

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

APPLICANT

AND

KELLY LESIUK

RESPONDENT

AND

**WOMEN’S LEGAL EDUCATION AND ACTION FUND (“LEAF”) and
INCOME SECURITY ADVOCACY CENTRE**

INTERVENERS

**MEMORANDUM OF FACT AND LAW OF THE INTERVENER,
INCOME SECURITY ADVOCACY CENTRE**

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INTRODUCTION: FROM INCOME SECURITY TO INCOME INSECURITY

1. The Income Security Advocacy Centre is of the view that in order to fully and fairly determine whether ss. 6(1) and 7(2) of the *Employment Insurance Act* violate s. 15(1) of the *Charter*, it is vital to understand the reality confronted by unemployed workers barred from accessing Employment Insurance benefits as a consequence of the hours of work eligibility rules. This necessitates consideration of the provisions in their historical context, and further, within the context of the full gamut of income security programs.
2. While unemployed workers such as Kelly Lesiuk can and do deplete their savings or turn to family members when denied Employment Insurance, low-income unemployed workers are compelled by circumstance to traverse the various income security programs in order to survive. It is essential to note that the restrictions imposed on eligibility by virtue of the impugned provisions are mirrored in the eligibility rules governing other income security programs often operate to leave low-income unemployed workers without any source of income. This fuller context is relevant to the analysis pursuant to both s. 15(1) and s. 1 of the *Charter*. It is ISAC's position that the impugned provisions are discriminatory in their effect having as they do a disproportionate impact on economically vulnerable women, immigrant and disabled workers and workers of colour and cannot be saved by s. 1.

PART I - FACTS

3. ISAC adopts the facts set out in Kelly Lesiuk's Memorandum of Points of Argument. Additionally, ISAC relies on two sets of facts in order to fully and fairly contextualize the constitutional inquiry:
 - (i) the legislative history of unemployment insurance with a focus on the clear and stated links between unemployment insurance and other income security programs;
 - (ii) the reality faced by low-income unemployed workers denied Employment Insurance benefits, both in terms of the need to engage with other income security programs and the rules governing the latter.
- A. **Legislative History of Unemployment Insurance in Canada**
 - (i) **Tracing the Lines of Responsibility**
4. Prompted by the depression of the 1930s, the Canadian government introduced the *Employment and Social Insurance Act*, S.C. 1935, c. 38, which was to establish a national unemployment insurance program. However, the Supreme Court of Canada and the Judicial Committee of the Privy Council found the legislation to be *ultra vires*, insurance being the exclusive power of the provinces. A

constitutional amendment assigning to the federal government the exclusive power to legislate in the matter of unemployment insurance took effect in 1940.

“Milestones in the History of Unemployment and Employment Insurance Legislation in Canada”, René Racette, HRDC, 1999, **Applicant’s Record, Vol. 8, Tab 17, pp. 6664–5.**

5. That year, the government introduced the *Unemployment Insurance Act*, S.C. 1940. Its introduction was premised on the notion that aid to those able to work but without jobs would fall to the federal government while the provinces would retain responsibility for other social welfare services including aid to those unable to work. The concerns leading to the constitutional amendment included the fact that the provinces/municipalities did not have the financial resources to meet the needs of the unemployed. A number of provinces requested and received funds from the federal government for this purpose.

“Equality of Opportunity, Reducing Disparities and Essential Services of Reasonable Quality: The Evolution of (Un)Employment Insurance”, Paul Phillips,, **Applicant’s Record, Vol. 4, Tab E, Exhibit B, pg. 3159.**

6. Aside from fiscal considerations, unemployment insurance was designed to get people off welfare. While the alleviation of poverty was not the principal goal of the unemployment insurance program, prior to the 1996 changes, the program played a key role in this regard, particularly in comparison to countries where other income support programs are more liberal and generous.

