipt of social assistance as an analogous ground of discrimination under s. 15(1) would further the protection of human dignity.

[88] Second, although the receipt of social assistance reflects economic disadvantage, which alone does not justify protection under s. 15, economic disadvantage often co-exists with other forms of disadvantage. That is the case here. The economic disadvantage suffered by social assistance recipients is only one feature of and may in part result from their historical disadvantage and vulnerability. I am comforted in this conclusion by two Nova Scotia decisions: R. v. Rehberg (1994), 111 D.L.R. (4th) 336, 19 C.R.R. (2d) 242 (S.C.) and Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224, 119 N.S.R. (2d) 91 (C.A.). [page508]

[89] Third, immutability in the sense of a characteristic that cannot be changed -- race is an example -- is not a requirement for recognizing an analogous ground. The Supreme Court of Canada has taken a more expansive view of "immutability". A characteristic that is difficult to change, that the government has no legitimate interest in expecting us to change, that can be changed only at great personal cost or that can be changed only after a significant period of time may be recognized as an analogous ground. See Corbiere, supra; Granovsky, supra; Andrews, supra. Receipt of social assistance is a characteristic that is difficult to change, at least for a significant period of time. It fits the expansive and flexible concept of immutability developed in the cases. I thus generally agree with the following observation of

the Divisional Court at para. 110:

> Examined, as it must be, from the perspective of the equity claimant, the status of being a social assistance recipient cannot be changed except over an extended period of time. At the point when the claimant experiences the impugned discrimination, she continues in financial need and cannot change her status except by foregoing state assistance, surely an unacceptable personal cost. The possibility of changing her status at some later time is irrelevant to her experience, and therefore irrelevant to the section 15 analysis. Her status is, therefore 'immutable' as that concept has developed in the authorities cited supra.

[90] Fourth, an important indicator of recognition is whether the proposed analogous ground is protected in human rights statutes, which themselves are considered quasi-constitutional. See Miron, supra at p. 496 S.C.R. Here the evidence supporting recognition is compelling. Most provincial human rights codes prohibit, for some purposes, discrimination on a ground related to receiving welfare: discrimination is prohibited on the basis of "receipt of public assistance" in Ontario and Saskatchewan, on the basis of "source of income" in Alberta, Manitoba, Nova Scotia and Prince Edward Island, on the basis of "social condition" in Quebec and on the basis of "social origin" in Newfoundland. [See Note 11 at end of document]

[91] Finally, homogeneity has never been a requirement for recognizing an analogous ground. Thus, though some recipients of social assistance may be more disadvantaged than others, [page509] mere disproportionate disadvantage borne by one or more sub-sets of a group does not militate against recognizing membership in that group as an analogous ground.

[92] The Divisional Court also recognized that social assistance recipients deserved s. 15 protection. The Divisional Court, however, defined the analogous ground more narrowly as sole support parents on social assistance or single mothers on social assistance. The intervenor LEAF supported the Divisional Court's characterization. It seems to me, however, that recognizing the broader or more general category, receipt of

social assistance, is preferable. It is more truly analogous to the enumerated grounds, which themselves are general; it conforms to the similar protection accorded to social assistance recipients in human rights legislation; it recognizes a group that is vulnerable to discrimination and that historically has been subjected to negative stereotyping; and it simplifies the equality analysis under s. 15. By contrast, recognizing as analogous a highly specific ground like sole support mothers on social assistance makes the s. 15 analysis, which is difficult enough, unnecessarily complex. Moreover single mothers on social assistance already receive two-fold s. 15(1) protection on the grounds of sex and marital status. What is novel about the respondents' position is that they seek recognition that their status as social assistance recipients is also relevant to the equality analysis. In my view, the most coherent way to achieve this is to recognize receipt of social assistance as an analogous ground.

[93] In summary, the definition of spouse has subjected the respondents to differential treatment on the basis of three prohibited grounds of discrimination: sex, marital status and receipt of social assistance.

