Court File No. 1547/95

ONTARIO
COURT OF JUSTICE

B E T W E E N:

Robyn Denise Coates

Applicant

-and-

Wayne Marlon Watson

Respondent

-and-

Joshua Coates

Added Party

FACTUM OF APPLICANT MOTHER

Date: October 21, 2016

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PART I – ADJUDICATIVE FACTS

1) To deny disabled children of unmarried parents the right to child support is discriminatory. Child support is the right of the child and any law that denies disabled children of unmarried parents that right automatically violates their *Charter* rights. Section 31 of the *Family Law Act* (hereinafter the "*FLA*") treats them as a discrete and insular minority and offends their right to be treated equally under the law. There is no pressing and substantial objective in denying disabled children of unmarried parents the right to support if they are over the age of 18 and not enrolled in a full time program of education. Rather, the right to support would accord with the laudatory purposes of child support. The - Applicant Mother must therefore be granted permanent ongoing child support for her severally disabled son, Joshua Coates born December 19, 1994 (hereinafter "Joshua")if the promise of the *Charter* is to have meaning.

2) Notionally this litigation case began in or around 1995 when the Applicant Mother sought an order for amongst other relief an Order for Final Sole Custody and an Order that the Respondent pay ongoing child support for Joshua. The parties finally signed Minutes of Settlement dated January 7, 1999 that were filed with this Honourable Court on the same date that were turned into a final court order dated January 7, 1999 granting the Applicant Mother amongst other relief child support in the amount of $258.00 per month based on the Respondent's annual income at the time of $29,000 per year.

3) In reality however this litigation really began when the Applicant Mother filed a Motion to Change that resulted in a further child support order dated May 1, 2014 of the Honourable L.S. Parent J that granted the Applicant Mother child support of $880.00 per month based on an imputed income of $100,000 per annum, which prompted the Respondent to seek and obtain permission to serve and file a Motion to Change seeking a variation of the Order of the Honourable L.S. Parent J dated May 1, 2014. As a result the parties' are currently before this Honourable Court for a determination as to whether Joshua is still entitled to child

support because of his ongoing and permanent lifelong disability and whether section 31 of the Family Law Act is unconstitutional because it primarily offends section 7 and 15 of the Charter.

4) This factum is filed on behalf of the Applicant Mother, who is the biological mother of Joshua. The Applicant's son, Joshua was born with a micro deletion of chromosome 22, which is also known as 22q11.2 Deletion Syndrome or Di George Syndrome (hereinafter "Di George Syndrome")[1]. Di George Syndrome is a rare genetic condition with an estimated prevalence of 1 in 4000 live births, is the second (2^{nd}) most common cause of developmental delay and major congenital heart disease after Down syndrome, accounting for 2.4% of individuals with developmental disabilities[2], which makes it impossible for Joshua to "ever hold down a job", "hold a meaningful job of his own" and also means that "he will never be independent and will require the care and supervision of others throughout his life" according to Dr. Susan Hayward[3].

5) The Applicant and the Respondent were friends for three years prior to conceiving Joshua. The Applicant and the Respondent never married, either before r after Joshua's birth.

6) The Applicant applied for support for Joshua pursuant to the *Family Law Act* (hereinafter the "*FLA*") in 1995 since the *Divorce Act* did not apply in this case because she and the Respondent were never married. The Divorce Act does not govern the support of children of unmarried parents no longer enrolled in a full time program of education. The Applicant Mother initially sought child support for Joshua for the simple reason that she wanted Joshua to have the same standard of living he would have enjoyed had she and the Respondent co-habituated in a

[1] Letter from Dr. Susan Hayward dated April 8, 2015 found at Tab 10 of the Applicant's Document Brief, which is Exhibit "A" to the Applicant's Affidavit dated April 28, 2015, which is found at Tab 1 of Vol. 4 of the Continuing Record and See Joshua's Genetic Chromosome Report, which can be found at found at Tab 11 of the Applicant's Document Brief, which is Exhibit "A" to the Applicant's Affidavit dated April 28, 2015, which is found at Tab 1 of Vol. 4 of the Continuing Record.
[2] "Practical Guidelines for Managing Patients with 22q11.2 Deletion Syndrome" authored by Anne S. Bassett MD, et al, found at Exhibit "C" of the Applicant's Form 14A Affidavit dated October 24, 2014 at Tab 11 of Vol. III of the Continuing Record.
[3] Supra Footnote 2

long term common law relationship of some permanence. The Applicant Mother now seeks for her son, in addition to child support, something almost all Canadians take for granted: the right to equality under the law.

1. Joshua Coates Medical History

7) The Honourable Justice Bovard in his Endorsement of November 20, 2014 noted that Joshua suffers from a physical condition that prevents him from being able to work or withdrawing from the Applicant's care. Specifically Joshua medical issues are as follows:

(a) He was born with omphalocele (intestines located outside of his body). Tetralogy of Fallot (a congenital heart defect),

(b) He was born with DiGeorge Syndrome or 22q11.2 Deletion Syndrome, which in medical terminology means micro deletion of chromosome 22 (a chromosomal defect causing lifelong chronic severe and debilitating physical and psychiatric problems).

(c) He also suffers from Attention Deficit Disorder and Generalized Anxiety Disorder.

(d) He has an IQ of 50.

(e) He will never be independent, will never hold down gainful employment that pays him an income and will always require the care and supervision of others throughout his life.

(f) As a result of his medical condition, Joshua, requires constant 24 hour a day supervision in order to prevent him from assaulting other people (he assaults the Applicant/Mother at least once a week), prevent him from self harming and from attempting to commit suicide.

Applicant's Affidavit dated December 14, 2015 at para(s) 5, 7, 8, 9, and attached Exhibits at V. 8/Tab 1

8) The information about Joshua's medical history, disability and ongoing lifelong needs can be found at Exhibit "A" through "C", "J", "L" of the Applicant's Form 14A Affidavit dated October 24, 2014 at Tab 11 of Vol. III of the Continuing Record and in the Applicant's Document Brief at Tabs 1 – 12, 26 – 31 and 37, which is Exhibit "A" to the Applicant's Affidavit dated April 28, 2015, which is found at Tab 1 of Vol. IV of the Continuing Record. However, for the purpose of the argument under the *Charter of Rights and Freedoms* (Hereinafter the "*Charter*") the following six (6) facts are relevant:

   a. Joshua, born December 19, 1994 is the biological child of the Applicant, Robyn Denise Coates (hereinafter "Robyn") and the Respondent, Wayne Marlon Watson (hereinafter "Wayne");

   b. Robyn and Wayne never married;

   c. Joshua suffers from a rare genetic disease that is a known as a micro deletion of chromosome 22, which is also known as 22q11.2 Deletion Syndrome or Di George Syndrome;

   d. Robyn was granted Final Sole Custody of Joshua pursuant to the Orders of Justice J. Kerrigan Brownridge dated December 20, 1995 and Justice Wolder dated January 7, 1999;

   e. Joshua is disabled and is unable to ever withdraw from parental care;

   f. Robyn has cared for Joshua throughout Joshua's life and continues to do so;

   g. Wayne has been paying support since January 7, 1999 when Robyn and Wayne entered into Minutes of Settlement.

   h. Wayne commenced a Motion to Change on or around July 22, 2014 to terminate support for Joshua pursuant to s. 31 of the *Family Law Act*.

9) Despite the Voluminous medical evidence filed by the Applicant in these proceedings the <u>Respondent disputes Joshua's medical history</u> as he believes that Joshua "was diagnosed with a mild developmental disability in 2002"[4].

[4] Paragraph 27 of the Respondent Affidavit sworn November 4, 2015 contained at Tab 1 of Volume 7 of the Continuing Record.

2. Procedural History

(a) Procedural History – Prior to Notice of Constitutional Challenge

10) From in or around May 24, 1995 when the Applicant swore her Application until present the parties' have been engaged in extensive litigation regarding primarily the issue of child support. This litigation resulted in numerous court orders of the Ontario Court of Justice located in Brampton, Ontario. On or around December 20, 1995 the Applicant Mother was awarded final sole custody of Joshua pursuant to Minutes of Settlement agreed to by the parties on or around December 20, 1995 that was turned into the Order of Justice J. Kerrigan Brownridge.

Order of Justice J. Kerrigan Brownridge dated December 20, 1995

11) The Applicant attempted to discontinue the litigation with the Respondent in or around March 14, 1996 when she filed a Notice of Discontinuance that would have seen her abandon her claim for child support for Joshua against the Respondent. However, pursuant to an endorsement of the Ontario Court of Justice located in Brampton, Ontario the Applicant was not allowed to discontinue her claim for child support as only she had signed the Notice of Discontinuance and the Respondent failed to sign it, which resulted in the continuance of the litigation over the issue of child support.

Court Endorsement dated March 21, 1996

12) The Applicant and Respondent finally signed Minutes of Settlement dated January 7, 1999 that were filed on the same date that resulted in a Final Court Order dated January 7, 1999. The Final Order granted the Applicant Mother amongst other relief child support in the amount of $258.00 per month based on the Respondent's annual income at the time of $29,000 per year.

13) On or around May 20, 2012 the Applicant filed a Motion to Change with the Ontario Court of Justice located in Brampton, Ontario seeking an Order increasing the amount of child support that the Respondent should be paying since it had not increased since 1999 despite the fact that Respondent income had increased. When the Respondent failed to file an Answer or appear in court

the Honourable Pawagi J made an Order dated December 6, 2012 requiring the Respondent to pay $546 per month in child support based on an annual imputed income of $60,000 and pay $347.00 in section 7 expenses for Joshua as his 55 percent contribution to Joshua's extracurricular expenses

14) On or around May 1, 2014 of the Honourable L.S. Parent J granted the Applicant Mother Child support of $880.00 per month based on an imputed income of $100,000 per annum. This development prompted the Respondent to seek and obtain permission to serve and file a Motion to Change seeking a variation of the Order of the Honourable L.S. Parent J dated May 1, 2014.

15) On or around July 22, 2014 the Respondent filed a Motion to Change seeking to terminate child support pursuant to section 31 of the Family Law Act.

16) Despite the endorsement of the Honourable A.W.J Sullivan dated September 15, 2015 granting the parties some limited ability to cross examine on distinct affidavit evidence, cross-examinations were never held nor were there requests by the Respondent to cross-examine on either of the issue of Joshua's health or income. Further, Justice A.W.J Sullivan in his endorsement on September 15, 2015 directed that a "motion (directed hearing) be…held on January 8, 2016" to resolve the outstanding issues raised by the Respondent's Motion to Change filed on July 22, 2014

17) On January 8, 2016 both parties came to court as directed by the September 15, 2015 endorsement of the Honourable A.W.J Sullivan seeking an adjournment. The Applicant on that date sought an adjournment and leave to file a Notice of Constitutional Question challenging the constitutionality of s. 31 of the Family Law Act and the Respondent sought an adjournment and leave to file an Amended Motion to Change. Both parties' requests were granted and the Honourable Justice W. Sullivan granted both parties 15 days respectively to file their respective materials. On that same date the Honourable A.W.J Sullivan made Order on a without prejudice basis, on consent, that the Respondent pay

child support for Joshua commencing on January 1, 2016 in the amount of $630.00 per month based on an income of $69,000.

18) On January 19, 2016, after the Applicant served her Notice of Constitutional Challenge, the Respondent issued an Amended Motion to Change the Order of the Honourable Justice Parent dated March 12, 2014[5] seeking an Order terminating child support for Joshua as of December 14, 2014, etc…

(b) Notice of Constitutional Challenge

19) On or around January 16, 2016 the Applicant served a Notice of Constitutional Challenge[6]on the Respondent through his counsel of record. Shortly after the Applicant filed her Notice of Constitutional Question, on February 11, 2016 and March 21, 2016 respectively the Department of Justice and the Ontario Ministry of the Attorney General both declined, by way of letters that were filed with the Ontario Court of Justice located in Brampton, Ontario, to intervene and therefore by inference not supporting the Respondent's position that s. 31 of the *Family Law Act* is constitutional.

20) After the Applicant filed her Notice of Constitutional Challenge the parties' made multiple appearances before the Ontario Court of Justice in Brampton, Ontario before they were ordered to argue a motion on or around August 16, 2016 before the Honourable A.W.J Sullivan about amongst other issues, the issue of whether the Applicant could raise a constitutional issue challenging the validity of section 31 of the *Family Law Act* on the basis that it violates section 7 and 15 of the Canadian Charter of Rights and Freedoms.

21) On August 16, 2016 the Honourable Justice A.W.J Sullivan released an endorsement that (1) made the parties son, Joshua, a party and a "special party" to the Notice of Constitutional Question filed by the Applicant, (2) requested that the Office of the Public Guardian and Trustee (hereinafter "Office of the PGT") pursuant to Rule 4(3) of the Family Law Rules of Ontario represent Joshua in

[5] See Tab5 of Volume 9 of the Continuing Record in the matter of Coates v. Watson, Court File Number 1547/95
[6] See Tab 3 of Volume 9 of the Continuing Record in the matter of Coates v. Watson, Court File Number 1547/95

relation to the Notice of Constitutional Question, and (3) requested that the Office of the PGT inform the parties and the Court by September 13, 2016 of its decision to represent Joshua and (4) set the matter down to be argued in November 22, 2016 at 2:15 p.m. As a result of the Honourable A.W.J Sullivan's endorsement, the Office of the PGT, filed a letter dated September 12, 2016 with the court that was sent to all parties and their respective counsel wherein they refused to consent to act as Joshua's legal representative.

(c) Applicant Mother's Position

22) The Applicant Mother seeks equal recognition for the parties' son, Joshua, under the law and to have the Respondent contribute towards Joshua's support. The Applicant commends to the court the comments of McIntyre J in the decision of *W. (M.M.) v. W. (P.J.)* that "no right thinking society would fail to recognize a parent's duty to support a child."

***W.(M.M.) v. W.(P.J.)**, 2009 CarswellYukon143 at 8*, **Tab 67**

PART II – LEGISLATIVE FACTS

Legislative History – Support of Illegitimate Children

23) It is trite law, but very rarely articulated so fundamental is the premise, that a parent has an obligation to support their children. In fact so fundamental is the premise that it has been said that "no right thinking society would fail to recognize a parent's duty to support a child." This obligation as Little Pov. J has observed "is (a) well known and historical obligation"

W.(M.M.) v. W.(P.J.)**, Supra at 8, **Tab 67
Ropos-Harder v. Tanner**, 1995 CarswellOnt 2018, [1995] W.D.F.L. 1456 at 3, **Tab 47

24) Prior to the establishment of Canada as a nation in 1867 the British Government in England was responsible for the laws that governed what is now Canada. In 1576 British Parliament passed the *Poor Law Act*, which governed the legal status of "bastard children" or children out of wedlock. With the passing of the *Poor Law Act* financial support of children born out of wedlock shifted from state and religious institutions to either the mother and/or father. The law governing children married out of wedlock did not substantially change until the introduction

of the *Bastardy Act* in 1809. After the introduction of the *Bastardy Act* the financial burden of caring for a child born out of wedlock shifted from both parents to primarily the father. Despite the fact that the *Bastardy Act* was enacted in 1809 Britain Upper Canada, as Canada was known prior to confederation, philosophically abided by the *Poor Law Act*.