“Equality of Opportunity, Reducing Disparities and Essential Services of Reasonable Quality: The Evolution of (Un)Employment Insurance”, **supra, pp. 3158, 3226-3227.**

Examination-in-chief of P. Phillips, **Applicant’s Record, Vol. 1, Tab 4, pg. 253.**

7. After the 1940 Act came into effect, the provinces continued to be responsible for meeting the needs of those not covered by the federal program. Ottawa formalized the provision of financial aid to the provinces in 1956 in the passage of the *Unemployment Assistance Act*, S.C. 1956 c. 2, which in Ontario led to the repeal of its *Unemployment Relief Act*, S.O. 1933, c. 65, and the enactment of the *General Welfare Assistance Act*, S.O. 1958.

(ii) Defining the Scope and Purpose of the Unemployment Insurance Program

8. Since its inception in 1940, successive Canadian governments have struggled to find a balance between two policy objectives:

- (i.) an insurance program, the notable features of which are contributions by the beneficiaries, ongoing rather than emergency coverage, the absence of a needs test and pooled risk;
- (ii.) an income security program designed to forestall destitution and redistribute income.

“Milestones in the History of Unemployment and Employment Insurance Legislation in Canada”, **supra, at pp. 6663 & 6672.**

9. The tension between these two notions of unemployment insurance has resulted in a conflict between the ability of the program to meet the needs of unemployed workers and the desire to contain the costs of the program by restricting entitlement to benefits through a variety of means including the eligibility rules.

“From Unemployment Insurance to Employment Insurance: A Supplementary Paper”, Minister of Human Resources Development, Applicant’s Record, Vol. 5, Tab 2, pp. 4069-70 and 4123-28.

10. While the introduction of the program heralded a welcome shift away from the assumption that unemployment is attributable to personal rather than societal/structural failing, blaming the worker has never completely disappeared from view and runs as a thread throughout the history of the unemployment insurance program, in more or less nuanced ways. This thread also resonates in all income security programs available to those physically able to work.

“Canadian Women and Part-Time Work”, Exhibit B in the Affidavit of Norene Pupo, Applicant’s Record, Vol. 4, Tab A, pg. 2928.

11. Following directly from the “personal responsibility” analysis is a delineation between “deserving” and “undeserving” workers. The latter are characterized by what is said to be an unwillingness to work only so long as is necessary to establish eligibility for unemployment insurance. Government studies and reports are replete with references to the “moral hazard” of unemployment, “disincentives” to work, and dependence on unemployment insurance. From this perspective, tighter eligibility rules are thought to act as a social control of allegedly errant and lazy workers.

“Employment Patterns and Unemployment Insurance”, L. Chistofides and C. McKenna, Applicant’s Record, Vol. 6, Tab H, pg. 4914.

“Canadian Women and Part-Time Work”, supra, pg. 2928.

B. Restrictive and Intrusive Eligibility Rules in Provincial Welfare Programs: Echoes of Restricted Access to EI

12. The impugned provisions have resulted in a decline in the number of unemployed workers eligible to receive benefits, with a disproportionate affect on part-time workers.

“The Employment Insurance System: The Effects of the Shift to an Hours-Based Entrance Requirement”, David A. Green and W. Craig Riddell, Applicant’s Record, Vol. 10, Tab 11, pp. 7562, 7573.

13. Women, immigrant and disabled workers and workers of colour are over-represented in part-time work and are therefore most likely to be disentitled to employment insurance by operation of the impugned provisions, are more likely to be unemployed and experience higher rates of poverty than the norm.

Pupo and Duffy, "Canadian Women and Part-Time Work", Applicant's Record, Vol. 4, Tab A, Exhibit "B", pg. 2866-68, 2901, 2916-2917.

Morley Gunderson, Leon Muszynski and Jennifer Keck, "Women and Labour Market Poverty", Ottawa: Canadian Advisory Council on the Status of Women, 1990, pg. 66, LEAF's Record, Vol. 1, Tab 5.

Ekua Smith and Andrew Jackson, "Does a Rising Tide Lift All Boats? Labour Market Experiences and Incomes of Recent Immigrants, 1995-1998" (Ottawa: Canadian Council on Social Development, 2002), LEAF's Record, Vol. 2, Tab 19, pp. 8, 9 & 12.

"The Dynamics of Women's Poverty in Canada", C. Lochhead and K.Scott, Canadian Council on Social Development, March 2000, at pg. 16, citing Gail Fawcett, "Living with Disability in Canada: An Economic Portrait, 1996, HRDC, LEAF's Book of Authorities, Vol. 1, Tab 10.

