Part 1 Overview and Position

1. Joshua Coates (Joshua) born December 19, 1994, is the biological child of the Applicant, Robyn Denise Coates (Robyn) and the Respondent Wayne Marlon Watson (Wayne). Robyn and Wayne never married. Accordingly, any support entitlement arises under the *Family Law Act* as opposed to the *Divorce Act*.

***Family Law Act,* RSO 1990, c F.3 [*FLA*] - Tab 37 of Joshua Coates' Book of Authorities [Book of Authorities].**
***Divorce Act,* RSC 1985, c 3 (2d supp) - Tab 36 of Book of Authorities.**

2. On August 16, 2016, the Honourable Justice A.W.J. Sullivan released an endorsement that made Joshua a party and a "special party" to the Notice of Constitutional Question filed by Robyn before this Honourable Court. The Office of the Public Guardian and Trustee refused to consent to act as Joshua's legal representative.

3. Joshua suffers from a variety of ailments which preclude him from working and withdrawing from the Applicant's care. Joshua is unable to live independently and will require the care of others for the duration of his life. Robyn has provided that care and continues to do so.

4. Wayne acknowledged a support obligation for Joshua until Joshua turned 18 in 2012. On or around July 22, 2014, Wayne brought a Motion to Change seeking to terminate his child support obligation for Joshua on the basis that Joshua was over the age of 18 years, and not enrolled in a full-time education program so as to maintain his entitlement to support under s 31 of the *FLA*.

5. As a result of Joshua's disability, he is unable to enrol in a full-time program of education. The Ontario *FLA* imposes a support obligation only for adult children who continue to be enrolled in a full-time program of education. The *Divorce Act* is more inclusive. It provides a support obligation for children

who are unable to withdraw from parental control for various reasons, including illness or disability. However, the *Divorce Act* has two threshold requirements:

(i) that the parents be married; and

(ii) that the parents be divorced or that a divorce application is pending

6. The consequences of the different legislative schemes is as follows:

(i) children of intact married families can claim child support from either or both parents under the *FLA* for the purpose of continuing their education;

(ii) children of intact common law partnerships can claim child support from either or both parents under the *FLA* for the purpose of continuing their education;

(iii) children of intact married families or intact common law partnerships have no right to ongoing support after the age of majority solely on the basis of disability;

(iv) children of divorcing or divorced parents can claim support both for education and in circumstances where the child remains dependent due to inability to withdraw from parental care;

(v) children of separated common law partnerships do not have the right to claim support on the basis of disability; they can only claim support on the basis of continuing in a full-time program of education.

7. The result is that children in categories (iii) and (v) have fewer rights to support than children in category (iv).

8. Wayne seeks to uphold the distinction as a valid exercise of provincial legislative authority. He further maintains that Robyn and Joshua do not have standing to raise the Constitutional Issue.

9. Robyn submits that the distinction discriminates against an identifiable class (disabled children of unmarried parents) and therefore violates section 15 of the *Canadian Charter of Rights and Freedoms.* Note that Joshua would have a similar problem even if his parents had been married and separated but had not commenced divorce proceedings. As such it is the deprivation of access to the wider ambit of entitlement under the *Divorce Act* that triggers this constitutional challenge.

***Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [en by the *Canada Act 1982* (UK), 1982, c. 11, Sched B] [*Charter*] - Tab 35 of Book of Authorities.**

10. Joshua adopts Robyn's position and further submits that the distinction violates section 7 of the *Charter*, which guarantees security of the person. This argument will entail an analysis of the nature of the family support obligation and indeed the nature of the concept of family, and family responsibility. In this context the current position of the Ontario government is germane. In a June 2011 discussion paper issued by the *Commission for Review of Social Assistance in Ontario*, the commissioners observed that "[s]ocial assistance is intended by the government to be used as a last resort when people have no other financial options."