The Poor Act**,** *18 Eliz., c. 8,* ***Tab 75.***
Bastardy Act, *49 Geo. 3, c. 68,* ***Tab 76***

25) It was not until the Thirteenth Provincial Parliament of Upper Canada in 1837 passed *An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of Illegitimate Children liable for support* that the financial burden for illegitimate children shifted from both parents to primarily fathers. The law governing unmarried children did not change again until 1921 with the passage of *The Children of Unmarried Parents Act*, which was the forerunner of *The Child Welfare Act* of 1970. *The Children of Unmarried Parent's Act* further increased the burden on fathers by fixing paternity on them and making them "liable for medical expenses of the mother, weekly payments toward the maintenance of the child until he reached sixteen years of age, and the burial expenses of both the mother and child. These liabilities were additional to the duty of the father to reimburse any other person who furnished necessaries to the child."

An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of Illegitimate Children liable for support, *7 William 4, C.8;* ***The Children of Unmarried Parents Act*****, 11 Geo,. 5, c.54;** ***The Child Welfare Act****, R.S.O. 1970, C.64, Part III;* **The Ontario Law Reform Commission of 1973**, ***Report on Family Law,*** *Ministry of the Attorney General, http://www.archive.org/details/reportonfamilyla03onta, at pg. 3,* ***Tabs 77, 78, 79 and 71***

26) In 1970 the law regarding illegitimate children was changed again with the introduction of *The Child Welfare Act* (hereinafter the "*CWA*"). However the *CWA* did nothing to shift financial liability for an illegitimate child off of the shoulders of fathers as evidenced by section 59(1). Things began to change somewhat with the issuance in 1973 of the Ontario Law Reform Commission's "Report on Family Law" (hereinafter "the Commission). Led by H. Allan Leal, Q.C. the Commission's findings led to the passage of the *Children's Law Reform Act*, which according to

the Ontario Court of Appeal "was intended to remove disabilities suffered by children born outside of marriage".

The Child Welfare Act, Supra, s.59 (1)**; *A.A. v. B.B.*,** *2007 ONCA 2 at 20,* ***Tabs 79 and 2***

27) The *CLRA* was enacted because as the Commission stated in the introduction to their *Report on Family Law* (hereinafter "*Report*"):

> In Ontario and many other common law and civil law jurisdictions, the child born outside of marriage suffers a number of legal disabilities. These disabilities arise at the moment of birth and may remain with the child throughout his lifetime. The justification for this seems highly questionable, and in our discussions on possible reforms in the law relating to children we have accorded high priority to finding a means by which the child born out of marriage may be allowed to enjoy the same rights and privileges as other children in our society.

The Ontario Law Reform Commission of 1973, ***Report on Family Law***, Supra at 1, **Tab 71**

Later on in their *Report* in the section entitled "Proposal's for change" the Commission stated that:

> We have taken as our major premise the view that the status of "illegitimacy" ought to be abolished in Ontario and that so far as it is consistent with the interests of the child born outside marriage, his position under the law ought to be equated with that of other children.

The Ontario Law Reform Commission of 1973, ***Report on Family Law***, S*upra at 10,* ***Tab 71***

28) The reasoning for the Commissions position was that no matter what the justification was for treating children born out of wedlock differently in the past, the commission could not "perceive any factor in modern society which justifies law which perpetuated this discrimination." The Commission was influenced by and arguably this Honourable Court should be persuaded by the report of the sub-commission of the Commission on Human Rights of the United Nations that cast light on the discrimination against persons born out of wedlock:

> Discrimination against persons born outside the accepted family structure dates many centuries back in the history of mankind. Such persons, because of the nature of their birth, were placed in a category which was inferior to that enjoyed by persons born within the framework of the prevailing family pattern.
>
> ….
>
> It has often been said that a person born out of wedlock, his parents and sometimes his mother's entire family, suffer a stigma as a result of the nature of his birth. Words as strong as "discredit", "disdain" "shame" "contempt" and "condemnation" have been used to describe such stigma.

…

> As has been said, social discrimination manifests itself not only in the attitude of the members of the community towards the persons concerned, but also in the various aspects of the life of the person born out of wedlock, whether private or public.
>
> ….
>
> Most other differences between the status of persons born in and out of wedlock are discriminatory in nature. For example, in the matter of maintenance and inheritance rights, the study reveals that in many countries persons born out of wedlock enjoy rights which are inferior to those enjoyed by persons born in wedlock, and sometimes absolutely no rights of inheritance thus, persons born out of wedlock who, because of the very nature of their birth are deprived of a normal family life, are also denied the possibility of being raised and of living according the same standards as those enjoyed by persons born in wedlock. Such differences, which are discriminatory in nature, may be eliminated or at least greatly improved upon.[emphasis added]
>
> ….
>
> …once filiation has been established, whether it entails a full family relationship or limited effects only, all persons born out of wedlock should have the same maintenance rights as persons born in wedlock…[emphasis added]

The Ontario Law Reform Commission of 1973, ***Report on Family Law***, *Supra at 10***;** V.V. Saario, Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, "**Study of Discrimination Against Persons Born out of Wedlock"** *U.N. Doc. E/CN.4/SUB.2/. 265 REV.1* at pp.1, 143, 19-20, 143,110-111, **Tab 71-72**

29) While the sub-commission of the Commission on Human Rights of the United Nations acknowledged paragraph 2 of article 25 of the Universal Declaration of Human Rights stating that "…all children whether born in or out of wedlock shall enjoy the same social protection," the sub-commission further recognized during the debate of the General Assembly that:

> "According to the rights proclaimed in this Declaration, illegitimate children are equal to legitimate children and have the same right to social protection."
>
> In explaining this proposal, the representative of Yugoslavia, pointed out that discrimination against illegitimate children in certain countries, although it involved individuals only an did not affect entire social groups, was netherless, a serious infringement of human rights and as such should not be tolerated. He noted that children born out of wedlock were deprived in varying degrees and in varying forms of family rights, property rights and inheritance rights…Thus, from birth, various human

being suffered injury to their personal dignity and were deprived of certain fundamental rights. [emphasis added]

V.V. Saario, Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, "**Study of Discrimination Against Persons Born out of Wedlock: Annex III: Consideration By the United Nations of the Position of the Person Born Out of Wedlock**" *U.N. Doc. E/CN.4/SUB.2/. 265 REV.1* at pp.191, **Tab 72**

30) Ultimately the Ontario Law Reform Commission's objective was to see the laws of Ontario governing children born out of wedlock changed so as to "remove, as far as the law is capable of doing so, a stigma which has been cast on children who in the nature of things cannot be said to bear responsibility for it." In the Commissions view "the disadvantage under which the child suffers is repugnant to the principles of equality of more enlightened times" and that "the law of Ontario should declare positively that for all its purposes all children should have equal status."

The Ontario Law Reform Commission of 1973, ***Report on Family Law***, *Supra at 10 and 12,* ***Tab 71***

31) Following the issuance of the Commission's *Report on Family Law* the central recommendation that arose from it, namely that "Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law" was enshrined into law with the enactment of Part I and II of the *CLRA in* 1977. As the Ontario Court of Appeal has said "the Commission's central recommendation concerning equality is found in the Act's first section:

> 1. (1) Subject to subsection (2), for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside of marriage.
> …
>
> (4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing there from shall be determined for the purposes of the common law in accordance with this section.

A.A. v. B.B.**,** *Supra at 20;* ***CLRA, R.S.O. 1990,*** *C.c.12, as am, s.1 (1) and (4),* ***Tab 2 and 80***

32) After the *CLRA* abolished the distinction between illegitimate and legitimate children in 1977 the *Family Law Reform Act* was amended in 1980 to eliminate the distinction for the purposes of child support. In 1986 the Ontario Government

introduced *An Act to revise the Family Law Reform Act*, which was the precursor to the present *FLA* introduced in 1990. Further the wording of s. 31 of *An Act to revise the Family Law Reform Act* is identical to the present wording of s. 31 of the *FLA*, which the Applicant Mother argues is under inclusive and therefore discriminatory when viewed through the lens of the Charter.

The Purposes of Child Support in Contemporary Canada

33) Modern Canadian Society recognizes that the purpose of child support is to provide for the support of children on the breakup of their parent's relationship. Couples when they have a child, whether they are married or not, enter into a social contract to support their children until they are no longer dependent and can support themselves. This obligation arises from the date children are born:

> Giving birth to a child is an event of profound moral and legal significance. This is an event that gives rise to significant moral and legal duties. Together, the parents have brought a child into the world. Together, they share responsibility for the child's well-being. The child is vulnerable, and so there is a legal duty to protect. The child cannot support itself, and so there is a duty to provide the necessities of life.
>
> These parental responsibilities are the social pillars upon which the institution of the family is built. These duties are integral to a parent-child relationship. They define who we are, and what we want to be, as a family, as a society, and as a people.
>
> These duties fall upon the parents who chose to create life. These duties fall upon the parents equally. These are obligations that attach at birth. They continue to bind the parents until the infant reaches the age of majority or leaves a state of dependency. These solemn obligations are not readily given up. <u>They cannot be abandoned</u>.
>
> ***M.(T.) v. N.(0.),*** *2007 NUCJ 18, 43 (6th) 233 at 9 – 11,* ***Tab 31***

34) Parent's obligation to support their children has been recognized by the Supreme Court of Canada. According to the court the purpose of child support is to try and provide children with the same standard of living they enjoyed while their parents were together:

> The contemporary approach to child support was delineated by Kelly J.A. in *Paras v. Paras* (1970), [1971] 1 O.R. 130 (Ont. C.A.). In that case, the Ontario Court of Appeal established a set of core principles that has been endorsed by this Court in the past and continues to apply to the child support regime today: see *Richardson v. Richardson*, [1987] 1 S.C.R. 857 (S.C.C.); *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.). These core principles animate the support obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.
>
> ***S.(D.B.) v. G.(S.R.),*** *[2006] 2 S.C.R. 231 (S.C.C.) at 35 – 42,* ***Tab 48***

Arguably the principles set out by Bastarache J are applicable whether a child's parents are married or not. According to the court in *Storr*, "[i]t is an established tradition of Canadian law that from the day a child is born, each of the parents of a child are responsible for the support of that child. This support obligation is triggered by the birth of the child and not by some other event such as notice of a court application for child support."To argue that a parent's child support obligation changes as aresult of a child growing older and based on the legal status of the parent's relationship is not supportable in law, does not conform with the principles underpinning the purpose of child support legislation and is simply discriminatory.

Storr v. Steen**,** *2010 CarswellNWT75 at 17 – 18,* ***Tab 52***

Effects of the Denial of Child Support

35) In deciding whether a particular situation amounts to a breach of s.15, the Supreme Court has adopted a contextual analysis which includes an evaluation of four criteria:

a) Is the identified group subject to pre-existing disadvantage?

b) What is the nature of the relationship between the grounds for discrimination and the claimant's characteristics or circumstances?

c) Does the impugned activity or legislation have any ameliorative purpose?

d) What is the nature and scope of the interest affected by the impugned law?

Law v Canada**,** *[1999] 1 S.C.R. 497 at 63-75,* ***Tab 26***

36) S. 15(2) recognises that there may be instances in which legislation or other governmental activities discriminate in order to promote societal objectives. That is not the case here. The Supreme Court has taken judicial notice that responsibility for child care is largely assumed by women, and that one of the consequences is economic deprivation – "the feminization of poverty":

> Women have tended to suffer economic disadvantages from marriage or its breakdown because of the traditional division of labour with that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work, at home, such as taking care of the household,

> raising children, and so on. Today, though more and more women are working outside the home, such employment continues to pay a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities.

Moge v Moge**,[1992] 3 S.C.R. 813 at 55, 70, 91-92*; ***New Brunswick Minister of Health and Community Services v G.(J.), [1999] 3 S.C.R. 46 at 113, **Tab 35-36**

37) In *New Brunswick Minister of Health and Community Services v G.(J.)*, Justice L'Heureux-Dube notes:

> This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings: see, for example, M. Callahan, "Feminist Approaches: Women Recreate Child Welfare", in B. Wharf, ed., Rethinking Child Welfare in Canada (1993), 172. The fact that this appeal relates to legal representation in the family context for those whose economic circumstances are such that they are unable to afford such representation is significant. As I wrote in Moge v Moge, [1992] 3 S.C.R. 813, at p. 853, "In Canada, the feminization of poverty is an entrenched social phenomenon." The patterns of relationships within marriage disproportionately lead to women taking [page100] responsibility for child care, foregoing economic opportunities in the workforce, and suffering economic deprivation as a result: Moge, supra, at p. 861. Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives.

New Brunswick Minister of Health and Community Services v G.(J.), [1999] 3 S.C.R. 46 at 113, **Tab 36**

38) L'Heureux-Dube further remarked that the economic inequality which developed during the spousal relationship is often exacerbated by the breakdown of the spousal relationship because the spouse who has made economic sacrifices during the relationship generally retains primary childcare responsibilities following separation or divorce.

Moge v Moge**,Supra at 72, **Tab 35

39) Although L'Heureux-Dube commented on the increased levels of poverty among women and their children twenty four years ago, the feminization of poverty remains a prominent social problem in Canadian society. Despite the fact that more women are currently employed and earning higher salaries than in the past, they continue to experience a disproportionate level of income decrease following separation or divorce compared to men.

Anne-Marie Ambert, Divorce: Facts, Causes, Consequences, 3rd ed (Ottawa: The Vanier Institute of the Family, November 2009) at p. 17, online: The Vanier Institute of the Family, http://www.vanierinstitute.ca/modules/news/newsitem.php?ItemId=96., **Tab 70**

40) Section 31 of the FLA, insofar as it precludes disabled children of unmarried parents from qualifying for child support, furthers the prejudice that women have traditionally suffered on account of the assumption of childcare responsibilities during the spousal relationship and after its dissolution. Although child support is a direct contribution to the child's expense, whether it is received or not has a significant impact on the primary caregiver, overwhelming the mother. If child support is not paid, the costs in relation to caringfor the child rests entirely on the mother's shoulders who, in most cases, is already economically disadvantaged due to the gendered roles assumed throughout the relationship.

41) Applying the *Law* criteria, the Applicant Mother submits that the legislative distinction, if anything saddles her with a burden in accordance with *Wareham v. Ontario*, which states "[i]n order to succeed, the plaintiffs "must show unequal treatment under the law – specifically that they failed to receive a benefit that the law provided, or [were] saddled with a burden that the law did not impose on anyone else". Specifically the burden the Applicant submits the burden that the law places on her and does not impose on someone else is that exacerbates the potential financial prejudice to disabled dependant adult children of unmarried parents, and by extension to their caregivers, who for the most part are women and generally mothers as noted above. Further, the consequences of post separation poverty arising from inadequate support are insidious and wide ranging. Moreover these effects are so pervasive that they have been studied to the extent that courts over the past 20 years routinely take judicial notice of them, *and* of the social science literature which analyzes them.

Thibaudeau v. Canada[1995] 2 S.C.R. 627 at 182 -185; ***Willick v. Willick***[1994] 3 S.C.R. 670 at 52-54 and ***Wareham v. Ontario (Minister of Community and Social Services)****, [2008] O.J. No. 166 (Ont. S.C.J.) at para 61,* ***Tabs 57, 68 and 65***

42) As noted by Justice Wood in *Arsenault v. Arsenault:*

> *non payment of support often results in support recipients and their families having to rely on public funds. The connection between non payment of support and the present levels of child poverty in Canada hardly needs to be underlined.*
>
> ***Arsenault v. Arsenault***(1998) 38 R.F.L. 4th 175 O.C.J. at 27, **Tab 8**

43) As noted by professor *Nicholas Bala*

> *the clients of child welfare agencies are often poorly educated, living in or near poverty, and not infrequently members of a racial minority group and living in a family led by a single parent usually the mother".*
>
> ***Bala et al.* Canadian Child Welfare Law,** 2d ed. (2004) at p 24, **Tab 74**

44) The Applicant Mother submits that the legislation as drafted, if applied as the Respondent propounds in his Motion to Change has the effect of discriminating against her and Joshua by comparison to formerly married parents of disabled children and disabled children of divorced parents because it saddles her and Joshua with a burden the law does not impose on someone else, namely a denial of the right to claim child support under the Divorce and a denial of child support after the age of 18 when a child is no longer enrolled in a full time program of education despite ongoing lifelong need.