"Employment: Issues and Challenges", from, "In Unison 2000: Persons with Disabilities", Canada, Federal, Provincial and Territorial Ministers Responsible for Social Services, http://socialunion.gc.ca/In_Unison2000/iu00100e.html at http://socialunion.gc.ca/In_Unison2000/iu03100e.html, pg. 2, ISAC's Book of Authorities, Tab 1.

14. Workers denied EI benefits must access other sources of income. For low-income workers, welfare is a likely alternative. In its 1998 Report on Employment Insurance Coverage, Statistics Canada found that 23.3% of those ineligible for EI turned to welfare. This explains the correlation between declining numbers of workers eligible for unemployment insurance benefits and rising welfare rolls.

"Report on the Main Results of the Employment Insurance Coverage Survey, 1998", July 1999, Statistics Canada, pg. 14. ISAC's Book of Authorities, Tab 2.

15. Women and immigrants are over-represented amongst welfare recipients. In 2001, approximately two thirds of single adults (including single parents) receiving welfare in Ontario were women. Similarly, according to Citizenship and Immigration Canada, 14.3% of immigrant tax filers who were permanent residents reported welfare as an income source in 1995, as compared to 9.6% of all Canadians. Similarly, 26% of people with disabilities had incomes below Statistics Canada's Low Income Cut Off (LICO), as opposed to 11% of those without disabilities.

"Ontario Works Average Monthly Caseload by Gender, by Age Groups, Calendar Years 1999-2001", in Ministry of Community and Social Services Response to Freedom of Information and Protection of Privacy Act Request, ISAC's Book of Authorities, Tab 3.

"The Economic Performance of Immigrants: Education Perspective", Citizenship and Immigration Canada, May 1999, p. 9, ISAC's Book of Authorities, Tab 4.

"Income: Issues and Challenges", from "In Unison 2000: Persons with Disabilities in Canada", supra, at http://socialunion.gc.ca/In_Unison2000/iu04100e.html, pg. 1.

16. It is against this backdrop that the compounding restriction of access provincial welfare benefits should be considered. In Ontario, massive changes to the welfare were introduced in 1995. Central amongst them was the reduction of benefits by 22% and mandatory participation in “workfare” placements, in effect, unpaid work. In addition, new requirements have been added to an already onerous eligibility process. In Ontario, 31.3% of applicants are denied welfare.
- “Making Welfare Work: Report to Taxpayers on Welfare Reform”, May 2000, Government of Ontario, pp. 3 & 13, ISAC’s Book of Authorities, Tab 5.*
- “Intake Study – Final Report: Study of the Ontario Works New Application Process”, December 2001, Government of Ontario, p. 44, ISAC’s Book of Authorities, Tab 6.*
17. Establishing eligibility for welfare is significantly more intrusive than establishing eligibility for Employment Insurance. Unlike Employment Insurance, eligibility is determined on the basis of the income and assets of the unemployed worker’s entire family. As a result, the worker and all family members are subjected to the full financial and social eligibility process. This process requires disclosure of intensely personal information and authorization of broad-reaching inquiries by the municipal welfare authorities.
- Ontario Works Act, (OWA), S.O. 1997, c. 25, section 7(1) & (3)(c), ISAC’s Book of Authorities, Tab 10.*
- Ontario Regulation (O. Reg.) 134/98, s. 14 & 17(2), ISAC’s Book of Authorities, Tab 11.*
18. All applicants must meet strict asset levels before eligibility can be considered. A single person will be ineligible, if he or she has assets in excess of one month’s maximum welfare benefits, currently set at \$520. A single parent with one dependent child is entitled to \$1457. The assets of all family members are considered and the definition of assets is broad and includes cash, bonds, stocks, cash surrender value of life insurance policies, interest in a property, interest in a property held in trust and available to the benefit unit and any property readily convertible to cash. Applicants who have assets in excess of these limits must use up their assets before they can become eligible for welfare payments.
- OWA, s. 7(3)(b), supra.*
- O. Reg 134/98, s. 38 & 39., supra*
- “September 2001 Ontario Works Policy Directives, Assets, Directive 15.0”, pg. 10, ISAC’s Book of Authorities, Tab 12.*
19. In addition, even in the face of clear economic need, applicants who are seen to have quit or been fired from employment without reasonable cause, can be denied for ongoing benefits for three months on a first occurrence or six months. Applicants are hampered in their ability to challenge a quit/fire decision within a meaningful time period, as appeals to the Social Benefits Tribunal can take many

months to be heard. Even where the economic need is immediate, emergency assistance to such applicants can be issued for a maximum of only one-half month.