(d) The differential treatment discriminates

[94] The third and final step in the Law framework requires the court to decide whether the differential treatment is discriminatory. Before 1995, each respondent received a family benefits allowance as a single mother solely responsible for the support of her child or children. When the 1995 definition was passed, each respondent was reclassified as a spouse. I have already concluded that the 1995 definition subjected each respondent to differential treatment based on the grounds of sex, marital status and receipt of social assistance. In my view, the effect of the differential treatment imposed on the respondents by the 1995 definition is discriminatory.

[95] The Supreme Court's guidance on the discrimination analysis supports this conclusion. In Law and subsequently in Lovelace, supra, at pp. 990-91 S.C.R., that court listed a number [page510] of contextual factors that may be relevant to

deciding whether differential treatment discriminates under the third step of the framework. These contextual factors include:

-- whether the distinction in question reflects and reinforces existing disadvantages, stereotypes and prejudices;

-- whether the alleged ground of discrimination corresponds to the actual needs, capacity or circumstances of the claimant;

-- whether the purpose or effect of the challenged law or program is to ameliorate the condition of more disadvantaged groups and whether persons excluded from the benefit are more advantaged than those included; and

-- whether the nature and scope of the interests affected by the challenged law go to the core of human dignity.

An examination of these four contextual factors reveals that the 1995 definition of spouse in s. 1(1)(d) is substantively discriminatory. I will discuss each of these factors in turn.

(i) The distinction reflects and reinforces existing disadvantages, stereotypes and prejudice

[96] This first contextual factor is "probably the most compelling factor" in showing discrimination. See Law at p. 534 S.C.R. As discussed earlier, social assistance recipients -- especially single mothers on social assistance -- are an historically disadvantaged group. The definition of spouse at issue in this appeal perpetuates this historical disadvantage. It creates financial stress from the beginning of the relationship. It reinforces the stereotypical assumption that a woman will be supported by the man with whom she cohabits and will have access to his resources. And it devalues women's desire for financial independence. The Divisional Court put it this way at para. 124:

> The regulations reinforce . . . pre-existing disadvantage and vulnerability. Persons on social assistance are often stigmatized and feel themselves unworthy. The serious

invasion of their privacy and the unwarranted assumption of their dependency upon a man occasioned by the Regulation can only reinforce this unfortunate aspect of their lives.

(ii) The alleged grounds of discrimination do not correspond to the respondents' actual needs, capacity or circumstances

[97] The second contextual factor recognizes that in some cases equality can be achieved only by differential treatment. In some [page511] cases, the differential treatment imposed by the legislation will not violate a complainant's human dignity because it corresponds to the complainant's "actual needs, capacity, or circumstances". See Law at p. 538 S.C.R. The differential treatment at issue in this case, however, does not achieve equality. Instead, the definition labels a single mother a spouse without regard to whether her co-resident is providing meaningful support or whether she and her co-resident have meaningful financial interdependence.

[98] The government points out that the evidence shows that most people in unmarried relationships who were reclassified as spouses either stayed off social assistance or reapplied as a couple. Thus, the government contends, this evidence shows that the definition has accurately captured those couples whose finances are truly interdependent. Even accepting the evidence, I do not accept the conclusion the government draws from it. Individuals reclassified as spouses may have stayed off social assistance for any number of reasons that have nothing to do with financial interdependence. Or they may have reapplied as a couple because the definition forced them into financial dependence and gave them no other realistic choice.

(iii) The definition of spouse does not have an ameliorative effect

[99] Legislation that has an ameliorative purpose or effect consistent with the purpose of the equality guarantee may not be discriminatory. The government argues that the differential treatment imposed by the definition of spouse does not discriminate because social assistance legislation has the

ameliorative purpose of providing last-resort funding to persons in need, and the 1995 definition of spouse advances this purpose by allocating scarce public money to those who need it most. I accept that Ontario's social assistance legislation is generally ameliorative, both in purpose and effect. But though a social program may be ameliorative as a whole, one or more of its components may still be discriminatory if they perpetuate prejudice, stereotypes or other disadvantage undermining human dignity. That is the case here because the challenged definition of spouse is anything but ameliorative. The words of the Supreme Court in Law, at p. 539 S.C.R., are apt:

> Underinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination[.]