Jurisdiction of the Ontario Court of Justice regarding Constitutional Questions

45) According to subsection 52(1) of the Constitution Act. 1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.), "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

> ***Constitution Act.1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.), Tab 91***

In light of subsection 52 of the *Constitution Act, 1982* the preliminary question that must be determined is to what extent the Ontario Court of Justice has jurisdiction to determine whether legislation is inconsistent with the *Charter*. In order to make that determination it is therefore necessary to examine under what circumstances and to what extent a Provincial Court has authority to impugn legislation that is found to be inconsistent with the Charter.

46) As was noted in *F. v. K., 2004 ONCJ 138 (CanLII)* at paragraph 9 "the Ontario Court of Justice draws its jurisdiction from…section 38 of the *Courts of Justice Act, R.S.O. 1990, c. C-43 [as amended]*, which states:

> 38. Criminal jurisdiction.—(1) A provincial judge has the power and authority of two or more justices of the peace when sitting in the Ontario Court of Justice and shall exercise the powers and perform the duties that any Act of the Parliament of Canada confers on a provincial court judge when sitting on the Ontario Court of Justice.

(2) *Provincial offences and family jurisdiction*— The Ontario Court of Justice shall perform any function assigned to it by or under the Provincial Offences Act, the Family Law Act, the Children's Law Reform Act the Child and Family Services Act or any other Act.

(3*) Youth court jurisdiction*— The Ontario Court of Justice is a youth court for the purposes of the Young Offenders Act (Canada).

F. v. K., 2004 ONCJ 138 (CanLII), **Tab 22**

47) The Ontario Courts of Justice are akin to administrative tribunals in that they are creatures of statute and do not have the inherent jurisdiction of a Superior Court of Justice. Despite the fact Justice Gerald V. La Forest (speaking for the majority)in *Cuddy Chicks Ltd. v. Ontario Labour Relations Board* found that administrative tribunals and therefore by analogy, provincial courts, have the jurisdiction to address constitutional issues that are properly raised by a party to a proceeding when he stated that:

> "It is essential to appreciate that s. 52(1) [of the Constitution Act, 1982] does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdiction point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on Charter questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus a tribunal must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought"

***Cuddy Chicks Ltd. v. Ontario Labour Relations Board*, 1991** CanLII 57 (SCC), [1991] 2 S.C.R. 5, 122 N.R. 361, 47 O.A.C. 271, 81 D.L.R. (4th) 121, 4 C.R.R. (2d) 1, 50 Admin. L.R. 44, [1991] S.C.J. No. 42 at page14**, Tab 17**

48) Further, Justice Charles D. Gonthier of the Supreme Court of Canada, set out a clear set of guidelines relating to the jurisdiction of administrative tribunals and by analogy Provincial Courts of Justice to consider *Charter* questions and make *Charter* decisions:

> "[3] Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended the excluded Charter issue from the tribunal's authority over questions of law."

He went on further at paragraph [31], to say that:

> "[31] In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity.

> A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."

Nova Scotia Workers' Compensation Board v. Martin**,** [2003] 2 S.C.R. 504, 2003 SCC 54 (CanLII), 310 N.R. 22, 231 D.L.R. (4th) 385.110 C.R.R. (2d) 233, 4 Admin. L.R. (4th) 1, 28 C.C.E.L. (3d) 1, [2003] S.C.J. No. 54 at para(s) 3 and 31, **Tab 37**

49) Following on the decisions in *Cuddy Chicks Ltd. and Nova Scotia Workers' Compensation Board* the British Columbia Court of Appeal in *Shewchuk v. Ricard and Attorney General for British Columbia* found that:

> "It is clear that the power to make general declarations that enactments of Parliament or of the legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts.
>
> But it is equally clear that if a person is before a court upon a charge, complaint, or other proceeding properly within the jurisdiction of that court then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the *Canadian Charter of Rights and Freedoms*, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context is nothing more than a decision of a legal question properly before the court. It does not trench upon the exclusive right of the superior courts to grant prerogative relief, including general declarations."

Shewchuk v. Ricard and Attorney General for British Columbia (1986), 1986 CanLII 174 (BC CA), 2 B.C.L.R. (2d) 324, [1986] 4 W.W.R. 289, 28 D.L.R. (4th) 429, 24 C.R.R. 45, 1 R.F.L. (3d) 337, [1986] B.C.J. No. 335 (B.C.C.A.) at page 439, **Tab 50**

50) In light of the decision in *Shewchuk,* a Provincial Court judge has the jurisdiction to decide issues relating to the constitutionality of legislation and does not exceed their jurisdiction in deciding that legislation violates the *Charter* and is therefore of no force or effect. As a result it is clear from the case law that the Ontario Court of Justice has jurisdiction to consider the Applicant Mother's *Charter* question as it strictly a question of law, which is within the jurisdiction of a Provincial Court of Justice to deal with, because the *FLA* is a provincially created statute which expressly confers powers to the Ontario Court of Justice over family law matters and support obligations but limits its jurisdiction, by excluding it from determining issues relating to property matters, as specifically stated in section 34(2) of the *FLA*. Further, any decision that this Honourable Court might make regarding the constitutional validity of s. 31 of the *FLA*, which regulates only

the support obligations of unmarried parents to their children, despite the wording of the FLA found in the preamble, and not formerly married parents, as they have recourse to seeking child support for disabled children over the age of 18 and no longer enrolled in a full time program of education pursuant to the *Divorce Act*, falls within the jurisdiction of the Ontario Court of Justice, as those powers are found in section 34 of the FLA, would be specific to this case alone and binding only the parties of this matter.

F. v. K., *2004 ONCJ 138 (CanLII) at para 13****, Tab 22***

51) In the present case the Applicant Mother is asking this Honourable Court to interpret s. 31 of the *FLA* in a way that will not impugn the principles of equality and human dignity protected by the *Charter* in sections 15 and 7 respectively.

52) Since the Applicant's Constitutional question is a question of law, this Honourable Court has jurisdiction to decide whether s. 31 of the *FLA* is violating s. 15 of the *Charter* as under inclusive legislation which is of no force and effect. Further this Honourable Court may decide that the appropriate remedy, within its jurisdiction, would be to adopt an interpretation of the word "child" of s.31 of the *FLA* that would not offend s.15 of the *Charter*, which would be an interpretation that would be aligned with the definition of the word "child" provided in the ***Divorce Act*** in s. 2 (1) under the topic "Definitions" where it states that:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; (enfant à charge)"

Divorce Act*, s. 2 (1) Supra,* ***Tab 90***

PART II – ISSUES

53) The Applicant Mother suggests that the legal issues to be decided in this case are as follows:

i) Does the Applicant have standing to raise Charter Issues?

ii) If the Applicant has standing does section 31 of the *Family Law Act* infringe or deny, in whole or in part, the rights and freedoms guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

iii) If the answer to (ii) is “yes” is section 31 of the *Family Law Act* saved by section 1 of the Charter of Rights and Freedoms?

iv) If section 31 of the *Family Law Act* infringes or denies, in whole or in part, the rights and freedoms guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* what is the appropriate remedy?

Issue (I) – Standing

54) The Applicant Mother's position is that a constitutional issue can be raised in the context of private litigation. In the case at bar, the Applicant is directly affected by the effects of s. 31 of the *FLA* and is prejudiced by not being entitled to child support as a result of having never have being married to the Applicant. Joshua will remain under the care and control of the Applicant for the remainder of his life due to his permanent disability. Further, Joshua lives with the Applicant Mother, who provides him shelter and food and provides for his everyday needs. The Applicant Mother personally bears the burden of providing for her Joshua who will never be able to live independently. This burden would be compounded by a strict interpretation of s. 31 of the *FLA* that would result in a denial of ongoing child support and would be in the Applicant's respectful submission discriminatory effect on the grounds of marital status, because if the Applicant had married and divorced or separated the Respondent, then s. 15. 1 of the Divorce Act would apply and as a result, the Applicant in the exact same situation (but for the fact of not being married) would be entitled to ongoing child support for Joshua, who is a child with disability, who although over the age of majority, will never leave the care and control of the Applicant, his mother.

55) According to the Ontario Superior Court of Justice in *Bedford v. Canada*, "[i]n order to challenge the constitutional validity of a law, a person must demonstrate a "special interest" in the impugned legislation." In the case at bar, the Applicant by serving and filing a notice of constitutional question on all the parties who have or may have an interest, asserts private standing and a special interest in the outcome of the determination of the constitutionality of Section 31 of the ***FLA***.

Bedford v. Canada, *2010 ONSC 4262* at paras 44 and 46, **Tab 11**

56) In ***Chaoulli*** the Supreme Court of Canada held that all laws are subject to the purview of the Constitution and that no controversial or complex issue is a bar to *Charter* review. McLachlin, CJ stated that:

> While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional

limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power":

Chaoulli v. Quebec (Attorney General), *2005 SCC 35* at para 107, **Tab 14**

57) Further, in *Bedford* the court held that "[i]n some cases, a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if he or she has no right to damages or other coercive relief." The court also held that "if the law applies to a party differently from other members of the general public, he or she is said to be "exceptionally prejudiced" and is entitled to seek a declaration of invalidity."

Bedford *supra at para 48****, Tab 11***
Smith v. The Attorney General of Ontario, *[1924] S.C.R. 33,* ***Tab 51.***

58) In the case at bar, the Applicant is directly affected by the effects of s. 31 of the *FLA* and is saddled with a burden that is not imposed on someone else by section 31. Namely not being entitled to child support as a result of Joshua's disability whereas similarly situated divorced parents who care for a permanently disabled child are entitled to child support by virtue of the fact that they can make a claim for child support pursuant to the Divorce Act instead of section 31 of the *Family Law Act*. Further, despite the fact that it is the Applicant who served and filed a notice of constitutional question, it is the Respondent who indirectly raised the issue of the constitutionality of Section 31 of the *FLA* by arguing that the Section should be strictly applied and does not conflict with Section 15.2 of the *Divorce Act*. Therefore the Applicant takes the position that she can raise question of constitutional validity in the current litigation because legislation cannot be allowed to contravene any section of the Constitution and inadvertently discriminate against any Canadian citizen. Section 31 of the ***FLA*** violates the Charter s.15 on the ground of marital status of the parents by limiting the children of common law couples' right to child support while children born to married parents have a choice of laws and can apply for and have an unlimited right to child support under section 15.2 of the ***Divorce Act*** if the child that they are

caring for is permanently disabled and unable to ever leave there care and custody.

59) In the case at bar, the Applicant submits, there is a strong factual foundation supporting the Applicant's *Charter* argument. Namely the Applicant's son is being treated unequally as a result of being the child of a common law union as opposed to the child of a marriage, which prevents the Applicant on his behalf from seeking child support under the ***Divorce Act*** and limits her to pursuing child support under the ***FLA.*** Further, Curtis, J in Vivian and Courtney at paragraphs 29-30 and 32-33 clearly outlines a basis for the Respondent's ***Charter*** claim:

> Children whose parents are married are treated differently than children whose parents are not married. Children of married parents had a long and now mostly historical advantage over children whose parents were not married. Some of this advantage was rooted in moral analysis about shame and blame assigned to unmarried parents, in a construct from another era, regarding children born "out of wedlock", an old-fashioned and now seldom used expression
>
> These laws, while directed at and defined by the parties' legal status functioned to disadvantage the children, who were blameless and innocent of decisions their parents made. As society changed, that has changed. These laws could not survive the introduction of the *Canadian Charter of Rights and Freedoms, 1982*, which provided certainty of equality for all Canadians.
>
> ....
>
> Laws in Ontario have changed to eliminate any vestiges of this overt and intentional discrimination. Children are to be treated the same, no matter who their parents are and no matter what the legal status of their parents' relationship.
>
> The continuation of that distinction here for an ill or disabled child of unmarried parents is difficult to justify in the modern era of the *Canadian Charter of Rights and Freedoms*. It is questionable whether those provisions of the FLA would survive a challenge to their constitutionality.
>
> ***Vivian v. Courtney,*** *2010 ONCJ 768 at* paras 29-30, 32-33**, Tab 60**

As a result not only does the Applicant Mother have a sufficient adjudicative and evidentiary basis for her Charter claim, all of the proper and relevant parties have been given notice and have indicated to this Court whether they intend to participate, which in the case of the Federal Department of Justice and the Ontario Ministry of the Attorney General they have declined to do as is there right, once put on notice in regards to a challenge to the validity of a section of

Federal and/or Provincial legislation. The Applicant Mother therefore takes the position that she has standing.

60) Further, allowing the Applicant to raise the Charter issue in the Applicant's respectful submission would avoid a potential miscarriage of justice. This Honourable Court should take judicial notice of the Hansards of the Legislative Assembly of Ontario when the Provincial Government brought an Act to Amend the ***FLA*** to adopt the federal child support guidelines to promote uniformity with the ***Divorce Act*** and amended section 31 of the ***FLA***. In particular, there are several passages where Members of Parliament stressed the importance of uniformity and fair treatment of all children under federal and provincial legislation, which this court should carefully consider:

> The goals of this legislation are quite commendable. The bill should provide for consistency in child support and in child support guidelines and provide uniformity between the Divorce Act of Canada and the Family Law Act of Ontario. It should also allow for flexibility to the courts so they can determine the appropriate amounts of support that children will receive. As I stated earlier, it is important that we treat children fairly in accordance with their economic circumstances, their geographic circumstances and other circumstances that may be brought to play before the court. If the courts are to adjudicate properly they need flexibility, always remembering that what is important above all is the best interests of the child.
>
> I say the goals are commendable because all children in this province and in Canada, I think we would agree, require our full attention as legislators. I hope we can also agree that there should be no children who are forced to go hungry, that there should be no children who are forced to suffer cold, a lack of education, a lack of clothing, and that all children in this province and in this country should be nurtured and treasured and well cared for, as they represent our future. There should be no higher priority for us as legislators than the wellbeing and the future of our children.
>
> It's for these reasons that this is important legislation. At first blush it looks simply like an administrative piece of legislation, but the bill attempts to rectify a very serious flaw in our justice system by providing the uniformity and flexibility I talked about before. I hope we bear in mind that it is the child and the child's interests and best needs that we must be responsible for collectively.
>
> ….
>
> Compatibility with the federal guidelines should assist a great deal in reducing confusion and ensuring that children get the support they deserve efficiently and effectively. Frankly, this is an area where it sets an example for cooperation among the levels of government which can only benefit the ultimate consumer or user or client in this particular case. We should have more examples of situations where provincial legislation and federal

legislation help one another, streamline one another, piggyback on one another, rather than making it more confusing and more difficult, as often is the case, for individuals.

....

The family law, which is the Ontario jurisdiction, applies in all other cases, and the vast majority of families that are separating go through at least a phase of that separation under the Family Law Act of Ontario. So this bill and how the guidelines apply affect the largest number of children and separated parents in the province. It is very important that the Family Law Act of Ontario be brought into some kind of alignment with the new federal law.

....

When we talk about these issues, particularly as many of the government members like to talk about family values, we are talking about very fundamental obligations that we have to our children. It seems to me that when we are talking about the dollars and cents, we need to be talking about what those obligations are and defining them a little bit more clearly. Most young children don't appreciate how much it costs their parents to feed them, to clothe them, to keep them properly housed. Until you actually start to look at what it costs to raise a child, even at the, I must say, rather minimal levels we see in the guidelines -- it is terribly important to understand what happens when that support is not there. It is terribly important for us to recognize that we who are not paying our responsible share of raising our children are directly contributing to a level of hardship that will affect those children for the rest of their lives.