***Commission for the Review of Social Assistance in Ontario: Discussion Paper: Issues and Ideas June 2011*; Francis Lankin, Munir Sheikh – commissioners at 13 - Tab 32 of Book of Authorities.**

11. The support responsibility applies to divorced parents of disabled children; it also applies to adult children capable of contributing to the support of parents in need. Joshua submits that there is no principled reason to exclude children of common law partnerships from the security that accrues by being a family member born to unmarried parents.

PART 2 - THE FACTS

12. In general, Joshua adopts the Adjudicative Facts as set out in the Factum for the Applicant Mother, Robyn Coates. For the purpose of the argument under the *Charter,* the following facts are relevant:

    (i) Joshua, born December 19, 1994, is the biological child of the Applicant, Robyn Denise Coates (“Robyn”) and the Respondent, Wayne Marlon Watson (“Wayne”);

    (ii) Robyn and Wayne never married;

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

    (iv) 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;

    (v) Joshua is disabled and is unable ever to withdraw from parental care;

    (vi) Robyn has cared for Joshua throughout Joshua’s life and continues to do so;

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

    (viii) Wayne commenced a Motion to Change on or around July 22, 2014, to terminate support for Joshua pursuant tosection 31 of the *FLA*.

13. The information about Joshua's medical history, disability, and ongoing, lifelong needs can be found at Exhibits "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, and is foundat Tab 1 of Vol. IV of the Continuing Record.

PART 3 – ISSUES

14. Joshua wishes to address the following legal issues in this case:

a. Does Joshua have standing to raise the *Charter* issues?

b. Does section 31 of the *FLA* infringe or deny, in whole or in part, Joshua's right to equal protection and equal benefit of the law as guaranteed by section 15(1) of T*he Constitution Act*, *1982* (the *Charter*)?

c. Is Joshua's right to security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms ("Charter"*) *infringed* by the provisions of section 31 of the *FLA*?

d. If the answer to (c) and (d) s "yes" then is section 31 of the *FLA* saved by the provisions of section 1 of the *Charter*?

15. For ease of reference the relevant sections of the *Charter* are as follows:

> 1. *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*
>
> 7. *Everyone has the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

> *15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability.*

PART 4 – LAW AND ARGUMENT

Issue One: Does Joshua have standing to raise the Charter issues?

16. As Joshua was made a party to these proceedings with respect to the Constitutional Issues by the endorsement of the Honourable Justice A.W.J. Sullivan dated August 16, 2016, it is his position that he has standing to raise the *Charter* issues.

17. The Supreme Court of Canada held in *S(DB) v G(SR)* that a core principal in the law relating to child support is that "child support is the right of the child." Contrary to Wayne's position, Joshua's right to child support is directly involved in this matter and therefore he has standing to raise the *Charter* issues.

***S(DB) v G(SR)*, 2006 SCC 37 at paras 35-42,[2006] 2 SCR 231 [*DBS*] – Tab 48 of Applicant Mother's Book of Authorities.**

18. Further, Joshua's exclusion from entitlement to child support under section 31 of the *FLA* as a disabled adult child of unmarried parents provides him with a special interest in the result of his litigation as it will have a significant financial impact on his daily life and well-being. This case is similar to the Appellants in *Withler v Canada*, where the Supreme Court of Canada agreed with the trial judge that "...where the target of the impugned provision is the plaintiff and it is the plaintiff who suffers discrimination associated with her spouse's age, the plaintiff should have standing." As constructed, the legislation saddles Joshua with a burden, namely once he turned 18 he was expected to find an additional source of income to replicate Wayne's child

support payments despite Joshua being disabled and unable to withdraw from Robyn's care.

***Withler v Canada (Attorney General),* 2011 SCC 12 at para 28, [2011] 1 SCR 396 [*Withler*] - Tab 69 of Applicant Mother's Book of Authorities.**

19. The restricted scope of child support under the *FLA* engenders differential treatment of children based on their parents' marital status. Where access to a benefit is limited on the basis of something that is so intimately connected to a claimant's identity and simultaneously beyond his or her control, the claimant can involve the protection of section 15 of the *Charter*.

***Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at para 85, [1997] SCJ No 26 (QL) – Tab 2 of Book of Authorities.**

20. From Joshua's perspective, definitional preclusion is no answer to the claim of discrimination. Under the *Charter's* equality guarantee, Wayne cannot rely on a history of legislative discrimination towards children born outside of marriage and individuals with disabilities to justify the government's continuing discrimination in section 31 of the *FLA*. Wayne's concerns about the proper use of judicial resources in this instance must take a back seat to the ideals proclaimed in the *Charter* if those values are to have any meaning.

21. The essence of human rights jurisprudence is its mandate to critically evaluate and challenge long-standing historical practices. Since discrimination is itself traditional, there is a grave danger in perpetuating an unconstitutional law by relying on historical precedent. There is a long and shameful history in Ontario of denying benefits to children of unmarried parents, including children suffering from life-long disabilities. Joshua is blameless and innocent of his parents' decisions, namely their decision not to marry. Joshua submits that he has standing to challenge section 31 of the *FLA* and has a direct interest in ensuring that he and all "[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."

***Vivian v Courtney,* 2010 ONCJ 768 at para 32 [*Vivian*] - Tab 60 of Applicant Mother's Book of Authorities.**

22. The reality is that disabled children of unmarried parents who are above the age of majority continue to need financial support. Their parent's marital status makes them no less deserving of support, let alone worthy of concern, respect, and consideration.

23. Denying Joshua and all other disabled children of unmarried parents over the age of majority the full and equal right to child support would be a failure of justice. It would be sidestepping the live legal issue raised 20 times across Canada where the constitutional validity of legislation regarding illegitimate children was referred to at paragraph 65 of the Respondent Mother's Factum, and most recently in *Vivian v Courtney*. Finally, and most importantly, it would be a denial of the promise of equality guaranteed in our *Charter*.

***Vivian*, *supra* - Tab 60 of Applicant Mother's Book of Authorities.**
***Vivian v Courtney*, 2012 ONSC 6585 - Tab 62 of Applicant Mother's Book of Authorities.**
***Vivian v Courtney*, 2011 ONSC 397 - Tab 61 of Applicant Mother's Book of Authorities.**
***Vivian v Courtney*, 2013 ONSC 5090 (Div Ct) - Tab 63 of Applicant Mother's Book of Authorities.**

Issue Two: Does Joshua's status as a disabled child of unmarried parents affect his right to support from either of those parents so as to disadvantage him when compared to disabled children of married parents who are divorced or divorcing?

24. The denial of child support to disabled adult children of unmarried spouses breaches the section 15 equality guarantee, as it violates the *Charter's* guarantee of inclusion and respect for all persons.

25. The jurisprudence establishes a two-part test for assessing a section 15(1) claim:

(i) Does the law create a distinction based on an enumerated or analogous ground?

(ii) Does the distinction create a distinction create a disadvantage by perpetuating prejudice or stereotyping?

***Withler, supra* - Tab 69 of Applicant Mother's Book of Authorities.**

26. Section 31 of the *FLA* discriminates in the following manner:

(i) The impugned law subjects the claimants to differential treatment based on grounds protected by section 15, specifically marital status, disability and sex; and

(ii) The differential treatment discriminates in a substantive sense.

***R v. Kapp*, 2008 SCC 41 [2008] 2 SCR 483 [*Kapp*] - Tab 40 of Applicant Mother's Book of Authorities.**

a) The claimants are subjected to differential treatment based on protected characteristics.