OWA, ss. 7(4) & 9, supra.

O. Reg. 134/98, ss. 33,34 & 56, supra.

20. For those unemployed workers who manage to qualify for welfare benefits, they and their family are subjected to intrusive and demeaning ongoing eligibility monitoring. The entire family, or “benefit unit” as it is impersonally called, must comply with complex income rules that require such things as loans from friends, bank loans, credit card advances and receipt of the National Child Tax Benefit payments to be declared and deducted from benefits. The complexity and breadth of the income rules creates ongoing risk of violation, declaration of overpayment, cancellation of benefits and even prosecution for fraud.

OWA, s. 7(3)(b), supra.

O. Reg. 134/98, s. 48 – 54.1, supra.

21. Acceptance of intrusive monitoring of personal and family circumstances is also a condition of ongoing eligibility. Applicants are subjected to unannounced home visits to determine such matters as whether there is an undisclosed spouse, boarder or family member whose presence should result in the reduction or cancellation of benefits. The Ontario Court of Appeal recently released a decision on the spousal determination process which recognized the offensive nature of that process for welfare recipients. To add to the demeaning experience, Ontario also operates a well publicized “snitch line” that entitles anyone to level an anonymous and unsupported accusation of abuse against a welfare recipient.

OWA, ss. 7(3)(c) & 14(1), supra.

O. Reg. 134/98, ss. 12, 14, 17, 22, 23 & 33-35, supra.

“Making Welfare Work: Report to Taxpayers on Welfare Reform” p. 7, supra.

22. At the same time as welfare applicants must accept highly intrusive monitoring as a condition of eligibility, they must also make do with inferior re-employment supports. Where eligibility for Employment Insurance gives unemployed workers access to significant skills retraining programs and programs such as the SEA Program (Self Employment Assistance Program) which is designed to develop entrepreneurial skills, Ontario’s Ontario Works program is focussed on “activities that support the shortest route to employment” of any kind, without regard to or support for training that can improve the long term economic prospects of the applicants. The employment support programs

provided by welfare are limited to achieving basic literacy, numeracy skills and basic job readiness skills.

OWA, s. 4, 6, 16(2) & 44, supra.

O. Reg 134/98, s. 3,25, 26, 28 & 29, supra

“September 2001 Ontario Works Policy Directives, Setting Participation Requirements, Directive 6.0”, pg.6, ISAC’s Book of Authorities, Tab 13.

23. Welfare’s focus on the “shortest route to employment” does not give unemployed workers the same opportunity that they would have under receipt of Employment Insurance benefits to look for suitable employment relative to their experience, training and career aspirations. Instead, the “participation” requirements imposed by Ontario Works, push recipients, under threat of benefit cancellation, to accept any available work, even where it may impair their ability to obtain more suitable and more remunerative employment; a pressure which in turn drives recipients towards even more precarious, minimum wage, low-skill, dead-end employment. The loss of EI re-employment supports is particularly critical for women, immigrant, disabled workers and workers of colour, who face significant systemic employment barriers and who are most in need of effective re-employment supports.

O. Reg. 134/98, s. 33 & 34, supra.

“Equality of Opportunity, Reducing Disparities and Essential Services of Reasonable Quality: The Evolution of (Un)Employment Insurance”, supra, pg. 3223.

24. On top of the intrusive and onerous measures described above, the receipt of social assistance carries with it a powerful social stigma and an array of negative stereotypes, which lead to discriminatory treatment of welfare recipients. The stigma operates both to disadvantage welfare recipients within their community, but also to damage self-esteem and feelings of self-worth. The existence and effect of this effect has been expressly recognized judicially and has recently led the Ontario Court of Appeal to find “receipt of social assistance” to be an analogous ground for the purpose of protection under section 15 of the *Canadian Charter of Rights and Freedoms*. In doing so, the Court quoted with approval the following passage from a lower court ruling:

The regulations [defining “spouse”] 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 life.”