....

Bill 128 is all about kids. It's about kids who don't have to be poor, but who are; it's about kids who don't have to do without and shouldn't, but they do; and it's about making sure that there's some uniformity and some guidelines for judges, and some fairness. It's the evolution of a long history. There are others here, because of their backgrounds, who are more familiar with the history of litigation and judicial leadership that developed certain standards or rough standards. But my fear and my concern is that this government continues to drag its feet, not just to evade and avoid its responsibilities. By God, it's abdicated its responsibilities to women and kids in this province.

....

There's also a great number of people who don't fall within the jurisdiction of the federal divorce legislation because they haven't been legally married. They may be living in common-law relationships; they may be living in relationships where they have children but they haven't gotten married. Those people who break up obviously have an obligation to support their children and this legislation recognizes that. I think it's important that it does acknowledge that every parent of a child continues to have an obligation to support that child. It's important that we remind people of the obligation they have.

The Applicant respectfully submits that during the most recent amendment of section 31 of the ***FLA*** it was the intent of Parliament that the ***FLA*** operate with fairness and uniformity with the ***Divorce Act*** and that there should be no higher priority than the wellbeing and the future of the Province's children. It is through this context that the Court should examine the constitutionality of the ***FLA*** and respectfully come to the conclusion that not addressing the Applicant's Charter claim would produce a miscarriage of justice.

36th Session of Parliament, Legislative Assembly of Ontario, September 10, 1997, September 15, 1997 and September 24, 1997 at pp. 11984-11998, 12101 and 12368-12369, Tab 73

61) The issue of whether or not a permanently disabled child, such as Joshua, who is born to parents who entered into a common law marriage as opposed to civil or church sanctioned marriage is an issue of the right to equality under the ***Charter***. The Charter guarantees all Canadian citizens and legal residents of Canada the right to be treated equally under and before the law. Therefore the refusal to raise the issue or allow the issue to be litigated on its merits would be tantamount to the legal sanctioning of differing support entitlements as a result of discrimination based on marital status.

62) The refusal to allow the matter to be argued on its merits would continue to deny Joshua the opportunity open to every similarly situated child under the ***Divorce Act***. In ***Flora v. Ontario Health Insurance Plan*** where the Appellant applied for, but was denied, payment for life-saving medical treatment outside of Canada and sought to amend his appeal to the Divisional Court to allege that his right to life, pursuant to s. 7 of the *Charter* was violated, the Divisional Court held that if the court did not hear his appeal he would "be denied an opportunity open to everyone else similarly situated" and that "it is at least possible that based on s. 7, OHIP should pay for out-of-province procedures" recognized to prevent death and that "[t]o refuse Mr. Flora the opportunity to make such an argument would, I find, possibly result in a miscarriage of justice." In the case at bar, denying the Applicant the right to argue the *Charter* issue would deny Joshua the opportunity to be treated the same as a child with a disability entitled to support under the ***Divorce Act*** and perpetuate the unintended discrimination against children born

out of wedlock on the basis that they are considered illegitimate and therefore less deserving than children born within the confines of marriage and thus have less of an entitlement to child support.

Flora *supra* at paras 38-39, **Tab 20**

63) Further, it is the Applicant's position that as Curtis, J. found in Vivian v. Courtney, "[c]hildren are to be treated the same, no matter who their parents are and no matter what the legal status of their parents' relationship" and that "[t]he continuation of that distinction here for an ill or disabled child of unmarried parents is difficult to justify in the modern era of the ***Canadian Charter of Rights and Freedoms***;" and that the refusal to allow the issue to be raised or litigated would be a miscarriage of justice.

Vivian v. Courtney, *2010 ONCJ 768 at* para 33, **Tab 60**

64) Despite the Respondent's position to the contrary, the question as to the constitutional validity of s. 31 of the FLA is very much an alive legal issue as the validity of s. 31 has been questioned:

(1) in a brief but well argued case comment that states that the distinction between children of unmarried and children of married parents created by s. 31 of the FLA "cries out for a Charter analysis" and is an annotation to the decision of *M.(L.L.) v. K. (W.L.), 2007 ABQB 764, 47 R.F.L. (6th) 299, 2007 CarswellAlta 1715*co-written by noted family law counsel, Martha McCarthy;

(2) by the Honourable Curtis J in Vivian and Courtney, as noted above, noted in Orbiter that s. 31 is unconstitutional and ripe for a Charter challenge;

(3) by Honourable Penny J in Vivian v. Courtney, 2012 ONSC 6585 (S.C.J.) when he stated that "section 31 of the Family Law Act may be unconstitutional by virtue of treating adult children of unmarried parents less favourably than children of married parents who proceed under the Divorce Act"; and

(4) by the Ontario Divisional Court when it found that "[t]he issue of the constitutional validity of s. 31 of the Family Law Act, and its potential discriminatory treatment of the children of unmarried parents is very much a live issue before the Courts".

65) Further, the constitutional validity of legislation regarding illegitimate children as children born out of wedlock were considered have been subjected to Charter challenges 20 times across Canada in private civil law proceedings including in 2012, when the Honourable Czutrin J. of the Superior Court of Justice in Toronto granted the Respondent Mother, standing to challenge the constitutional validity of section 31 of the *FLA*.

***M.(L.L.) v. K. (W.L.)**, 2007 ABQB 764, 47 R.F.L. (6th) 299, 2007 CarswellAlta 1715*
***Shewchuck v. Richard**1986 CarswellBC 114; **W.(D.S) v.H.R.)** 1988 CarswellSask 341; **D.(P.A.) v. G.L.)** 1988 CarswellNS 373; **K.(L) v. J.(T.W.)**, 1988 CarswellBC 342; **Surette v. Harris Estate**, [1989] N.S.J. No. 1; **Catherine Elaine Panko (a.k.a. Fradette) v. Glen Vandesype**, 1993 CarswellSask 46; **Alberta (Diurector, Parentage &Maintenance Act) v. H.(R**), 1993 CarswellAlta 23; **Tighe (Guardian ad litem) v. McGillivray Estate,** (1994) 127 N.S.R. (2d)**; M.(R.H) v. H.(S.S.)**, 1994 CarswellAlta 69; **Massingham-Pearce v. Konkolus**, (1994) CarswellAtla 171; **Rath v. Kemp** 1996 CarswellAlta 966; **A.(D.M.) v. K.(R.)** 1996 CarswellSask 172; **T.(P.) v. B.(R.), 2001 ABQB 739; T.(P.) v. B.(R.)**, [2004] A.J. No. 803; **Taylor v. Canada (Minister of Citizenship)**, [2006] F.C.J. No. 1328*
***M.(L.L.) v. K. (W.L.)**, 2007 ABQB 764, 47 R.F.L. (6th) 299, 2007 CarswellAlta 1715*
***Vivian v. Courtney**, 2010 ONCJ 768 at para 33*
***Vivian v. Courtney**, 2012 ONSC 6585 (S.C.J.)*
***Vivian v. Courtney**, 2011 ONSC 397 at paragraph 58*
***Vivian v. Courtney,** 2013 ONSC 5090 (Div. Ct.) at para 73*
Tabs 28, 50, 66, 18, 25, 53, 12, 5, 59, 30, 32, 43, 1, 54, 56, 28, 60, 62, 61, and 63

66) Finally, the Applicant submits that she has standing to raise the issue of the constitutional validity of s. 31 of the *FLA* because as Penny J of the Ontario Superior Court of Justice stated in *Vivian v. Courtney* "if a court decides that a child does not qualify under s. 31 of the *Family Law Act* on the basis that he was not engaged in a full time programme of education, it is then necessary to consider whether, by denying an adult child qualification for child support on the basis of disability, s. 31 of the *Family Law Act* is contrary to s. 15 or s. 7 of the *Charter*, which is the situation in the instant case. Therefore, based on Penney J's holding in Vivian v. Courtney, in light of the fact that Respondent's position is that Joshua is no longer entitled to child support because of the operation of s.

31 as it currently reads, this Honourable Court should grant the Applicant the right to challenge the constitutionality of s. 31 of the FLA.

Vivian v. Courtney**, 2012 ONSC 6585 (S.C.J.) at paragraph 73**, Tab 62

Issue (II) – Interpretation of s. 31 of the *FLA*

67) S. 31 of the *FLA* states, that "every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so". As it is written s. 31 of the *FLA* does not obligate a parent, whether a father or a mother, to provide support for his or her unmarried disabled child who is not a minor or is enrolled in a full time program or education.

68) The Applicant respectfully submits therefore that the ambit of the C*harter* is automatically engaged as s. 31 of the *FLA* is under inclusive in comparison to s. 15.1 of the *Divorce Act* and discriminates against her virtue of the fact that it saddles her with a burden that the law does not impose on someone else.

69) Section 15.1 of the Divorce Act states that:

> - **15.1 (1)** A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.
>
> - **Interim order**
>
> **(2)** Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to pay for the support of any or all children of the marriage, pending the determination of the application under subsection (1).

***Divorce Act**, R.S.C. 1985, C.3 (2nd) Supp)*, **Tab 90**

70) The Divorce Act provides the definition of the "children of the marriage" in section 2(1) and reads as follows:

> ***child of the marriage*** means a child of two spouses or former spouses who, at the material time,
>
> - **(a)** is under the age of majority and who has not withdrawn from their charge, or
> - **(b)** is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; (*enfant à charge*)

***Divorce Act**, R.S.C. 1985, C.3 (2nd) Supp)*, **Tab 90**

71) For the purposes of analysis the comparator groups are:

i. Disabled adult children of married and divorced or divorcing parents; and

ii. Disabled adult children of unmarried parents; or married but separated parents who do not divorce thereby rendering the provisions of the Divorce act unavailable

Charter of Rights and Freedoms, *s. 15*, **Tab 91**

72) The Applicant's position is further buttressed by the decision of Curtis J in *Vivian v. Courtney*, 2010 ONCJ 768, which must be viewed through the lens of the *Charter*. Repeatedly Curtis J makes reference to the fact that "the child support obligation of parents who are married is a slightly different one than the child support obligation of unmarried parents" when comparing the child support obligations found under the *Divorce Act* and the *FLA*. As Curtis J observes "the child who is over the age of majority and from unmarried parents has *no prima facie* right to child support on the basis of illness or disability, as does the child of married parents."

Vivian v. Courtney, *2010 ONCJ 768 at paragraphs 25, 27 and 29 at 28,* ***Tab 60***

73) Most of the laws that draw distinctions "for children based on the marital status of their parents were removed from most areas of Canadian law many years ago" as they were either deemed unconstitutional or simply did not conform to evolving public opinion. Anarchistic views of a difference between children based on whether their parents were married or not were cast aside. Changes were made to areas of law such as estates, inheritance and property to reflect this new view point as Canadian gradually came to accept the fact that "children are to be treated the same, no matter who their parents are and no matter what the legal status of their parents relationship.".

Vivian and Courtney *2010 ONCJ 768 at paragraphs 31 and 32,* ***Tab 60***

74) However changes relating to children were not made in all areas of Ontario law. Some areas, specifically s. 31 of the *FLA* in this instance, still retain vestiges of an older bygone era when children were treated differently based on the legal status of their parent's relationship. For that reason Curtis J in *Vivian v. Courtney* and due to the fact that the Respondent Mother, who was unrepresented at first

instance, did not challenge the constitutionality of s.31 of the *FLA*, resorted to finding that the child in that case was still enrolled in a full time program of education. Had the Respondent Mother been represented and challenged the constitutionality of s. 31 Curtis would likely have awarded child support on the basis that the difference between the federal and provincial provisions governing child support is discriminatory. As Curtis J stated:

> the continuation of that distinction here for an ill or disabled child of unmarried parents is difficult to justify in the modern era of the Charter of Rights and Freedoms. It is questionable whether those provisions of the FLA would survive a challenge to their constitutionality.
>
> ***Vivian and Courtney*** *2010 ONCJ 768 at paragraphs at 33,* ***Tab 60***

(a) Legislative Restriction

75) Parents of children born to married parents are entitled to institute proceedings for child support pursuant to either provincial statute or federal statute. Section 91(26) of the *Constitution Act, 1867* gives the federal government exclusive legislative authority over the substantive law of divorce. If however "there has been a divorce but no child support order…made under the *Divorce Act*, the option exists to bring child support proceedings under either federal or provincial legislation". Whereas parents of children born to unmarried parents are restricted to instituting proceedings for child support pursuant provincial statute, in particular section 31 of the *FLA*. Therefore the Applicant is being treated unequally under the law because she is being saddled with a burden the law does not impose on someone else, namely formerly married single parents of permanently disabled children who need ongoing child support after they have turned 18 and are no longer in attendance in a full time program of education, which is the test as set out at paragraph 27 in *Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C..R 657 (S.C.C.)* that the Applicant has to meet in order to succeed in a claim under section 15 of the *Charter*. The reason that the Applicant is being saddled with a burden the law does not impose on someone else is due to the fact that (1) unlike formerly married parents of permanently disabled children she does not have a choice of laws when it comes to seeking child support for Joshua and is restricted to

seeking child support pursuant to s. 31 of the *Family Law Act* only and (2) once Joshua is no longer enrolled in a full time program of education she is burdened with having to make up the shortfall that Joshua faces on a yearly basis to sustain himself.

Constitution Act, 1867 *(U.K.), 30 & 31 Victoria, c.3, 91(26);* ***French v. Mackenzie,*** *2003 CarswellOnt 1748* at 8; ***Auton (Guardian ad litem of) v. Bristish Columbia (Attorney General)****, [2004] 3 S.C..R 657 (S.C.C.)* at 27**, Tab 81, 21, and 9**

76) By virtue of the fact that unmarried parents of children are restricted to applying for child support under provincial statute, specifically s. 31 of the *FLA*, the provincial law governing child support is discriminatory because as it now reads, it is perpetuating a distinction that has been found to be discriminatory. Namely the distinction between "legitimate" and "illegitimate" children. After the Charter was proclaimed as having full force and effect, nineteen of nineteen challenges to legislation denying "illegitimate" children the full benefit of the law were successful in almost all areas of Canadian law.

Shewchuck v. Richard*1986 CarswellBC 114;* ***W.(D.S) v.H.R.)*** *1988 CarswellSask 341;* ***D.(P.A.) v. G.L.)*** *1988 CarswellNS 373;* ***K.(L) v. J.(T.W.)****, 1988 CarswellBC 342;* ***Surette v. Harris Estate****, [1989] N.S.J. No. 1;* ***Catherine Elaine Panko (a.k.a. Fradette) v. Glen Vandesype****, 1993 CarswellSask 46;* ***Alberta (Director, Parentage &Maintenaince Act) v. H.(R****), 1993 CarswellAlta 23;* ***Tighe (Guardian ad litem) v. McGillivray Estate,*** *(1994) 127 N.S.R. (2d)****; M.(R.H) v. H.(S.S.)****, 1994 CarswellAlta 69;* ***Massingham-Pearce v. Konkolus****, (1994) CarswellAtla 171;* ***Rath v. Kemp*** *1996 CarswellAlta 966;* ***A.(D.M.) v. K.(R.)*** *1996 CarswellSask 172;* ***T.(P.) v. B.(R.), 2001 ABQB 739; T.(P.) v. B.(R.)****, [2004] A.J. No. 803;* ***Taylor v. Canada (Minister of Citizenship)****, [2006] F.C.J. No. 1328*
Tabs 28, 50, 66, 18, 25, 53, 12, 5, 59, 30, 32, 43, 1, 54, and 56

77) The first of the nineteen cases to challenge the distinction was *Tighe*, which concerned a challenge to Nova Scotia's *Intestate Succession Act* (hereinafter the "*ISA*"). On appeal the Nova Scotia Court of Appeal found that the *ISA* was discriminatory because it prevented "illegitimate" from inheriting from their biological father's. Specifically, Chipman J.A, writing on behalf of a unanimous court, held that the court had no hesitation in finding that the legislation was discriminatory and "[T]he illegitimate child is precluded from the benefits of the legislation by reason of a distinction – birth out of wedlock. Such a distinction is based on personal characteristics associated with the group to which the child belongs. It is an unfair distinction." Further on in his judgment Chipman J.A. states that "I can see no persuasive case to be made for saying that any pressing

social objective exists to justify this unfair distinction" before holding that "the legislation before us offends the *Charter* because it is under-inclusive…It failed because it did not extend the entitlement to certain illegitimate children."