The discrimination resulting from the 1995 definition of spouse is not excused merely because it occurs within an otherwise ameliorative program. [page512]

(iv) The nature and scope of the interests affected go to the core of human dignity

[100] The fourth contextual factor requires an examination of the interests affected by the 1995 definition of spouse. Differential treatment is more likely to be found discriminatory where its impact is localized and severe and where it affects interests that go to the core of human dignity. See Law at p. 540 S.C.R. As the Supreme Court said, ibid.:

> the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution . . .

Social assistance may well constitute a fundamental social

institution. In any case, the impact of the challenged definition of spouse is localized in the sense that women and single mothers are disproportionately affected. And the impact is severe, compromising, as it does, the respondents' ability to meet their own and their children's basic needs. Because of the definition, each respondent lost her entitlement to social assistance as a single person. Even though each respondent may still apply with her co-resident for benefits as a couple, these benefits are lower than the benefits available to a sole support parent. Moreover, if her co-resident is self-employed or in school, the couple is ineligible.

[101] Beyond purely financial concerns, more fundamental dignity interests of the respondents have been affected. Being reclassified as a spouse forces the respondents and other single mothers in similar circumstances to give up either their financial independence or their relationship. Many women, including three of the respondents in this appeal, have been victimized by alcoholic or abusive partners. Forcing them to become financially dependent on men with whom they have, at best, try-on relationships strikes at the core of their human dignity.

[102] What is more, because the 1995 definition potentially creates forced financial dependence, it likely has a chilling effect on the formation of relationships. The Board found that the definition has a chilling effect:

> The Board is satisfied that the uncertainty imbedded in the definition of spouse and in its application by social assistance authorities, combined with the drastic effect on the availability of assistance if one is found to fall within the definition, would have a chilling effect on a sole support parent's attempts to build a new family through a relationship with a person of the [page513] opposite sex. She is not free to choose how to live her personal life, nor to pursue in the manner of her choice, an intimate relationship with a man without the fear of putting her own and her children's survival at risk.

The Divisional Court upheld this finding and, although the

government argues otherwise, in my view it is reasonably supported by the evidence. Each respondent testified that she would not have entered into a co-residency relationship in the first place if it meant losing her entitlement to family benefits.

[103] Although the expert evidence canvassed by the Divisional Court in support of this chilling effect was largely retrospective, the chilling effect can be inferred from the definition itself. From the moment a single mother on social assistance begins co-residing with a man, she risks being reclassified as a spouse and losing part or all of her entitlement to social assistance. And if the co-residents reapply as a couple, the social assistance cheque may be made out to the male co-resident, leaving the woman in a position of economic dependence on a man who has no legal obligation to support her or her children. To the extent that the challenged definition of spouse has a chilling effect on relationship formation, it interferes with the respondents' highly personal choices and affects interests that go to the core of their human dignity.

[104] Finally, the administration of the definition is highly intrusive of the privacy of single persons on social assistance. They are subjected to heightened scrutiny of their personal relationships. They are required to complete a detailed questionnaire on their personal living arrangements. The questionnaire includes the following questions:

> Do you and your co-resident spend spare time at home together?
>
> Do you go to church, temple, synagogue, etc. with your co-resident?
>
> How do you and your co-resident address each other's parents?
>
> Who takes care of you and your co-resident when either of you are ill?
>
> Do you ask your co-resident for advice regarding the

children?

Does your co-resident buy them birthday or other presents? These and many other questions on the questionnaire touch on highly personal matters. Far from negating any discrimination as the government contends, administering the challenged definition by requiring social assistance recipients to complete this questionnaire further suggests that the definition undermines human dignity.

[105] I conclude that the 1995 definition of spouse in s. 1(1)(d)(iii) of Regulation 366 under the Family Benefits Act imposes differential [page514] treatment on the respondents on the combined grounds of sex, marital status and receipt of social assistance and that this differential treatment discriminates against them, contrary to s. 15 of the Charter.