Falkiner v. Director, Income Maintenance Branch, O.R. Ontario Court of Appeal, May 13, 2000, decision c35052, par. 96 , ISAC Book of Authorities, Tab 15.

Examination-in-chief of P. Phillips, Applicant’s Record, Vol. 1, Tab 4, pg. 253

C. Explaining the Trend to Restrictiveness: The Demise of National Standards and Policies of the International Monetary Fund (IMF) and the Organization of Economic Cooperation and Development (OECD)

25. In 1995, the federal government repealed the Canada Assistance Plan (CAP), replacing it with the Canada Health and Social Transfer (CHST). Parliament had originally adopted CAP to encourage the provinces to develop social assistance programs that met national standards. In its preamble, CAP stated Canada's commitment to the provision of adequate assistance to those in need "and the prevention and removal of the causes of poverty and dependence on social assistance". The federal government made transfer payments to the provinces to finance social assistance programs subject to the provinces meeting a number of standards including accessibility (the provision of assistance to any person in need), adequacy (assistance was to be provided in an amount consistent with a person's basic needs) and the right to refuse work. The only standard to have survived the termination of CAP was the universality requirement: the provision of social assistance is not to be tied to a term of residency.

26. The repeal of CAP and national standards came in the wake of the issuance of an International Monetary Fund (IMF) document dated December 9, 1994. The 1994 statement begins by advising the Minister of Finance "to consolidate the federal fiscal position by...cutting government spending...It is critical that fiscal policy take the lead". That followed the 1993 statement which observed that "it has been well established that unemployment insurance benefits reduce incentives to work...A review of income support and social assistance programs also will be needed to support deficit reduction".

"Statement of the Fund Mission to the [Canadian] Minister of Finance", 1993/94/95, International Monetary Fund pp. 12 & 22, ISAC's Book of Authorities, Tab 7.

27. In fact, the IMF called for further reforms to the employment insurance program which was said to create "employment disincentives". That analysis is said to be supported by research conducted by the OECD, which purports to find that longer unemployment insurance entitlement periods can increase the duration of unemployment.

"Statement of the Fund Mission to the [Canadian] Minister of Finance", 1995, pg. 14, supra. "Improving Social Security in Canada: From Unemployment Insurance to Employment Insurance", HRDC, Applicant's Record, Vol. 5, Tab 2. pg. 4081.

28. Not content with commentary on unemployment insurance, in a 1999 background paper, the IMF called for legislated limits on entitlement to welfare for employable recipients. That theme was recently taken up by the government of British Columbia in its welfare reform package, which will include regulations establishing time limited income assistance cycles and prescribing the maximum

proportion of that cycle for which a family unit is eligible, as well as the authority to reduce assistance to prescribed groups.

“IMF Staff Country Report No. 99/14, Canada: Selected Issues” March 1999, International Monetary Fund, p. 56, ISAC’s Book of Authorities, Tab 8.

Employment and Assistance Act, S.B.C. 2002, c. 40, s.36, (Royal Assent given May 30, 2002, not yet proclaimed), ISAC’s Book of Authorities, Tab 14.

29. The seamlessness of income security programs in Canada and the recent and unitary theme of restricted access and entitlement resonating in each of the programs is central not only in the government’s design of the impugned provisions (in response to the IMF and OECD), but also the lived reality of low-income unemployed workers, the majority of whom are women, immigrant and disabled workers and workers of colour. For these reasons, a determination of the constitutionality of the provisions must take place within the context of the broad range of income security programs.

PART II – POINTS IN ISSUE

30. Against this factual backdrop, ISAC wishes to address two issues:

- (a) Did the Umpire err in law in concluding that the impugned provisions violated s.15(1) of the *Charter*?
- (b) If the answer to the first question is yes, are the impugned provisions saved by s. 1?

It is ISAC’s view that the impugned provisions violate s. 15(1) because they discriminate on the grounds of sex, race and disability, and further, that the provisions cannot be saved by s.1 because they are not justified in a free and democratic society.