Tighe, *Supra at12, 13, and 28****, Tab 59***

78) Following on the heels of *Tighe* the Alberta Court of Appeal in *T.(P.)*, concluded that:

> A distinction drawn against children of unmarried parents is, prima facie, contrary to s. 15(1). Thus any test that circumscribes that right relative to that available to children of married parents is not in keeping with Charter values. The appropriate test in determining entitlement to child support for children of unmarried parents after majority is the same test as articulated under the Divorce Act and the jurisprudence developed as to whether a child remains a dependent
>
> ***T.(P.) v. B.(R.)****, 2004 CarswellAlta 906 at 13,* ***Tab 54***

T.(P.) was an appeal of an Order requiring a biological father of an "illegitimate" child to pay child support for a child over the age of 18 after the lower court Judge granted the biological mother's application challenging the constitutional validity of s. 16(2) of the *Parentage and Maintenance Act* because it was under-inclusive in comparison to the *Divorce Act* and denied "illegitimate" adult children over the age 18 the right to support.

(b) Statutory Interpretation

79) In many respects, the case presents similar issues to those raised in *T.(P.) v. B.(R.)*.Principles of statutory interpretation and fundamental justice lead inexorably to the conclusion that children of unmarried parents with disabilities not enrolled in a full time program of education should be treated the same as children of married parents with disabilities. Statutory interpretation must always be undertaken through the "the interpretive lens of equality." The Honourable Madam Justice L'Heureux-Dube describes this principle with respect to the *Moge v. Moge* decision:

> Despite the fact that this case was not brought under s. 15 of the Charter, this court held that equality considerations must inform the determination of spousal support obligations under the Divorce Act. The Court recognized that, in order, to be sensitive the equality

> implications of interpreting a provision in a particular way, judges may need to examine the factual, social and economic context in which a particular piece of legislation operates. In that particular case, focusing on equality enabled the Court to look at the perspective and experiences of women and children, so as to ensure that the principles governing spousal support took into account their needs and realities. Moreover, as a result of that case, the concept of substantive equality became important not only for the area of family law, but also more generally for judicial fact-finding and analysis.
>
> Cases such as these emphasize the fact that one's approach to every issue that comes before the courts, and not just to equality challenges, should be informed by the s. 15 equality guarantee.

C. L'Heureux-Dube (Hon.), "The Legacy of the Persons Case": Cultivating the Living Tree's Equality Leaves" (2000) 63 Sask. L. Rev. 389 at 38, 39 and 40.

80) Since there is no juristic reason why children of unmarried couples with disabilities not enrolled in a full time program of education under an equality-minded, contextual approach to statutory interpretation should be denied child support; s. 31 of the *FLA* should be interpreted in a way so as not to offend the Charter. The Court should adopt an interpretation of the word "child" in s. 31 of the FLA as if it includes the definition of the "child of marriage" contained in s. 2 (1) of the Divorce Act.

> To conclude otherwise would be to stand like King Canute, ordering the tide to recede when the tide in favour of equality rolls relentlessly forward and shows no signs of ebbing. If I am to be criticized – and of course I will be – then I prefer to be criticised, on an issue like this, for being ahead of the times, rather than behind the times. My hope…is that I am in step with the times.

Fitzpatrick v. Sterling Housing Association Ltd., [1997] EWCA Civ 2169 (23rd July, 1997)**, *Tab 19***

III. *The Framework for Analyzing Section 15 Charter Claims*

81) Section 15(1) of the *Canadian Charter* provides that:

> "[e]very 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.

Charter of Rights and Freedom,** s. 15**, Tab 91

82) Having established no juristic reason the Applicant Mother submits that s. 31 *FLA* of the *FLA* as it currently reads perpetuates the historical legal prejudice suffered by "illegitimate" children. Further, it perpetuates a disadvantage on the basis of

the ground of the marital status of the parents which jurisprudence has found to be an analogous ground.

83) In *Andrews* McIntyre J held that a person's s.15 rights will have been found to have been violated if they are discriminated against based on enumerated or analogous ground. Discrimination according to McIntyre can be

> described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.
>
> ***Andrews v. Law Society of B.C.,*** *[1989] 1 S.C.R. 143 at 56,* ***Tab 6***

If a distinction is found to exist the analysis must turn to whether the distinction is based on an enumerated or analogous ground. The enumerated grounds are those specifically listed in s. 15(1) of the *Charter*. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."

Corbiere v. Canada (Minister of Indian and Northern Affairs), *[1999] 2 S.C.R. 203 at 13,* ***Tab 16***

Test for s. 15 (1) Charter claims

84) The Supreme Court of Canada stated in *Withler* created a two part test for the purposes of assessing a s. 15(1) claim:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Law, *Supra;* ***R. v. Kapp****2008 SCC 41 at 17;* ***Withler v. Canada*** *2011 SCC 12 at 30,* ***Tab 26, 40 and 69***

(a) S. 31 of the FLA creates a distinction based on the analogous ground of marital status - Joshua is Subjected to Differential Treatment

85) With respect to the first inquiry, the Supreme Court of Canada has held that differential treatment exists if the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics.

Law*, supra at 39,* ***Tab 26***

86) The denial of child support for a disabled child of unmarried parents not enrolled in a full program of education draws a distinction on the basis of personal characteristics that are immutable and unchangeable, namely disability and the legal status of a child's parents. Had the parties been legally married as opposed to living in a common law relationship the Applicant Mother would have been entitled to seek an order under the *Divorce Act*. Pursuant to s. 15 .1 for permanent ongoing child support as a result of Joshua's disability. Instead, the Applicant Mother is only entitled to seek an order under the *FLA* for child support so long as Joshua is enrolled in a full time program of education. As a result the law draws a distinction between Joshua and disabled children of legally married parents.

87) The denial of child support on the basis of disability and the marital status of a child's parentsis a legal form of discrimination. It discriminates in a substantive sense, because it is inconsistent with the purpose of s. 15 of the Charter:

> 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 a members of Canadian society, equally capable and equally deserving of concern, respect, and consideration.
>
> ***Law**, supra at 51;**M v. H**, [1999] 2 S.C.R. 3 at 65, **Tab 26 and 27***

88) Jurisprudence has established that marital status is an analogous ground for the s.15 (1) analysis. The Supreme Court of Canada in *Miron v. Trudel* found that the marital status may serve as an analogous ground of discrimination under s. 15(1) of the Charter.

Miron v. Trudel[1995] 2 S.C.R. 418, ***Tab 34***

89) Section. 31 of the FLA denies equal benefit to partners of unmarried relationship by denying them the right to apply for child support of an adult child still in their charge due to disability, solely on the ground of their marital status. This ground is an analogous ground under s.15 (1).As in *Miron*, this is not the case "where a distinction drawn on the basis of an enumerated or analogous ground does not fall within the anti-discrimination guarantees of the Charter. It follows that discrimination under s. 15(1) is established."

Miron v. Trudel[1995] 2 S.C.R. 418, ***Tab 34***

90) The Supreme Court in *Gosselin v. Quebec* has stated that:

> "This Court has concluded that once recognized, an analogous ground remains a permanent marker of suspect distinction in all contexts: *Corbiere*, *supra*. "

Gosselin v. Québec (Attorney General), *[2002] 4 SCR 429, 2002 SCC 84 at para. 108,* ***Tab 23***

91) Since marital status is recognized as an analogous ground the first step of the test is completed.

92) However, a distinction based on an enumerated or analogous ground is not by itself sufficient to find a violation of s. 15(1). At the second step, it must be shown that the law has a discriminatory impact in terms of prejudicing or stereotyping in the sense expressed in Andrews.

(b)Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? - S.31 of the FLA has the effect of perpetuating prejudice and stereotyping against disabled children of unmarried parents.

93) The Court found in *Withler* stated that in order to establish the substantive inequality or discrimination, one must show that the impugned law, either in purpose or effect, perpetuated prejudice and disadvantage to members of a group on the basis of their personal characteristics. In explaining further the Court stated that:

> "Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In R. v. Turpin, 1989 CanLII 98 (SCC), [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as “remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society” (p. 1333). See also Haig v. Canada (Chief Electoral Officer), 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at pp. 1043-44; Andrews, at pp. 151-53, per Wilson J.; Law, at paras. 40-51."
>
> ***Withler v. Canada*** *2011 SCC at para.35,* ***Tab 69***

94) The Court in *Withler* at paragraph 36 adopted the position that if the impugned law imposes a disadvantage based on stereotype which results in perpetuation of prejudice, then even in the absence of proof of historic disadvantage, the

discriminatory impact of the impugned law on members of the group will constitute a violation of s. 15 of the Charter.

Withler v. Canada *2011 SCC at para.36****, Tab 69***

95) In the present case s. 31 of the FLA has the discriminatory effect of excluding from the benefit of the law disabled children of unmarried parents, not enrolled in an educational program that have reached the age of majority but by reason of disability are unable to withdraw from the charge of their parents. Joshua is a disabled adult child of unmarried parents who will never be able to live independently outside of parental control. S.31 of the FLA denies the Applicant Mother and Joshua the benefit that s. 15.1 of the Divorce Act provides for adult children with disability solely on the ground of the marital status of their parents.

96) Historically in Ontario and many other civil law jurisdictions, a child born to unmarried parents suffered a number of legal disabilities. It was not until the enactment of the *CLRA* that the status of illegitimacy became irrelevant and Ontario law was reformed to declare positively that all children have equal status in law. Following the passage of the *Charter*, nineteen of nineteen challenges to legislation denying "illegitimate" children the full benefit of the law were successful. In particular, the court in *M.(N.)*, and later, *P.(C.E.)*, recognized the following regarding the concept of illegitimacy:

> If the concept of illegitimacy had its roots in the view that a child born out of wedlock was the product of her mother's weakness, and thus her burden, the enactment of paternity legislation reflected a changed social reality and a recognition of the weakness of the father. Illegitimacy is no longer a concept recognized by the law. The Charter of Rights Amendments Act reflects the pluralism of family arrangements in the 1980's. It acknowledges that some parents choose not to marry.
>
> **...**
>
> Moreover, ordinary experience would inform every fair-minded person that parents are choosing in ever-increasing numbers to have children without marrying. Legislation recognizes that the child should not be penalized for this parental decision.

M.(N.) v. British Columbia (Superintendent of Family & Child Services), *1986 CarswellBC 22, 10 B.C.L.R. (2d) 234 at 48;* ***P. (C.E.) v. V. (G.),*** *1993 CarswellSask 46 at 44,* ***Tab 29***

97) However, despite Canadian courts recognizing that the preclusion of an 'illegitimate' child from the benefits of legislation by reason of being born out of

wedlock is unconstitutional, the distinction between the *Divorce Act* and the *FLA* continues to offend s. 15 of the Charter. The *FLA* offends the *Charter* because it is under inclusive and does not extend the entitlement of child support to certain illegitimate children. As a result, Joshua is disadvantaged solely because he is not the child of married parents and is not enrolled in a full time program of education; therefore, perpetuating the notion of illegitimacy and that children like Joshua are less deserving of respect, consideration and concern than disabled children of married parents.

Tighe *Supra at 12, 13, and 28;* ***T.(P.) v. B.(R.)****, [2004] A.J. No. 803****, Tab 59 and 54***

98) The inability to seek an order for permanent ongoing child support on the basis of disability and a child's parent's legal status both impose a burden on and withhold the equal benefit of the law from Joshua. It does so in at least the following respects, each of which will be explored below:

i. Withholds financial support and security to disabled children of unmarried parents;

ii. Denies equal respect, concern and consideration to disabled children born outside of marriage;

iii. Withholds access to family law rights, obligations and protections;

iv. Causes confusion and unfairness;

v. Denies a fundamental right to all children of separated parents.

(i) Withholds Financial Support and Security to Disabled Children of Unmarried Parents

99) Under s. 31 of the *FLA* there is a discriminatory assumption that children over the age of majority are self-sufficient unless in a full time program of education, with no consideration of the circumstances of children with disabilities. While it is a vital social responsibility to end discrimination against disabled persons that results in their overwhelming economic disenfranchisement, it is not rights-advancing to exclude adult children with disabilities from the child support regime. Instead, the current child support scheme in Ontario perpetuates the pre-existing disadvantage of these children and their custodial parent, namely in

this case the Applicant. As a result of s. 31 of the *FLA* the Applicant could be in a position of being solely responsible for providing for Joshua economically since the Respondent can theoretically abdicate his financial responsibility to Joshua because he was born out of wedlock to use a historically antiquated phrase from a bygone era.

100) Without an order for permanent ongoing child support s. 31 of the *FLA* saddles the Applicant with a burden the law does not impose on someone else. It forces her to make up any financial short fall that is not covered by the funding that Joshua receives for his care without a financial contribution from the Respondent whereas formerly married single parents of disabled children because of the application of the Divorce Act are able to cover the short fall that is not covered by the funding there disabled children receives for their care with a contribution from the other parent. Further, in light of the fact that Joshua is entirely dependent on the Applicant for support on a daily basis and the fact that the Respondent has the ability to abandon his responsibility to support his child solely because Joshua was born outside of wedlock is arbitrary, withholds the equal benefit of the law from Joshua and again saddles the Applicant with a burden the law does not impose on someone else and is therefore discriminatory.

(ii) Denies Equal Respect, Concern and Consideration to Disabled Children Born Outside of Marriage

101) The refusal to extend the right to child support to children of unmarried parents not enrolled in a full time program of education withholds from the Joshua and all disabled children of unmarried parents not enrolled in a full program of education the equal benefit of the law and is therefore discriminatory. It denies disabled children not enrolled in a full time program of education the right to child support and fails to provide them with the same standard of living they would enjoy if their parents remained together as disabled children of married parents currently enjoy under the *Divorce Act*. s. 31 of the *FLA* has the net effect of abdicating parental responsibility to support disabled children born outside of wedlock and

marks them as inferior and less deserving of concern, consideration and respect. It trivializes the marital status of a child's parents, treating Joshua and all disabled children born outside of marriage not enrolled in a full program of education, as second-class citizens in the current child support regime in Ontario.

102) In *Milne* the Alberta Court of Queen's Bench has specifically recognized "that children born out of wedlock are a "discrete and insular minority" entitled to the protection of s. 15 not only in the context of the impugned section but also in the "entire social and political and legal fabric of our society.'" In so doing, the Court acknowledged that unmarried relationships have been and continue to be treated with social disadvantage. This notion is further supported by the long line of illegitimacy cases, which eliminated the discriminatory distinction between "legitimate" and "illegitimate" children. The right to child support is an entitlement under the law and one that cannot be waived by a parent or denied by a court. If individuals who do not pay child support are subject to stigmatizing treatment, the discriminatory impact of denying an innocent child support for simply being born to unmarried parents is obvious. Exclusion suggests that disabled children of unmarried parents not enrolled in a full time program of education are not as worthy of their parents financial assistance as the children of married parents.