4. The Section 15(1) Violation is Not Justified under Section 1 of the Charter

[106] To maintain legislation found to violate a Charter right, the government must justify the violation under s. 1 of the Charter. To do so it must meet the test in R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200. It must show that the objective of the legislation in question is "pressing and substantial", and it must show that the means chosen to achieve the objective are proportional to the ends.

[107] The government's two stated objectives in passing s. 1(1)(d) of Regulation 366 are to treat married and unmarried couples alike and to allocate public funds to those most in need by ensuring that individuals use private resources before resorting to social assistance. Unlike the Divisional Court, I accept that these objectives are pressing and substantial.

[108] But the government's justification of the definition fails on the proportionality branch of the s. 1 test. The proportionality branch has three components: in this case the government must show that the definition of spouse is rationally connected to the government's two stated objectives, that the definition impairs the respondents' s. 15 rights as

little as possible, and that the definition's positive effects outweigh its negative effects.

[109] The government has not met any of the three components of the proportionality test. Given its overbreadth, the definition of spouse is not rationally connected to the government's objective of treating married and unmarried spouses alike. It treats as spouses persons who are not in marriage-like relationships because they do not have the necessary degree of financial interdependence.

[110] Similarly, because the definition is overly broad, it does not satisfy the minimal impairment component of the s. 1 test. I recognize that the government is not required to search out the least intrusive means of meeting its objective to satisfy this component. The government is held to a standard of reasonableness, not perfection. Moreover, as discussed earlier, the government is not required to use a definition of spouse that parallels the definition in the Family Law Act. Social assistance under the Family Benefits Act and support under the Family Law Act have different purposes and the Charter does not require the [page515] government to use the same definition to serve these different purposes. That said, clause (iii) of s. 1(1)(d) does not reasonably capture the financial interdependence that characterizes spousal relationships. Instead, clause (iii) seems designed to capture try-on relationships like those of the respondents, where the couple does share some expenses but has no mutual support obligations and no meaningful financial interdependence. These relationships are not spousal and the definition therefore does not minimally impair the respondents' s. 15 rights. I note that nothing in the record suggests that the government considered alternative definitions.

[111] Finally, the negative effects of the definition outweigh its positive effects. I agree with the respondents that the only possible positive effect of the definition is cost savings. The negative effects are considerable and include reinforcement of dependency, deprivation of financial independence and state interference with close personal relationships. I therefore conclude that the government has not

met its onus of justifying the s. 15 Charter violation.

5. The Section 7 Issue

[112] Although the respondents' principal submission is that the 1995 definition of spouse violates s. 15(1) of the Charter, they advance the alternative submission that the definition also violates s. 7. In this alternative position they are supported by the intervenor, The Canadian Civil Liberties Association.

[113] Because of the view I take of s. 15(1), like the majority of the Divisional Court, I do not find it necessary to address s. 7 of the Charter. To me this is a s. 15 case. I cannot conceive how the respondents could fail under s. 15 and yet succeed under s. 7. Thus, though I appreciate the able arguments made by all parties, I think it preferable to leave the important s. 7 issues raised by counsel for a case in which their determination is central to the outcome.

6. The Appropriate Remedy

[114] In dismissing the government's appeal, the Divisional Court declared that the definition of spouse in s. 1(1)(d) of Regulation 366 under the Family Benefits Act violated s. 15 of the Charter, could not be justified under s. 1, and was therefore of no force and effect. The respondents ask that we give the same declaration by simply dismissing the appeal.

[115] The government submits, however, that if the challenged definition is unconstitutional, the appropriate remedy is to declare [page516] the definition invalid to the extent of the inconsistency and suspend the declaration of invalidity for enough time to permit the government to amend the legislative or regulatory regime to conform to constitutional requirements. In my view, suspending the declaration of invalidity would be inappropriate.