PART III – SUBMISSIONS

A. Do the impugned provisions violate s. 15(1)?

(i) Overview

31. ISAC adopts the statement of the law and analysis pertaining to s. 15(1) as set out by LEAF and Kelly Lesiuk. In particular, ISAC wishes to note that a determination of whether or not there has been a violation of s. 15(1) turns on a subjective and objective assessment *from the perspective of those claiming the violation*. The objective assessment necessarily includes all of the individual’s or group’s traits, history and circumstances in determining whether there is a “rational foundation” for the claimant’s subjective belief. The analysis must proceed against the backdrop of the broader political, social, historical and legal context in which the alleged discrimination arises. It is with respect to objective assessment and contextual analysis that ISAC is asking the court to look at the alternatives

faced by low-income workers who are ineligible for Employment Insurance as a result of the impugned provisions.

Law v. Canada [1999] 1 S.C.R. 497, at 532-540, Applicant's Book of Authorities, Vol. II (Part 1), Tab 16

(ii) The Reality of Low-Income Unemployed Workers' Lives: Objective Analysis, Context and the Question of Dignity

32. In conducting its objective assessment of the claim of discrimination, the court must necessarily take into account the real and lived experience of those denied employment insurance as a result of the impugned provisions, including low-income workers. An analysis which focuses singularly on the impugned provisions without regard to the broader income security terrain low-income unemployed workers are compelled by circumstance to traverse is incomplete and lacking in full contextuality.
33. As noted above, unemployed workers denied employment insurance benefits as a result of the impugned provisions, and most immediately and especially low-income unemployed workers, are compelled by circumstance to seek out other economic resources. If personal or familial resources are not available, social assistance may be the only alternative where jobs, even those which pay minimum wage or less are not available or pay so little as to make survival impossible without income support.
34. However, given the restrictive and intrusive eligibility rules governing the provision of welfare, assistance may not be available or may drive the unemployed worker into grinding poverty, by, for example, requiring the depletion of family savings and the disposition of assets where either or both exist as a necessary condition for the granting of assistance.
35. Therefore, it is women, immigrant and disabled workers and workers of colour who are most likely to be caught by the impugned provisions and by virtue of their operation are most likely to be left without any source of income given the restrictive eligibility rules governing the provision of welfare.
36. Statutory provisions which disproportionately deny benefits to women, immigrant and disabled workers and workers of colour are, in their effect, an assault on the dignity of those affected. The assault on dignity is even more severe for those who are consequently forced to turn to social assistance rather than accessing benefits for which they have paid mandatory premiums is represents another layer of indignity. This is especially so given the harsh and demeaning rules governing the administration of welfare which in their effect, command rather than alleviate poverty.

B. Can the Impugned Provisions be Saved by s. 1?

(i) Overview

37. As noted in *R. v. Oakes*, s. 1 functions in two ways: it constitutionally guarantees the rights and freedoms in the provisions which follow and states the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. In this inquiry, the court must be guided by the values and principles emblematic of a free and democratic society including respect for the notion of dignity, a commitment to social justice and equality and a respect for cultural and group identity.

R. v. Oakes, [1986] 1 S.C.R. 103, at 138-139, **Applicant's Book of Authorities, Appendix B, Tab 22**

38. In determining whether or not the government has, on a balance of probabilities, established that the impugned provisions are a reasonable limit on the right to equality that can be demonstrably justified in a free and democratic society, context is once again at issue. As stated in *Thomson Newspapers*:

The analysis under s.1 of the Charter must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103 requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfill the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting.

Thompson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General), [1998], 1 S.C.R. 877, at para. 87, (Quicklaw), **ISAC's Book of Authorities, Tab 16.**

39. Further, as noted in *Thomson Newspapers* and *Lavoie v. Canada* the criteria making up the s. 1 test as stated in *Oakes* will be applied with varying levels of rigour depending on the context of the appeal. In part, the inquiry will turn on whether the legislation and/or provision requires Parliament to balance the interests of competing groups, in which case, some deference is required in the application of the s. 1 test, or whether the state is the antagonist of the individual. Other factors include the vulnerability of the group the legislator seeks to protect, the group's own subjective fears and apprehension of harm and the nature of the activity which is infringed.