Milne v. Alberta, *[1990] A.J. No. 521 at pg 8,* ***Tab 33***

(iii) Withholds Access to Family Law Rights, Obligations and Protections

103) The current legal regime in Ontario that governs unmarried couples confers on them almost the same rights and obligations whether they are heterosexual or same-sex couples. The situation is the same at the federal level. However in Ontario presently children of unmarried couples are disentitled to child support as a result of their "illegitimacy", which is discriminatory. These children did not choose their parents nor did they have any say in their parent's relationship status. The assumption that children over the age of the majority are self-sufficient unless in a full-time program of education, with no consideration of the circumstances of a child, especially one with a disability is discriminatory. As a result, the exclusion of disabled children born to unmarried parents from a

support scheme similar in nature and effect to that of the *Divorce Act* furthers the pre-existing disadvantage of disabled children born out of wedlock and places a further economic burden on the custodial parent. Parents of children born out of wedlock do not have a lesser responsibility to their children. As a result, the current regime not only has the effect of abdicating parental responsibility to support disabled children, but it wholly excludes disabled children of unmarried parents not enrolled in a full time program of education regardless of need or right.

(iv) Causes confusion and unfairness

104) Children of unmarried parents face the inconsistencies of the various patchworks of different provincial child support schemes across the country. A “child of the marriage” under s. 2(1) of the *Divorce Act* includes dependent adults “unable by reason of illness, disability or other cause, to withdraw from their [parent’s] charge or obtain the necessaries of life.” Similar or identical language is used in most provincial statutes, including but not limited to the *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 87; *The Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2, s. 4(1); *The Family Maintenance Act*, R.S.M. 1987, c. F20, s. 35.1; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 113(1); *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 37(7); *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 2, *Family Law Act, S.P.E.I.* 1995, c. 12, s. 31 However, only entitlement in Alberta and Ontario remains narrower in scope. In these jurisdictions, child support is not available for adult children with disabilities not enrolled in a full time program of education if their parents never married but Alberta appears to be on the cusp of creating a child support scheme in concert with the *Divorce Act* according to decisions such as *T. (P.)*. Had the Applicant and Joshua lived anywhere else in Canada save and except for Ontario or Alberta, Joshua would have the same right to child support as disabled children born to married parents. Denying Joshua’s right to child support simply because he had the misfortune of being born in Ontario is discriminatory, arbitrary and manifestly unjust. Further, as Professor Ruth Sullivan said “it is standard practice to consult the legislation of other provinces when interpreting provincial legislation…” and that “[w]ithin the

Canadian federation in particular, there are circumstances in which it is appropriate to think of the statues of different jurisdictions as working together to form a coherent regulatory regime", which the Applicant submits is the case in relation to child support.

Family Relations Act, R.S.B.C. 1996, c. 128, s. 87; ***The Family Maintenance Act***, 1997, S.S. 1997, c. F-6.2, s. 4(1); ***The Family Maintenance Act***, R.S.M. 1987, c. F20, s. 35.1; ***Family Services Act***, S.N.B. 1980, c. F-2.2, s. 113(1); ***Family Law Act***, R.S.N.L. 1990, c. F-2, s. 37(7); ***Maintenance and Custody Act***, R.S.N.S. 1989, c. 160, s. 2; ***Family Law Act, S.P.E.I.*** 1995, c. 12, s. 31

Ruth Sullivan, ***Sullivan on the Construction of Statutes***, Fifth Edition, Lexis Nexis Canada Inc. 2008 at pg. 419, **Tabs 82, 83, 84, 85, 86, 87, and 88**

(v) Denies a Fundamental Right to All Children of Separated Parents

105) A parent has a fundamental obligation to support a child according to Canadian and British jurisprudence.

106) The concept of parental responsibility has evolved from the support obligations of the *Poor Law Act* in 1576 to the elimination of any artificial and arbitrary distinction between 'legitimate' and 'illegitimate' children in the *Charter* era, particularly in regards to the interests of children born outside of marriage. Modern Canadian Society recognizes that the purpose of child support is to provide for the support of children on the breakup of their parent's relationship. When a couple has a child, whether they are married or not, they enter into a social contract to support their children until they are no longer dependent and can support themselves. This obligation aims to provide children with the same standard of living they enjoyed while their parents were together and arguably applies whether the child's parents are married or not. The current law allowing the Respondent to abandon his right to child support is not only an affront to Joshua's right to support, but injurious to parental responsibilities which are the social pillars of which the institution of the family and Ontario society, not to mention Canadian society, is built.

M.(T.) v. N.(0.), *Supra at 9 – 11*, ***Tab 31***

107) As stated earlier the premise of child support is so fundamental that "no right thinking society would fail to recognize a parent's duty to support a child." This

obligation as Little Pov. J observed “is (a) well known and historical obligation.” Therefore, withholding this historical and fundamental right must be a denial of the equal benefit of the law.

W.(M.M.) v. W.(P.J.)*, Supra** *at 8;* ***Ropos-Harder v. Tanner*, Supra** *at 3,* ***Tab 67 and 47

Does s.31 of the FLA violate s.7 of the Charter? - The Denial of Child Support Demeans the Dignity of Disabled Children of Unmarried Parents

108) Section 7 states that “[e]veryone has the right to life, liberty and security of the person” and “the right not to be deprived” of these “except in accordance with the principles of fundamental justice”.

109) The Supreme Court of Canada in *Carter v. Canada* stated that the test to determine if s. 7 has been violated is as follows:

> "In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice."
>
> ***Carter v. Canada (Attorney General),*** *[2015] 1 SCR 331, 2015 SCC 5 (CanLII) at para.55,* ***Tab 13***

110) Jurisprudence has shown that the underlying rights of the s.7 protection of “liberty and security of the person" include the individual autonomy and dignity.

> "Liberty protects “the right to make fundamental personal choices free from state interference”: Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses “a notion of personal autonomy involving . . . control over one’s bodily integrity free from state interference” (Rodriguez, at pp. 587-88, per Sopinka J., referring to R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering (New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 58; Blencoe, at paras. 55-57; Chaoulli, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together."
>
> ***Carter v. Canada (Attorney General),*** *[2015] 1 SCR 331 at para. 64,* ***Tab 13***

111) S. 31 of the FLA denies the Applicant Mother the right to be free from the stereotyping attached to unmarried parents of disabled adult children in such a degree as to exclude her and her illegitimate son from the benefit and protection

of the law that spouses or former spouses and disabled adult children of married parents enjoy.

112) This exclusion offends the Applicant Mother's and Joshua's personal dignity by perpetuation of the stigmatization of parents out of wedlock and illegitimate disabled children.

113) Clearly differential treatment on the basis of disability denies Joshua and other similarly situated children the equal benefit of the law in numerous different respects. The question arises therefore whether the differential treatment does so in a manner that demeans Joshua's dignity. Historically, courts beginning with *Andrews* through *Law* treated this analysis in an almost formalistic manner by setting out four contextual factors to assist in demonstrating that the denial of rights such as child support demeans the dignity of a claimant. Recently, however the courts have concluded that "[t]he analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law (in this instance s. 31 of the *FLA*) to worsen their situation."Nevertheless throughout the analysis, the main consideration "must be the <u>impact</u> of the law."The impact of the law in the instant case is that the denial of child support to disabled children of unmarried parents perpetuates and promotes the view that disabled children of unmarried children are illegitimate and less capable, less worthy or recognition, and less valuable members of Canadian society.

Andrews, s*upra at 25 and 28;****Law, s****upra at6-7****; Withler,*** *supra at 37****, Tabs 6, 26, and 69***

(i) Pre-existing Disadvantage

114) The first factor and "[A] key marker of discrimination and denial of human dignity under s. 15(1)" that demonstrates that the denial of child support for disabled children of unmarried parents has the effect of demeaning Joshua's dignity is the existence of a "pre-existing disadvantage, vulnerability, stereotyping, or prejudice" that is experienced by disabled children of unmarried parents and is exacerbated by the denial of child support. As the Alberta Court of Appeal

recognized in *T.(P.)*"a distinction drawn against children of unmarried parents is, prima facie, contrary to s. 15(1)" which means that any legal test that denies a child support on the basis of their disability and parents legal status renders them as invisible or inferior to other children. It is therefore logical to conclude that the denial of child support contributes to the perpetuation or promotion of the invisibility and cultural denigration of disabled children of unmarried parents not enrolled in a full time program of education. The denial of child support reflects and reinforces existing, inaccurate understandings of the merits, capabilities and worth of disabled children born to unmarried parents within Canadian Society, resulting in further stigmatization.

Gosselin v. Quebec (Procureur general) *2002CarswellQue 2706 at 30;* ***Law,*** *Supra at63;****T.(P.)*** *Supra at 13****, Tabs 23, 26, and54***

(ii) Relationship between Grounds and Claimant's Characteristics or Circumstances

115) The second contextual factor is whether the impugned law takes into account the claimant's actual situation. When approaching the question of whether s. 31 of the *FLA* is discriminatory it must be done so:

> in light of the purpose of the s. 15 equality guarantee. That purpose is to ensure that governments respect the innate and equal dignity of every individual without discrimination on the basis of the listed or analogous grounds. The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society and to be treated as an equal member, regardless of irrelevant personal characteristics, characteristics attributed to the individual based on his or her membership in a particular group without regard to the individual's actual circumstances.
>
> ***Gosselin,*** *Supra at 20****, Tab 23***

116) In order to do this the s. 15(1) analysis must be undertaken from the requisite subjective-objective perspective. In other words whether "'a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity' having regard to the individual's or group's traits, history, and circumstances." In the case at bar from the perspective of a reasonable person in the same position as Joshua they "would feel that a challenged distinction harmed (their) dignity" because s. 31 is not designed to promote the claimant's long-term autonomy and self-sufficiency. Rather it disregards the needs, capacities, and circumstances of disabled children of unmarried parents not

enrolled in a full time program of education. It declares that an entire class of Canadians unworthy of the recognition and support of their families.

Law**, Supra at 60; **Ardoch Algonquin First Nations & Allies v. Ontario**, 2000 SCC 37 at 55; **Gosselin,** Supra at 25**, Tabs 26, 7, and 23

(iii) Ameliorative Purpose or Effects

117) The third contextual factor to consider in identifying whether a law is discriminatory is whether the denial has an ameliorative purpose or effect for a historically disadvantaged group of Canadians. In the case at bar the denial of child support for disabled children of unmarried parent's not enrolled in a full time program of education has no ameliorative purpose whatsoever. The Supreme Court of Canada has held that an under inclusive benefit, like child support, that "excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination".

Law, supra at 72; ***Vriend v. Alberta**, [1998] 1 S.C.R. 493 at 94-104*
M V. H.,** [1999] 2 S.C.R. 3 at 71**, Tab 26, 64, and 27

(iv) Nature of Interest Affected

118) The fourth and final contextual factor is the nature of the interest affected by the impugned law. "[T]he more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction within the meaning of s. 15." In the instant case the discriminatory impact of the denial of child support is amply demonstrated by the fundamental nature and broad scope of the interest affected.

> [T]he discriminatory caliber 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, or affects "a basic aspect of full membership in Canadian society", or constitute[s] a complete non-recognition of a particular group.
>
> ***Law**, supra at 74**, Tab 26***

The circumstance of Joshua the distinction created by s. 31 of the *FLA* affects a basic aspect of full membership in Canadian society and constitutes a complete non-recognition of a particular group, specifically disabled children born to unmarried parents not enrolled in a full time program of education.

119) Few things are more important in Canadian Society than the support of a child. So important is the support of a child that it arises from the day a child is born and courts have recognized that this right is triggered by the birth of a child and not some other event such as the filing of a court application.

120) In conclusion, the denial of child support for disabled children of unmarried parents not enrolled in a full time program of education clearly violates s. 15(1) and s. 7 of the *Charter.* It draws a distinction on the basis of disabilities and a child's parent's legal/marital status that withholds the equal benefit of law in a manner that offends the human dignity of disabled adult children of unmarried parents not enrolled in a full time program of education. It exacerbates pre-existing disadvantage by deeming disabled children of unmarried parents not enrolled in a full time program of education less worthy of respect and recognition, fails to recognize the fundamental importance of child support and completely denies a fundamental constitutional and societal interest.

(v) Is Section 31 of the *FLA* Saved by Section 1 of the *Charter of Rights and Freedoms*?

(i)Principles relating to the Application of s.1 of the *Charter*

121) The Respondent, in light of the fact that the government has chosen not to take a position in relation to the constitutionality of s.31, bears the onus of justifying the infringement of Joshua's fundament right to child support as a disabled child of unmarried parents not enrolled in a full time program of education This violation cannot be excused by pointing to historic and existing discrimination against children born to unmarried parents considering that "[g]iven that s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."

Andrews, *Supra****; Corbiere,*** *Supra at 98****, Tab 6 and 16***

122) The requirement that the limit be demonstrably justified means that mere explanation or speculation will not suffice in justifying a discriminatory law. The objective of the rights denial must be based on evidence, not mere conjecture.

> To meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.
>
> ***RJR-MacDonald Inc. v. Canada (A.G.)**, [1995] 3 S.C.R. 199 at 128-129*; ***R. v.Oakes**, [1986] 1 S.C.R. 103 at 138**, Tabs 44 and 42***

ii)The Analytical Framework for Section 1 of the *Charter*

123) In *R. v. Oakes*, the Supreme Court set out the requirements that must be met in order to establish that a denial of a right is reasonable and demonstrably justified in a free and democratic society.

> First, the objective, which the measures responsible for a limit on the *Charter* right or freedom are designed to serve must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.
>
> ....
>
> Second, once a sufficiently significant objective is recognized, then the party invokings.1 must show that the means chosen are reasonable and demonstrably justified.
>
> ***M. v. H.,** Supra at 80*; ***R. v. Oakes,** [1986] 1 S.C.R. 103 at 73-74**, Tab 27 and 42***

iii. Objective of the "Infringing Measure"

(a) The Characterization of the Pressing and Substantial Objective

124) The limit on *Charter* rights and freedoms must serve a pressing and substantial objective. In a case involving *legislation* that discriminates by withholding a benefit granted to others, the courts focuses on the objective of the omission, and as a contextual matter, have regard to the objective of the statute and the objective of the impugned provision. The enunciation of the objective is crucial to the integrity of the s. 1 analysis.

> Care must be taken not to overstate the objective. The objective relevant to the s.1analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. [Emphasis in original]
>
> ***RJR-MacDonald Inc. v. Canada Supra** at 144*; ***Vriend v. Alberta**, Supra at 109-111*; ***Corbiere v. Canada (Minister of Indian and Northern Affairs)**, Supra at 99-100*; ***Thomson Newspapers Co. v. Canada (A.G.),** [1998] 1 S.C.R. 877 at 98, **Tabs 44, 64, 16, and 58***

(b) A Discriminatory Objective Cannot Be Pressing and Substantial

125) In order to be sufficiently pressing and substantial to justify overriding constitutionally protected rights and freedoms, the objective of the rights

limitation must be consistent with the values of a free and democratic society. As Dickson C.J. wrote:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

A pressing and substantial objective cannot be based on discriminatory rationales. This means that courts cannot require that the group seeking equality lose the identity for which it claims protection or require that children of unmarried parents be "just like" children of marriage in all respects. Privileging children born to married parents solely because of their parent's relationship status is not a justification for discrimination; it is the antithesis of equality.