27. The distinction between the treatment of children of married parents and children of common law parents is obvious. Justice Curtis in ***Vivian v Courtney***, articulated the distinction at paragraphs 26-29 of her judgment:

> 26 Under the Divorce Act, 1985, c. 3 (2nd Supp.), as amended, married or divorced parents have the legal obligation to support a child over the age of majority who is ill or disabled and unable to support herself:
>
> **Child support order**
>
> **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.
>
> **Definitions**
>
> **2.** (1) In this Act,
>
> "child of the marriage"

> "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;
>
> 27 The law for the children of unmarried parents is different. The obligation of an unmarried parent to support a child is set out in s. 31(1) of the FLA:
>
> 31. 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.
>
> 28 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. The child of unmarried parents who is over the age of majority must satisfy the requirement in s. 31 FLA of "enrolled in a full-time program of education" to continue to be eligible for support.
>
> 29 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.

***Vivian supra* at paras 26-29 - Tab 60 of Applicant Mother's Book of Authorities.**

28. The effect of the existing legislation discriminates between two groups of people:

    a) Disabled adult children of married and divorced or divorcing parents; and
    b) Disabled adult children of unmarried parents; or married but separated parents who do not divorce, thereby rendering the provisions of the *Divorce Act* unavailable

The legislative treatment of these groups of people is based solely on their parents' marital status. The economic consequences are dramatic. Disabled adult children of divorce have an ongoing right to parental support; disabled

adult children of others, including intact married parental units, do not. For the purpose of this argument, these groups constitute the main comparator classes.

29. For a section 15 analysis, a formal comparison with a selected mirror group is not required; rather an approach should be taken that examines the full context, including the situation of the claimant group and whether the impact of the law is to perpetuate disadvantage or negative stereotypes about that group.

***Withler supra* at para 40 - Tab 69 of Applicant Mother's Book of Authorities.**

30. The law is well settled that discrimination on the basis of marital status violates section 15 of the *Charter*.

***Miron v Trudel*, [1995] 2 SCR 418 at paras 154-166 , 124 DLR (4th) 693 [*Miron*] - Tab 34 of Applicant Mother's Book of Authorities.**

31. Joshua's only potential statutory access to support is governed by his parents' marital status. Disabled children of divorced parents have the statutory right to support which is not available to Joshua. As noted above, the Ontario legislation discriminates between dependent disabled children and non-disabled children who continue to be dependent as a result of enrolment in continuing education. In effect, this distinction between disabled and non-disabled children creates a further comparator class.

32. When read alone, the *FLA* discriminates between dependent children whose dependency stems from continuing in a course of education and dependent children who remain dependent by virtue of disability.

33. According to the Supreme Court of Canada in *Withler* supra, it is not necessary to pinpoint a particular group that corresponds to the claimant group except for the personal characteristic or characteristics alleged to

ground the discrimination. Further, “this provides the flexibility required to accommodate claims based on intersecting grounds of discrimination.”

***Withler, supra* at para 63.**

34. Section 15(2) of the *Charter* recognizes 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. Discrimination against disabled children of unmarried parents cannot be a societal objective. Further, the legislation adversely affects women and the children in their care. The Supreme Court of Canada 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.

***Moge v Moge*, [1992] 3 SSCR 813 at paras 91-92, 99 DLR (4th) 456 - Tab 35 of Applicant Mother’s Book of Authorities.**
***New Brunswick Minister of Health and Community Services v G(J)*, [1999] 3 SCR 46 at para 113, 177 DLR (4th) 124 [*G(J)]* - Tab 36 of Applicant Mother’s Book of Authorities.**

35. In *G(J)*,Justice L’Heureux Dube noted:

> 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.

***G(J), supra* at para 113 – Tab 36 of Applicant Mother’s Book of Authorities.**

36. Substantive equality is grounded in the idea that “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge

that they are recognized at law as human beings deserving of concern, respect, and consideration." Substantive equality requires the Court to focus on the actual impact of the impugned law from the perspective of a reasonable person in the circumstances of the claimants, taking into account the social, political, economic and historical factors concerning those it effects.