Thompson, ibid., at paras. 90 & 91
Lavoie v. Canada, 2002 SCC 23, at para. 53, **LEAF's Book of Authorities, Vol. 4, Tab 36.**

40. In this case, the context or factual setting within which the court must apply the s. 1 criteria necessarily includes the fate of low-income unemployed workers who have paid premiums and yet are denied benefits, and are consequently compelled to apply for welfare. If denied welfare, unemployed workers

may be left without any source of income and therefore, in a state of abject poverty. The dire consequences for low-income workers, a preponderance of whom are women, immigrant and disabled workers and workers of colour is a crucial part of the context that the court must consider.

(ii) Sufficiently Important Objective

41. With the exception noted in paragraph 40 below, ISAC adopts the analysis found at paras. 81-86 of LEAF's Memorandum of Fact and Law. ISAC adds that even were the government able to rely upon cost saving, which the Supreme Court of Canada has clearly stated is not permissible, the government would be entirely unable to support such an argument given the enormous and growing surplus in the Employment Insurance account. The actual surplus in the government's Employment Insurance account for 2000-01 was \$36 billion. The surplus has climbed in each year reported in the Performance Report for the period ending March 31, 2001 issued by HRDC; in 1999-2000 the actual surplus was \$28.3 billion while in 1998-99 it was \$21 billion. Further, in its 2001 Report, the Auditor General noted that the 2001 surplus represents \$21 billion more than the \$15 billion maximum that the Chief Actuary of HRDC considers sufficient to pay for the higher benefit costs expected during a recession and to prevent premium rates from rising. The Auditor General notes there has not been "an adequate justification for the size and rate of growth of the accumulated surplus".

"Report of The Auditor General of Canada – 2001", ch. 13, pp. 4 & 5, ISAC's Book of Authorities, Tab 9.

42. As set out by LEAF, the government has identified the elimination of incentives for employers to create part-time jobs of fewer than 15 hours per week and the maintenance of a fiscally viable EI plan as objectives of the impugned provisions. ISAC does not concede that these are in fact objectives of the impugned provisions. With respect to the latter, the accumulating surplus would suggest that the EI plan is more than fiscally secure and would continue to be so were the eligibility rules altered. As for controlling employer behaviour, reduced entitlement for unemployed workers seems an unlikely vehicle to achieve that objective. More suitable mechanisms might be those which affect employers rather than workers such as increasing the level of premiums paid by employers or experience rating.
43. In also disputing that the objectives of "ensuring a minimum degree of labour market attachment" and limiting "cross subsidization" of workers who work a short period of time are important objective, ISAC adds that the inability of the impugned measures to attain those objectives is even more apparent when the discriminatory effect on low-income and part-time workers is considered. Given the government's failure to fashion measures that in fact measure labour market attachment in a manner that is sensitive to the realities of the of labour market restructuring and the tremendous

growth in part-time and non-standard work, or that actually address cross subsidization, it must be presumed that the government itself attaches little importance to those two objectives.

44. Given that ISAC does not concede that the stated objectives reasonably relate to the impugned provisions and concurs with LEAF that the remaining objectives are unimportant, there is an insufficient objective, or in the language of *Oakes*, there is no “social problem” addressed by the impugned provisions and therefore, they cannot be upheld under s. 1.

(iii) Proportionality

45. In the alternative, if the impugned provisions are supported by a sufficiently important objective, the court will consider their proportionality.

a) Rational Connection to the Objective

46. In determining whether the measures adopted are rationally connected to their objective, the court will inquire into whether the measures are carefully designed so as to avoid arbitrariness, unfairness or irrationality.
47. ISAC adopts LEAF’s analysis at paras. 88 – 94 of their Memorandum of Fact and Law and adds that the stated objectives are not only internally irrational, but arbitrary and unfair. The denial of benefits to low income workers is not rationally connected to the objective of controlling employer conduct. While extending coverage and employer costs for workers who work less than 15 hours per week may well affect employers’ conduct, whether the covered employees access benefits is irrelevant to the employer’s interests.
48. The suggestion that there is “cross-subsidization” of claimants who work for short periods and therefore do not contribute enough premiums to cover their claims by long-serving workers is not internally rational. In fact, the impugned provisions operate so as to deny EI to the most marginalized workers, that is, those in part-time and contingent jobs, while still requiring them to contribute premiums which in fact fund the benefits of higher earning workers.
49. The stated objective of ensuring a fiscally viable plan cannot be rationally justified in light of the accumulating surplus. The stated objective of reducing dependency on EI is also internally irrational given that the very existence of the employment insurance program represents a public declaration of the intention to relieve against the need engendered by unemployment. For these reasons, the stated objectives have no rational connection to the impugned provisions.