[116] I recognize that this court has the jurisdiction to suspend a declaration of constitutional invalidity and has done so in other cases. See, for example, M. v. H., supra. Moreover,

I recognize the difficulties inherent in designing and administering a regulatory scheme like social assistance that meets the government's constitutional obligations and at the same time is fair and efficient. I also recognize that the government must take into account any number of factors not addressed by the court in the context of a specific case. Although the courts play an important role in determining the constitutionality of all or part of a regulatory scheme, they cannot design the scheme. That task is left to the legislature or to Cabinet. All of these considerations weigh in favour of suspending the declaration of invalidity.

[117] But suspending a declaration of invalidity raises a competing concern. That concern was discussed by Lamer C.J.C. in Schachter v. R., [1992] 2 S.C.R. 679 at p. 716, 93 D.L.R. (4th) 1:

> A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases.

[118] In this case, I see no pragmatic reason to suspend the declaration. On September 22, 2000, this court set aside a previously ordered stay of the Divisional Court's declaration on the ground that the government could not show irreparable harm if a stay were refused. In its reasons, the court noted that at the time at most 500 sole support parents were under the Family Benefits Act regime and that the government had already put in place temporary measures to implement the Divisional Court's decision. Moreover, the government had advised the court that it needed at most four to six months to design a scheme consistent with the Divisional Court's declaration. It has now had over a year since the stay was set aside. On the other hand, suspending the declaration may put hundreds of sole support parents like the respondents at risk of financial hardship. I would refuse to suspend the declaration of invalidity and instead would simply dismiss the government's appeal.

E. CONCLUSION

[119] In the Falkiner appeal, I would dismiss the appeal.
[page517]

[120] In the Thomas appeal, I would allow the appeal and set aside the order of the Divisional Court and the decision of the Social Assistance Review Board. I would remit to the Director Mr. Thomas' application for an allowance under the Family Benefits Act as a single "permanently unemployable person" (effective October 1, 1996) to be reconsidered in the light of these reasons.

[121] In both appeals, before deciding the question of costs, I would ask all parties to make written submissions.

Government's appeal dismissed; Individuals' appeal allowed.

Notes

Note 1: R.S.O. 1990, c. F.2.

Note 2: R.S.O. 1990, c. F.3, s. 29.

Note 3: R.R.O. 1990, Reg. 366, s. 1(1)(d).

Note 4: R.S.O. 1990, c. G.6.

Note 5: In 2000, the 1995 definition of spouse in Regulation 366 was revoked and an almost identical provision was substituted. Section 1(1)(d) of that Regulation now provides:

1(1) ... "spouse" means,

(d) a person of the opposite sex to an applicant or recipient who is residing in the same dwelling place as the applicant or recipient if,

(i) the person is providing financial support to the applicant or recipient,

(ii) the applicant or recipient is providing fincancial support to the person or,

(iii) the person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs,

and the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation.

Note 6: Both O. Reg. 134/98 under the Ontario Works Act, 1997 and O. Reg. 222/98 under the Ontario Disability Support Program Act, 1997 provide as follows:

1(1) ... "spouse", in relation to an applicant or recipient, means,

(d) a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient, if the soical and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation and,

(i) the person is providing financial support to the applicant or recipient,

(ii) the applicant, or recipient is providing financial support to the person, or

(iii) the person and the applicant or recipient have a mutual agreement or arrangement regarding their financial affairs.

Note 7: Under the social assistance legislation introduced in 1998, the initial right of appeal lies to the Social Benefits Tribunal.

Note 8: S.O. 1997, c. 25.

Note 9: S.O. 1997, c. 25, Sch. A.

Note 10: S.O. 1997, c. 25, Sch. B.

Note 11: Human Rights Code, R.S.O. 1990, c. H.19, s. 2(1),(2); The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 2(1) (m.01); Human Rights Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14, ss. 3(1), 4, 5, 7(1), 8(1), 9; The Human Rights Code, C.C.S.M., c. H175, s. 9(2)(j); Human Rights Act, R.S.N.S. 1989, c. 214, c. 5(1)(t); Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 1(1)(d); Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 10; Human Rights Code, R.S.N. 1990, c. H-14, ss. 6(1), 7(1), 8, 9, 12, 14.