Withler, supra at para 39 - Tab 69 of Applicant Mother's Book of Authorities.
Kapp, _supra_ at 15 - Tab 40 of Applicant Mother's Book of Authorities.
Egan v Canada, [1995] 2 SCR 513 at para 39, 124 DLR (4th) 609 [_Egan_] – Tab 5 of Book of Authorities

37. Joshua submits that the legislative distinction, if anything, exacerbates the potential financial prejudice to disabled dependent adult children of common-law relationships, and by extension to their caregivers. For the most part, their caregivers are women - generally mothers. 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 SCR 627 at paras182 -185, 124 DLR (4th) 449 - Tab 57 of Applicant Mother's Book of Authorities.
Willick v Willick, [1994] 3 SCR 670 at paras 52-54, 119 DLR (4th) 405 - Tab 68 of Applicant Mother's Book of Authorities.
Michie v Michie (1997) 36 RFL (4th) 90,1997 CarswellSask 608 at para 22(QB) – Tab 13 of Applicant Mother's Book of Authorities.

38. Separated parents each have an obligation to meet the needs of a dependent child. "Legitimate" children, unable to withdraw from parental care because of disability, illness or other cause, are entitled to child support, possibly for their lifetime. "Illegitimate" children in Ontario, undersection 31 of the *FLA*, are denied support during adulthood, except while a student.

39. Disabled children of unmarried relationships, and their residential parents, most often mothers, face economic hardships and insecurity not visited upon those whose parents married. It is substantively discriminatory that children

and residential parents have diminished access to financial resources as a result of the parents' marital status.

40. Even if perfect public supports were in place for people with disabilities, the legislative regime here denies access to child support to "illegitimate" children in contrast to "legitimate" children, sending the message that the claimant families are less worthy of respect, concern, and consideration. This offense to dignity is substantively discriminatory.

41. Based on the preceding submissions, Joshua submits that the legislation once found to be discriminatory cannot be saved by s 15(2) of the *Charter*.

b) Perpetuating Prejudice

42. Denying disabled adult children of unmarried spouses the right to child support perpetuates the historical prejudice suffered by Canadians with disabilities, children born outside of the marriage, and women upon the dissolution of spousal relationships.

(i) Perpetuating prejudice against people with disabilities

43. Persons with disabilities have been, and continue to be, subject to exclusion and marginalization. As Justice La Forest recognized in *Eldridge*,

> Persons with disabilities have too often been excused from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years: What Progress? What Prospects? (1997), 7 NJCL 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the 'equal concern, respect and consideration' that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon the emulation of able-bodied norms; see Sandra

> A. Goundry and Yvonne Peters, Litigating for Disability and Equality Rights: The Promises and the Pitfalls (1994), at pp. 5-6.

***Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 at para 56, 151 DLR (4th) 577 – Tab 6 of Book of Authorities.**

44. A year earlier in *Eaton*, Justice Sopinka had also recognized the pervasive structuring of Canadian society around able-bodied norms, and the consequent segregation of disabled individuals outside of mainstream society. He wrote:

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structure and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

***Eaton v Brant (Country) Board of Education*, [1997] 1 SCR 241 at para 67, 151 DLR (4th) 577 – Tab 4 of Book of Authorities.**

45. In both of these cases, the Supreme Court identified the prejudice rooted in able-bodied "norms" embedded in government policies. It subsequently called for the government to take positive action in rectifying this prejudice through the accommodation of differences.

46. The systemic, structural and attitudinal barriers that people with disabilities encounter on a daily basis often prevent full participation in competitive employment, education, job training, communications, housing, public and private transportation, health care, and social services. The barriers also impair accessing other goods, facilities, services and various important opportunities in both public and private spheres of society. As a result, many Canadians with disabilities live in conditions of poverty, isolation, and despair.

M David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of Ontarians with Disabilities Act – The First Chapter" (2004) 15 NJCL 125 at 133-137 – Tab 24 of Book of Authorities

Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012) [*Advancing Substantive Equality]* – Tab 41 of Book of Authorities.

47. Although most Canadians can become self-sufficient by the time they reach the age of majority and finish school, adults with disabilities like Joshua often have difficulty in attaining this independence. As a result, laws that impose an able-bodied assumption of independence only work to perpetuate the significant prejudice that people with disabilities have traditionally faced, denying them equality by failing to accommodate their different needs.