R. v. Oakes**,** *Supra at 67****, Tab 42***

126) The courts have refused to tolerate rights limitations founded on discriminatory objectives. In *R. v. Big M Drug Mart*, the Court held that the purpose of the mandatory Sunday-closing law was "to compel observance of the Christian Sabbath." That purpose directly contradicted the *Charter* guarantee of freedom of religion. Similarly, in *Vriend,* the Supreme Court remarked that the "legislative omission is on its face the very antithesis of the principles involved in the legislation as a whole". In *Rosenberg,* the Ontario Court of Appeal held that failure to include same-sex cohabitants in the definition of "spouse" had the objective of favouring heterosexual unions. The Court held that this objective was "discriminatory and cannot be viewed as justification for a constitutional violation."

Vriend v. Alberta**,** *Supra at 116***; *****R. v. Big M Drug Mart Ltd.,*** *[1985] 1 S.C.R at 137****, Tab 64 and 38***

127) It is precisely the purpose of s. 15 to interrogate exclusionary definitions and question "universal" or traditional understandings. The rigors of constitutional analysis require the Court to extend beyond platitudes of "what has been, must be", to demand a reasoned, evidentiary-based justification for the denial of

fundamental rights and freedoms. Further, in light of the long history of cases, referred to previously in paragraph 68, declaring that the distinction between illegitimate and legitimate children offends s. 15 of the *Charter* and is therefore discriminatory, it is impossible to find a pressing and substantial objective behind denying the rights of disabled children of unmarried parents to ongoing child support. Since one of the purposes of child support is to provide children with the same standard of living they enjoyed when their parents were living together, it is clear that there is no rational justification for the denial of child support to disabled or ill children born of unmarried parents.

128) After finding a *Charter* breach, the definitional argument - already recognized to be circular and discriminatory - obviously cannot serve as a compelling, rational justification for exclusion. “The task of the court in every case is to identify the functional values underlying the law”, not to accept the law’s current terms as a static definition.

Miron v. Trudel**,** *Supra at 164****, Tab 34***

129) It is undisputed that child support is an important human right that accords a multitude of benefits to the beneficiary. From a discriminatory perspective denying disabled children of unmarried parents not enrolled in a full time program of education the right to ongoing child support fails to respect the values underpinning the Charter, the legitimacy of a serious rights violation and the consequent harms is deemed “obvious.” In addition, the Attorney General of Ontario has left the Applicant Mother in the uncomfortable position of envisioning potential s. 1 arguments and making argument on the government’s behalf, a failure strongly criticized by the Supreme Court in *Miron*. But since the Attorney General of Ontario has not taken a position and offered any rational, any empirically-supported articulation of the pressing and substantial objective of the rights limitation produces a negative inference that the legislation is unconstitutional, cannot be saved by s. 1 of the *Charter* and must perforce fail.

C. The Laudatory Purpose of Child Support

1) The Requisite Approach: A Functional Objective

130) As indicated above, the issue under the first step of the *Oakes* analysis is whether the limit on *Charter* rights and freedoms furthers a pressing and substantial purpose. Since there is a discriminatory rationale for the serious infringement of fundamental rights and freedoms, it should not be necessary to consider the laudatory objective of child support for disabled children of unmarried parents not enrolled in a full time program of education itself, but it does sharpen the appreciation of the denial of rights and freedoms.

131) The pressing and substantial objective of denying child support to disabled children of unmarried parents who are not enrolled in a full time program of education cannot be to affirm or benefit solely children of married parents and children free from illness or disability. The Court must instead recognize a functional, non-discriminatory objective, lest the *Oakes* test be compromised. The proper approach to determining the salutary objective of a law is to consider its underlying purposes or functions, not to define its limits according to those to whom it has traditionally applied.

132) This approach is well illustrated by the decision in *M. v. H.* The near unanimous majority of the Supreme Court determined that the legislation was intended to provide an equitable resolution of economic disputes that arise when intimate relationships involving economic interdependence break down. The Court examined the functional objective of the impugned provision, rather than defining the objective in terms of heterosexuality. The sole dissent, by Justice Gonthier, held that the purpose of the *Act* was limited to different-sex couples only. It is not proper to attempt to define the purpose of the law by reference to the terms of discrimination itself. Rather, “[w]hen characterizing the objective ... for the purposes of s. 1 analysis, it is important to adopt a functional and pragmatic approach which frames that purpose neither too broadly nor too narrowly.”

M. v. H., *Supra at 82-107, 85, 156*; **Tab 27**
Miron v. Trudel, *Supra at 109 and 164,* ***Tab 34***

2. The True Functional Purpose of Child Support

133) Modern Canadian Society recognizes that the purpose of child support is to provide for the support of children on the breakup of their parent's relationship. Couples when they have a child, whether they are married or not, enter into a social contract to support their children until they are no longer dependent and can support themselves. This obligation arises from the date children are born.

134) A parent's obligation to support their children has been recognized by the Supreme Court of Canada. According to the court the purpose of child support, as previously cited is to try and provide children with the same standard of living they enjoyed while their parents were together. Arguably the principles set out by Bastarache J in *S.(D.B.)*are applicable whether a child's parents are married or not. According to the court in *Storr*, "[i]t is an established tradition of Canadian law that from the day a child is born, each of the parents of a child are responsible for the support of that child. This support obligation is triggered by the birth of the child and not by some other event such as notice of a court application for child support." To argue that a parent's child support obligation changes as a result of a child growing older and based on the legal status of the parent's relationship is not supportable in law, does not conform with the principles underpinning the purpose of child support legislation and is simply discriminatory and cannot be saved by s. 1 of the *Charter*.

Storr**, Supra at 17 – 18**, Tab 52

iv. The Proportionality Analysis

135) The Applicant Mother has demonstrated that there is no pressing and substantial objective in deny disabled children born to unmarried parents the right to ongoing child support. There is therefore no need to proceed with the proportionality test. In the alternative, if the objective is consistent with the *Charter's* normative principles and is pressing and substantial, it is necessary to determine whether the means chosen are reasonable and demonstrably justified.

> In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment

> of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.
>
> ***Vriend v. Alberta**, Supra at 108**, Tab 64***

136) The discrimination against disabled children born to unmarried parents not enrolled in a full time program of education fails at every step of the proportionality test. There is no rational connection between the positive aims ofchild support and the exclusion of disabled children of unmarried parents, no minimal impairment of the infringed rights and freedoms, and no proportionality between the deleterious effects of exclusion and the salutary effects of the measures; therefore, the denial of rights and freedoms cannot be justified in a free and democratic society.

(a) There is No Rational Connection

137) To justify the rights infringement, the Appellant Father must demonstrate a rational connection between the infringement and the purpose of the benefit. It is difficult to comprehend how denying disabled children of unmarried children not enrolled in a full time program of education child support furthers any laudatory purpose.

138) There is no rational connection between the rights limitation and the purpose of the benefit. In fact, if a functional view is taken of child support, its sole purpose is to secure a child's well-being and to try and approximate the same living standard a child enjoyed while their parents were together. Denying disabled children of unmarried parents no enrolled in a full time program of education the right to the same standard of living that disabled children of married parents enjoys is discriminatory, arbitrary and diminishes the quality of care that disabled children of unmarried parents not enrolled in a full time program of education have the right to receive. The denial of the equal right to child support to disabled children of unmarried parents who are not enrolled in a full time program of education is not rationally connected to supporting the well being or standard of living of children; on the contrary, s. 31 of the *FLA* has exactly the opposite effect. There is simply no rational connection between the denial of a right to

child support to disabled children of unmarried parents who are not enrolled in a full time program of education and the laudatory purposes of child support generally.

(b) There is No Minimal Impairment

139) Even if the denial of the right to child support to disabled children of unmarried parents not enrolled in a full time program of education is rationally connected to a pressing and substantial purpose, the Appellant Father must demonstrate that Joshua's rights and freedoms have been impaired no more than reasonably necessary to achieve a valid goal or objective. The law must set markers for entitlement that impair a person's rights and freedoms as little as possible. Equal respect and recognition of disabled children of married and unmarried parents would further all of the positive objectives and goals of child support. Using the government's likely objectives the over and under inclusive nature of the marker reveals that the limitation is far more than a minimal impairment of the numerous rights and freedoms at stake.

RJR-MacDonald Inc. v. Canada (A.G.), *Supra at 160, and 67*; ***Miron v. Trudel,*** *Supra at 167-175****, Tab 44 and 34***

140) Even if there was a complete legislative bar to disabled children born to unmarried parents who are no longer enrolled in a full time program of education receiving child support, there would still be little, if any, cause for deference:

> ...[W]here the nature of the infringement lies at the core of the rights protected in the *Charter* and the social objective is meant to serve the interest of the majority as a whole, as represented by state action, courts must be vigilant to ensure that the state has demonstrated its justification for the infringement. A less deferential stance should be taken and a greater onus remains on the state to justify its encroachment on the *Charter* right in question. In each case, therefore, only after the objective of the legislation has been identified can the appropriate degree of deference be determined. Indeed, cases will be rare where it is found reasonable in a free and democratic society to discriminate.

Adler v. Ontario **[***1996] 3 S.C.R. 609 at 95*; ***RJR-MacDonald Inc. v. Canada (Attorney General),*** *Supraat136, 138****, Tab 4 and 44***

141) In the case at bar the Ontario legislature does not seek to protect a vulnerable group (as in *Irwin Toy* or *Ross*). Rather s. 31 of the *FLA* privileges the majority at the expense of the vulnerable, in effect, setting up a two tiered child support regime reminiscent of the distinction between "legitimate" and "illegitimate"

children, which was found to be unconstitutional in 19 out 19 cases in a row when the issue was raised. Further the legislature has not responded to protect the autonomy or dignity of any single group under attack from another potentially more powerful group. Unfortunately the impugned law, s. 31 of the *FLA,* harms the vulnerable and fails to protect or recognize the rights of disabled children born of unmarried parents who are not enrolled in a full time program of education.

> [L]ittle deference should be shown in this case where the contextual factors mentioned above indicate that the government has not established that the harm which it is seeking to prevent is widespread or significant.

In this case, there is no harm whatsoever in ending discrimination against disabled children of unmarried children who are not enrolled in a full time program of education. There is no interest furthered by the exclusion and thus no deference to the legislature is warranted.

Thomson Newspapers Co. v. Canada (A.G.), *Supra at 118*; ***Ross v. New Brunswick School District No. 15,*** **[***1996] 1 S.C.R. 825*; ***Irwin Toy Ltd. v. Quebec(A.G.),*** *[1989] 1 S.C.R. 927*; ***R. v. Keegstra,*** *[1990] 3 S.C.R. 697*; ***R. v. Butler*****,** *[1992]1 S.C.R. 452****, Tab 58, 45, 24, 41 and 39***

142) The denial of a right to child support for disabled children of unmarried parents not enrolled in a full time program of education does not minimally impair the rights of disabled children born to unmarried parents not enrolled in a full time program of education. It excludes a class of persons on the basis of a protected personal characteristic for no reason whatsoever. If the raison d'être of child support is to try and achieve a similar standard of living for a child after their parents separation as they enjoyed prior to their parents separation and to provide for a child's maintenance then the impugned law's line of entitlement has been drawn solely on the basis of discriminatory thinking and cannot be saved by s. 1 of the *Charter*.

(c) There is No Proportionality of Salutary and Deleterious Effects

143) The final stage of the *Oakes* analysis considers whether there is proportionality between the deleterious effects of the measures that are responsible for limiting the rights or freedoms in question and the objective and whether there is proportionality between the deleterious and the salutary effects of the measures.

The question is “whether the consequences of the violation are too great when measured against the benefits that may be achieved.” This step is essential because “the result might be to uphold a severe impairment on a right in the face of a less important objective.”

Thomson Newspapers Co. v. Canada (A.G.), *Supra at 125****, Tab 58***
Bedford v. Canada,*2010 ONSC 4264 at 487****, Tab 11***

144) In this case, even if the exclusion of disabled children born to unmarried parents who are not enrolled in a full time program of education from the Ontario child support scheme were otherwise justified, the potential harm that could be inflicted by excluding them are so severe that the violation of rights and freedoms cannot be justified. The Respondent can point to no legitimate benefit to the denial of child support to disabled children born to unmarried parents who are not enrolled in a full time program of education. This is determinative. In the face of a serious violation of fundamental rights and freedoms and extensive evidence of numerous, damaging effects to an already disadvantaged minority, there is no benefit whatsoever to the exclusion.

145) Equal child support for all children, regardless of the marital status of their parents, is just the next step in the inevitable march towards full equality for all Canadians no matter their race, creed, sex, sexual orientation or disability; therefore, the Applicant Mother submits that s. 31 of the *FLA* fails to meet the proportionality test in *Oakes,* cannot be saved by s. 1 and represents an unjustifiable limit on Joshua right to equality.

VI. Constitutional Remedy

146) Where the guarantee of equality has been infringed, the remedy selected must promote “a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”. As the Supreme Court affirmed in *Corbiere*:

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court’s role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada.

Corbiere, *Su*pra at 110; ***Andrews,*** *S*upra**, Tabs 16 and 6**

147) The Supreme Court of Canada in *Chartier v. Chartier* adopted the position that the policies and values reflected in the Divorce Act "must relate to contemporary Canadian society and that the general principles of statutory interpretation support a modern understanding of the words “stands in the place of a parent”.

148) The Court continued citing Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, Iacobucci J:

> "Although much has been written about the interpretation of legislation . . . Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.(See to the same effect R. v. Hydro-Québec, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, 1996 CanLII 186 (SCC), [1996] 3 S.C.R. 550; Friesen v. Canada, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103.)"

Chartier v. Chartier, [1999] 1 SCR 242, 1999 CanLII 707 (SCC) at para 19**, Tab 15**

149) Jurisprudence has shown that the FLA definition of the word "child" includes a person to whom a parent has shown a settled intention to treat as a child of his or her family. To determine the existence of a "settled intention" the Court has adopted an objective test based on conduct, including consideration of the same factors that the *Divorce Act* has adopted.

> ***Ballmick v. Ballmick*****,** 2005 ONCJ 101 (CanLII) at para.19; *Chartier v. Chartier,* [1999] 1 SCR 242, 1999 CanLII 707 (SCC) at para.39, **Tabs 10 and 15**

150) In *Chartier v. Chartier* the Court found that a child remains "a child of marriage" even in the event that it is proven that a spouse and parent is not the biological parent of the child. The Court adopted the interpretation that did not offend the equality rights protected by the Charter following the principles of interpretation stated in *Rizzo & Rizzo Shoes Ltd.*

Chartier v. Chartier, *Supra****, Tab 15***

151) S. 36 of the Family Law Reform Act states that:

> 36. (1) When a divorce proceeding is commenced under the Divorce Act (Canada), an application for support under this Part that has not been adjudicated is stayed, unless the court orders otherwise. R.S.O. 1990, c. F.3, s. 36 (1).

152) From the above provision it is evident that the provincial legislature is aware that there are overlapping powers with regard to child support. Both the Federal Government and the Provincial have the power to regulate the subject matter of child support. Therefore, s. 36 of the *FLA* by providing for an automatic stay of any *FLA* commenced support proceeding recognizes that the two statutes (*FLA* and *Divorce Act*) deal with exactly the same subject matter.