b) Minimal Impairment

50. The arguments set out by LEAF in paragraphs 93 and 94 apply equally to women, immigrant, disabled workers and workers of colour. Forcing low-income unemployed workers to endure the demeaning and poverty inducing process of applying for welfare or to descend into destitution without any source of income imposes far from minimal impairment. The juxtaposition between being left without an income and the accumulating surplus is stark and suggest that the impairment is far from minimal.

c) Effects of the Impairment

51. Paragraphs 95 to 99 of the LEAF factum compellingly articulate the direct effects of the impairment which include access to both the financial benefit and to re-employment supports, which are crucial for workers that already suffer considerable disadvantage in the workplace. ISAC adds recognition of the serious effect on the most vulnerable of unemployed workers, who, because of financial necessity, must turn to welfare when they are denied Employment Insurance benefits. The resort to welfare exposes the unemployed worker and family members to intensely demeaning and intrusive eligibility procedures. Welfare is only available upon depletion of individual and family assets, thus pushing the worker into a deeper level of poverty. Because of the social stigma attached to receipt of social assistance it is both damaging to the dignity of the unemployed worker and to the worker's ability to obtain new employment.
52. To the extent that Employment Insurance is intended to have an income security objective, the impugned provisions operate at cross purposes to that intent by impoverishing low-income unemployed workers, of whom a preponderance are women, immigrants, disabled and workers of colour. Rather than ensuring income security, the provisions create income *insecurity* and layer another degree of disadvantage and vulnerability on top of those who already occupy that unfortunate terrain

(iv) Conclusion

53. In determining how vigorously the s. 1 criteria ought to be applied, regard will be had to whether the law at issue requires a balancing of the interests of competing groups as opposed to one in which the state is the antagonist of the individual. The impugned provisions fall squarely into the latter category and as such, no deference is owing to the government. Further, the provisions interfere with an "activity" whose social value is of chief importance: income security. This also dictates a rigorous application of the criteria. But rigorous or not, deferential or not, the impugned provisions cannot be saved by s. 1.

PART IV – ORDER SOUGHT

54. ISAC is seeking a declaration that the impugned provisions are unconstitutional in that they offend section 15(1) of the Charter and are not saved under s. 1.
55. The impugned provisions replaced the eligibility rules under the former unemployment insurance scheme. There, those working 15 or more hours a week qualified for regular benefits after 12 to 20 weeks of employment over the course of a year, depending on where they lived. At its highest, workers qualified after 300 hours of work (20 weeks X 15 hours). The current rules regarding regular benefits require workers to have been employed between 420 and 700 hours in order to qualify (again, depending on where the worker lives). New entrants and re-entrants require 910 hours of employment no matter where they live. Using the previous 15 hour a week minimum, a worker would need to work 60 weeks, that is, more than a year in order to qualify. Given the 52 week benefit period, a worker in these circumstances would never qualify. The current entry requirement for special benefits, that is, maternity, parental and sickness benefits, is 600 hours. Thus, even the lowest entry requirement for regular benefits under the current rules far surpass the highest threshold under the former requirements. The government has not offered a rational or viable justification for this departure, which, as noted above, is discriminatory in its effect.
56. ISAC further seeks an order requiring the government to hold public hearings on the matter of the eligibility rules and the basis upon which they should be determined (weeks, hours or some combination thereof) and with a direction, that given the discriminatory effect of the hours based rules, in no event should the entry requirement be higher than the equivalent of 300 hours for either regular or special benefits, the high-end of the minimum threshold under the old rules.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 13 day of September, 2002

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