48. The impugned statutory scheme is embedded with able-bodied norms. It demands complete financial independence at the age of majority unless the child is a student (a short-term venture hoped to promote independence). These are the "good" deserving children who might receive limited-term support. Dependence of an adult child as a result of disability is "bad" – it is possibly indefinite in duration, not likely in furtherance of soon-to-be-realized independence, and highly stigmatized. These adult children are not entitled to support despite their need or their parents' capacity to provide same.

ii) Perpetuating prejudice against children of common-law relationships

49. Before the enactment of the *Charter*, children born outside of the married suffered from a number of legal disabilities. Arguments against providing equal status to all children, irrespective of their parents' marital status, included: the belief that promoting such equality would disrespect marriage and traditional family values; the fear that abolishing the status of illegitimacy would lead to increased promiscuity; and the assertion that an intestacy was a voluntary act by which parents consciously decided to benefit children born to them in marriage and to exclude their other children. On this last point, it was argued that any proposal to bring children born outside of marriage into

the list of persons entitled to benefit on an intestacy would impinge on the principal of freedom of testation.

Ontario Law Reform Commission, Report on Family Law (Toronto: Ministry of the Attorney General, 1973) at 11-12 [*Report on Family Law*] – Tab 71 of the Applicant Mother's Book of Authorities

50. In its 1973 *Report on Family Law*, the Ontario Law Reform Commission emphasized the pervasive disadvantage suffered by children born outside of marriage which arose from the moment of birth and often remained with children throughout their entire lifetime. Among its observations, the Commission noted that the inferior status of children born outside of marriage prevented them from benefiting from the terms of a will or the protection of a statute unless a different result was expressly stated. Their status at common law had led the courts to conclude that any reference to "child", "children", or "issue" in a will or statute should be taken to refer only to children born within marriage unless the provisions in a given document unequivocally expressed a contrary intention.

***Report on Family Law*, *supra* at1, 3-7 – Tab 71 of the Applicant Mother's Book of Authorities.**

51. Given its findings, the Commission's central recommendation was that Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law. However, legislative action in Ontario was not taken until 1990 with the passage of the *Children's Law Reform Act*.

***Children's Law Reform Act*, RSO 1990, c C.12, as amended [*CLRA*] – Tab 34 of Book of Authorities.**

52. It has largely been established post-*Charter* that it is improper to draw distinctions among children based on their parents' marital status. In Ontario, the legislature sought to remove the disabilities and stigma suffered by children born outside marriage through the enactment of the *CLRA*. In particular, the equal status of all children set out in section 1:

Rule of parentage

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 marriage. R.S.O. 1990, c. C.12, s. 1 (1).

Common law distinction of legitimacy abolished
(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 therefrom shall be determined for the purposes of the common law in accordance with this section. R.S.O. 1990, c. C.12, s. 1 (4).

***CLRA, supra*, ss 1(1) and (4) as amended - Tab 34 of Book of Authorities**
***AA v BB*, 2007 ONCA 2 at paras 20-21, 83 OR (3d) 561 – Tab 2 of the Applicant Mother's Book of Authorities**

53. Further, section 2 of the *CLRA* reverses the old rule of construction at common law which excluded children born outside of the marriage.

Rule of construction
2. (1) For the purposes of construing any instrument, Act or regulation, unless the contrary intention appears, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined under section 1. R.S.O. 1990, c. C.12, s. 2 (1).