153) The uniformity principle dictates that the Charter is used as an interpretive tool so that there are national standards adopted with respect to human rights and civil liberties across Canada. This is evident from the fact that the Provincial Legislatures of almost all Provinces in Canada (with the exception of Ontario and Alberta) have adopted the definition given by the *Divorce Act* in their provisions for child support. The following statutes have almost exactly the same wording with the *Divorce Act*:

1. ***Constitution Act**, 1867 (U.K.), 30 & 31 Victoria, c.3, 91(26)**, Tab 81***
2. ***Family Relations Act**, R.S.B.C. 1996, c. 128, s. 87; **Tab 82***
3. ***The Family Maintenance Act**, 1997, S.S. 1997, c. F-6.2, s. 4(1); **Tab 83***
4. ***The Family Maintenance Act**, R.S.M. 1987, c. F20, s. 35.1; **Tab 84***
5. ***Family Services Act**, S.N.B. 1980, c. F-2.2, s. 113(1); **Tab 85***
6. ***Family Law Act**, R.S.N.L. 1990, c. F-2, s. 37(7); **Tab 86***
7. ***Maintenance and Custody Act**, R.S.N.S. 1989, c. 160, s. 2; **Tab 87***
8. ***Family Law Act, S.P.E.I.** 1995, c. 12, s. 31**, Tab 88***
9. ***Family Law Act**, R.S.O. 1990, c. F. 3, at s. 31; **Tab 89***

154) The Ontario Legislature's intention to align its legislation with the Federal legislation regarding the subject matter of child support is expressed in the adoption of s. 36 of the *FLA*. S. 36, which was adopted in order to avoid the multiplicity of judgments in the same subject matter and the proceedings are stayed since the *Divorce Act* is paramount to the *FLA*.

155) This is therefore a clear case where the Provincial Legislature would have included the Divorce's Act definition of the word "child" in s. 31 of the FLA. It is a principle of statutory interpretation that when there are equally plausible interpretations and one reading of the statute would result in an infringement of the Charter then the Court should adopt the interpretation which is consistent with the Charter values.

A.C. v. Manitoba (Director of Child and Family Services), *[2009] 2 SCR 181, 2009 SCC 30 (CanLII) at paras.108 and 114,* ***Tab 3***

156) In this case the Court has the jurisdiction to find that s. 31 of the FLA as it produces a discriminatory effect against the Applicant is in violation of the principle of equality stated in s. 15 of the Charter. In order to provide the appropriate remedy, the Court has the power to declare s. 31 of the FLA of no power or effect in the specific case according to s. 52 of the Constitution. In order to provide a remedy for the Applicant the Court can interpret the word "child" of s. 31 of the FLA in a way that it does not offend s. 15 (1) of the Charter.

157) If the Court finds that s. 31 of the FLA includes in the definition of the word "child" the definition included in s. 2.(1) of the Divorce Act, then child for the purposes of s. 31 of the FLA in the present case means:

> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; (enfant à charge)

158) The above interpretation does not offend the Charter and is within the Honourable Court's jurisdiction to provide as a remedy that does not interfere with the powers of the legislature inappropriately.

159) It is the Applicant's position that the best approach to ensuring that the *FLA* best vindicates the values expressed in the *Charter* would be for the court adopt the definition of "child of the marriage" in the *Divorce Act,* which includes ill or disabled children over the age of majority, in the court's interpretation of the word "child" in s. 31 of the *FLA*. The definition of "child of the marriage" in the *Divorce Act* is as follows:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (*a*) is under the age of majority and who has not withdrawn from their charge, or
>
> (*b*) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;
>
> ***Divorce Act,*** *supra****, Tab 90***

160) In *Schachter v. Canada*, the Supreme Court of Canada stated that severance or reading in is warranted only in the clearest of cases, when each of the following criteria are met:

> A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
>
> B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,
>
> C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.
>
> ***Schacter v. Canada, [****1992] 2. S.C.R. 679 at pg 87****, Tab 49***

161) More recently the Supreme Court in Canada reformulated the test for whether reading in/down is more appropriate than either striking down or severance in *M. v. H.* The Supreme Court of Canada held that a court of competent jurisdiction must consider the following criteria:

a. How precisely the remedy can be stated;

b. The budgetary implications;

c. The effect the remedy would have on the remaining portion of the legislation;

d. The significance or long-standing nature of the remaining portion; and

e. The extent to which a remedy would interfere with legislative objectives.

M. v. H., *supra at 139****, Tab 27***

162) In the present case, the defect in s. 31 of the *FLA* can be precisely stated via the under- inclusive definition of the word “child”, which has the effect of excluding disabled adult children born to unmarried parents not enrolled in a full time program of education who are unable to withdraw from their parent’s charge from the Ontario child support scheme. This can easily be resolved by adopting the interpretation of the definition of a “child of the marriage” in the *Divorce Act* so as to include disabled children and avoid the scrutiny of the *Charter*.

163) Further, should the definition of “child of the marriage” be adopted in the interpretation of s. 31 of the *FLA* it can be logically assumed that there will be no budgetary implications for the Ontario Government as disabled children born to unmarried parents who are not enrolled in a full time program of education will have a right to child support from their parents and will not further burden the state. The Supreme Court of Canada in *Schacter* further held that “[w]here the group to be added is smaller than the group originally benefited, this is an indication that the assumption that the legislation would have enacted the benefit in any case is a sound one.” In light of the current budgetary concerns of the Ontario Government and the size of the group the amendment of s. 31 of the *FLA* would govern interpreting s. 31 of the FLA as if it includes the definition of “child of the marriage” from the *Divorce Act* remains the best, least intrusive and most viable solution.

Schachter, *supra at 70,* ***Tab 49***

164) The Supreme Court of Canada in *Schacter* addressed the issue of reading in when determining whether to extend benefits not included in a statute when it referred to the decision in *Knodel*:

> In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than

> it would be to extend the benefits to the small minority who demonstrated their entitlement to them.
>
> ***Schachter,*** *supra at 68****, Tab 49***

165) S. 31 of the *FLA* should remain so as not to interfere with legislative intent of Parliament as the current provision, when not addressing disabled children is seemingly constitutionally sufficient. The case law suggests that courts have focused on the significant or long-standing nature of the remaining portion. Further, the court in *Schachter* stated that "[i]f the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion." In this instance, the Applicant Mother is requesting that this Honourable Court alter the current legislation as it reads in order to respect the significance of the provision and intention of Provincial Parliament while reading in the "child of the marriage" definition of the *Divorce Act* to comply with and exemplify the ideals of the *Charter*.

Schachter, *supra at 73,* ***Tab 49***

166) According to the Supreme Court of Canada in *Schachter* when fashioning a remedy to cure *Charter* violation it is necessary to vindicate the values enshrined in the *Charter* and to refrain from intruding into the legislative sphere as much as possible. Of course, the degree which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. The legislative objectives of the *Family Law Act,* which outlined in the preamble, are as follows:

> Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, **and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children** [emphasis added]
>
> ***Family Law Act,*** *supra;* ***Schachter,*** *supra****, Tab 89 and 49***

167) In effect, interpreting the word "child" of s. 31 of the *FLA* according to the definition of "child of the marriage" from the *Divorce Act* into embodies the final objective of the *FLA* by ensuring that parents equally share responsibility for their

children. The importance of this proposition should not and cannot be understated: Child support is the right of the child and any law that denies disabled children born to unmarried parents not enrolled in a full time program of education that right automatically violates their *Charter* rights. To deny disabled children born to unmarried parents not enrolled in a full time program of education the right to child support is discriminatory. Considering Joshua's immediate and ongoing need for financial support, reading in wording to s. 31 of the *FLA* would allow Joshua and other similarly situated children to apply for and receive ongoing child support after they are no longer enrolled in a full time program of education and thereby give meaning to the values and promise of the *Charter*.

168) As it is currently constituted s. 31 of the *FLA* potentially leaves the Applicant in a position of being the sole caregiver financially for Joshua as the Respondent can both, theoretically and arguably legally, abdicate his financial responsibility to Joshua because he was born to unmarried parents and is not enrolled in a full time program of education.

169) Further, the right to support would accord with the laudatory purposes of child support, particularly in the sharing of parental responsibility as espoused by the preamble and the overarching objectives of the *FLA*. In order for s. 31 of the *FLA* to best meet its objectives and in concert with the factors delineated by the Court in *Schacter* and *M. v. H.*, the Applicant Mother submits that the most efficient and effective *Charter* remedy is to read in the definition of "child of the marriage" in the *Divorce Act* into s. 31 of the *FLA*. It is this remedy that, in addition to the right to child support, best affords Joshua and all disabled children not enrolled in a full time program of education in Ontario, something that almost all Canadians take for granted: the right to equality.

PART IV – ORDER SOUGHT

The Applicant seeks:

(a) An declaration that any law, policy or practice of government that restricts a parent from seeking child support on behalf of a disabled child over the age of eighteen and not in a full time program of education is contrary to the Canadian Charter of Rights and Freedoms and is of no force and effect;

(b) An Order that in the present case the word child in s. 31 of the *Family Law Act* includes in its meaning a child who is of the age of majority or over and under the parents' charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; (enfant à charge)

(c) An Order dismissing the Respondent's Motion to Change;

(d) A final Order requiring the Respondent pay $630.00 per month based on an income of $69,000;

(e) An Order requiring the Applicant and the Respondent to contribute on a proportionate basis to any and all of Joshua's section 7 expenses based on their respective incomes added together and divided into the whole respectively to express a percentage;

(f) Costs on a total indemnity basis payable by the Respondent;

(g) Such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF October 2016

_____
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PART V – TIME ESTIMATE

1. The Respondent expects his portion of oral argument to last for approximately ½ day.

PART VI – LIST OF AUTHORITIES

Decisions cited	
1.	***A.(D.M.) v. K.(R.)***1996 CarswellSask 172
2.	***A.A. v. B.B.***, 2007 ONCA 2
3.	***A.C. v. Manitoba (Director of Child and Family Services),*** [2009] 2 SCR 181, 2009 SCC 30 (CanLII)
4.	***Adler v. Ontario***[1996] 3 S.C.R. 609
5.	***Alberta (Director, Parentage & Maintenaince Act) v. H.(R)****,* 1993 CarswellAlta 23;
6.	***Andrews v. Law Society of B.C****., [1989] 1 S.C.R. 143*
7.	***Ardoch Algonquin First Nations & Allies v. Ontario****, 2000 SCC 37*
8.	***Arsenault v. Aresenault*** (1998) 38 R.F.L. 4th 175 S.C.J.
9.	***Auton (Guardian ad litem of) v. British Columbia (Attorney General),*** [2004] 3 S.C.R 657 (S.C.C.)
10.	**Ballmick v. Ballmick**, 2005 ONCJ 101 (CanLII)
11.	***Bedford v. Canada****,2010 ONSC 4264*
12.	***Catherine Elaine Panko (a.k.a. Fradette) v. Glen Vandesype****,* 1993 CarswellSask 46
13.	***Carter v. Canada (Attorney General),*** [2015] 1 SCR 331, 2015 SCC 5 (CanLII)
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16.	***Corbiere v. Canada (Minister of Indian and Northern Affairs)****, [1999] 2 S.C.R. 203*
17.	***Cuddy Chicks Ltd. v. Ontario Labour Relations Board*****,** 1991 CanLII 57 (SCC)
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19.	***Fitzpatrick v. Sterling Housing Association Ltd.***, [1998] Ch. 304, Ward L.J., dissenting
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24.	***Irwin Toy Ltd. v. Quebec(A.G.)***, *[1989] 1 S.C.R. 927*
25.	***K.(L) v. J.(T.W.)****, 1988 CarswellBC 342*
26.	***Law v. Canada (Minister of Employment and Immigration)****, [1999] 1 S.C.R. 497*
27.	***M v. H****, [1999] 2 S.C.R. 3*
28.	***M.(L.L.) v. K(W.L.), 2007 ABQB 764****, R.F.L. (6TH) 299, 2007 CarswellAlta 1715*
29.	***M.(N.) v. BC (Superintendent of Family & Child Services)****, 1986 CarswellBC 22, 10 B.C.L.R. (2d) 234*
30.	***M.(R.H) v. H.(S.S.)****, 1994 CarswellAlta 69;*
31.	***M.(T.) v. N.(0.)***, *2007 NUCJ 18, 43 (6th) 233*
32.	***Massingham-Pearce v. Konkolus****, (1994) CarswellAtla 171*
33.	***Milne v. Alberta****, [1990] A.J. No. 521*
34.	***Miron v. Trudel***[1995] 2 S.C.R. 418
35.	***Moge v. Moge***, [1992] 3 S.C.R. 813
36.	***NB Minister of Health and Community Services v. G.(J.)***, [1999] 3 S.C.R. 46
37.	***Nova Scotia Workers' Compensation Board v. Martin*****, [2003] 2 S.C.R. 504, 2003 SCC 54 (CanLII)**
38.	***R. v. Big M Drug Mart Ltd***., 1985 CarswellAlta 316
39.	***R. v. Butler***, *[1992] 1 S.C.R. 452*
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48.	***S.(D.B.) v. G.(S.R.)***, *[2006] 2 S.C.R. 231 (S.C.C.)*
49.	***Schacter v. Canada****, [1992] 2. S.C.R. 679*
50.	***Shewchuck v. Richard****1986 CarswellBC 114*
51.	***Smith v. The Attorney General of Ontario*** [1924] S.C.R. 331
52.	***Storr v. Steen***, *2010 CarswellNWT 75*
53.	***Surette v. Harris Estate****, [1989] N.S.J. No. 1*
54.	***T.(P.) v. B.(R.)****, [2004] A.J. No. 803*
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68.	***Willick v. Willick***[1994] 3 S.C.R. 670
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1.	***Anne-Marie Ambert, Divorce: Facts, Causes, Consequences, 3rd ed***(Ottawa: The Vanier Institute of the Family, November 2009)
2.	The Ontario Law Reform Commission of 1973, ***Report on Family Law**, Ministry of the Attorney General, http://www.archive.org/details/reportonfamilyla03onta*
3.	V.V. Saario, Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council***, "Study of Discrimination Against Persons Born out of Wedlock" U.N. Doc. E/CN.4/SUB.2/. 265 REV.1***
4.	**36th Session of Parliament, Legislative Assembly of Ontario,** September 10, 1997, September 15, 1997, September 24, 1997 and October8, 1997.
5.	***Bala et al.* Canadian Child Welfare Law,** 2d ed. (2004) at p 24

PART VIII – LEGISLATION

1. ***The Poor Act**, 18 Eliz., c. 8.*
2. ***Bastardy Act**, 49 Geo. 3, c. 68*
3. ***An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of Illegitimate Children liable for support**, 7 William 4, C.8*
4. ***An Act For the Protection of the Children of Unmarried Parents***, 11 Geo,. V, c.54;
5. ***An Act to the Child Welfare Act, 1965**, R.S.O. 1970, C.64, Part III*
6. ***CLRA**,* R.S.O. 1990, *C.c.12, as am, s.1 (1) and (4)*
7. ***Constitution Act**, 1867 (U.K.), 30 & 31 Victoria, c.3, 91(26)*
8. ***Family Relations Act***, R.S.B.C. 1996, c. 128, s. 87;
9. ***The Family Maintenance Act***, 1997, S.S. 1997, c. F-6.2, s. 4(1);

10. ***The Family Maintenance Act***, R.S.M. 1987, c. F20, s. 35.1;
11. ***Family Services Act***, S.N.B. 1980, c. F-2.2, s. 113(1);
12. ***Family Law Act***, R.S.N.L. 1990, c. F-2, s. 37(7);
13. ***Maintenance and Custody Act***, R.S.N.S. 1989, c. 160, s. 2;
14. ***Family Law Act, S.P.E.I.*** 1995, c. 12, s. 31
15. ***Family Law Act***, R.S.O. 1990, c. F. 3, at s. 31;
16. ***Divorce Act***, R.S.C. 1985, c. 3 (2nd Supp) at s. 2(1) and 15.1(1);
17. ***Canadian Charter of Rights and Freedoms***

Court File No. 1547/95

Robyn Denise Coates	**and**	**Wayne Marlon Watsonand**
Applicant		**Respondent**

Joshua Coates
An Added Party

Ontario

Court of Justice

Proceedings Commenced at Brampton

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