***CLRA, supra*, s 2(1) as amended – Tab 34 of Book of Authorities**

54. In those provinces that did not engage in such reform, the Courts have repeatedly held that legislative distinctions which treat children of married and unmarried spouses differently violated the equality guarantee under section 15 of the Charter. The following areas were among those affected:

a. Limitation provisions with respect to filiation proceedings and child support applications where the child was born to unmarried parents;
b. The rights of unwed biological parents in the context of adoption;
c. The enforceability of child support agreements between common-law spouses;

d. The termination of child support agreements between common law spouses;
e. The termination of child support from the father of a child born to unmarried parents upon the marriage of the child's mother;
f. The inheritance rights of children born outside of marriage; and
g. General entitlement to child support for adult children, as well as support for adult children born outside of marriage that are unable to remove themselves from their parents' charge.

***W (DS)v H (R),* [1989] 2 WWR 481, 18 RFL (3d) 162 (Sask CA) – Tab 21 of Book of Authorities**

***A (DM) K(R),* [1996] WDFL 1018, 22 RFL (4th) 65 (Sask CA) – Tab 1 of Applicant Mother's Book of Authorities.**

***D (PA)v G (L)* (1998), 89 NSR (2d) 7, 227 APR 7 (Fam Ct) - Tab 18 of the Applicant Mother's Book of Authorities**

***G (MJ)v M (KT)* (1990), 96 NSR (2d) 366, 253 APR 366 (Fam Ct) – Tab 7 of Book of Authorities**

***K (L)v L (TW)* (1988), 31 BCLR (2d) 41, 1998 Carswell BC 342 (Prov Ct) – Tab 25 of the Applicant Mother's Book of Authorities**

***M (RH)v H (SS)* (1994), 26 Alta LR (3d) 91, 121 DLR (4th) 335 (Alta QB) – Tab 30 of the Applicant Mother's Book of Authorities**

***Rath v Kemp* (1996), 200 AR 357, 26 RFL (4th) 152 (CA) – Tab 43 of the Applicant Mother's Book of Authorities**

***Williams v Haugen*, [1998] 2 WWR 269, 65 Sask R 207 (Unified Fam Ct) - Tab 22 of the Applicant Mother's Book of Authorities**

***M (N) v British Columbia (Superintendent of Family & Child Services*), [1987] 3 WWR 176, 34 DLR (4th) 488 (BCSC) – Tab 10 of the Applicant Mother's Book of Authorities**

***P(CE) vV(G)* (1993), 45 RFL 3(d) 424, 101 DLR (4th) 726 (Sask QB) - Tab 16 of the Applicant Mother's Book of Authorities**

***Milne (Doherty) v Alberta (Attorney General)*, [1990] 5 WWR 650, 26 RFL (3d) 389 (Alta QB) – Tab 33 of the Applicant Mother's Book of Authorities**

***Surette v Harris Estate*(1998), 91 NSR (2d) 418, [1989] NSJ No 262 (QL) (SC (TD)) - Tab 53 of the Applicant Mother's Book of Authorities**

***Tighe (Guardian ad litem of) v McGillivray Estate* (1994), 112 DLR (4th) 201,[1994] NSJ No 61 (QL) (CA) - Tab 59 of the Applicant Mother's Book of Authorities**

***PT v RB*, 2004 ABCA 244, 242 DLR (4th) 30 - Tab 55 of the Applicant Mother's Book of Authorities**

***Massingham-Pearce v Konkolus*, [1995] 7 WWR 183, 13 RFL (4th) 313 (Alta QB) [*Massingham-Pearce*] - Tab 32 of the Applicant Mother's Book of Authorities**

55. In *Massingham-Pearce*, the Court of Queen's Bench of Alberta considered the constitutionality of the definition of "child" under the *Maintenance Order Act*, which explicitly excluded "illegitimate" children as follows:

> 1. In this Act,
> (a) "child" includes a child of a child,and the child of a husband or wife by a former marriage, but does not include an illegitimate child.

As a result of this definition, the Act's child support provisions did not extend to children born outside of marriage.

***Massingham-Pearce, supra* – Tab 32 of the Applicant Mother's Book of Authorities**
***Maintenance Order Act*, RSA 1980, c M-1 – Tab 39 of Book of Authorities.**

56. In his decision, Justice Roslak found that the Act's definition of "child" violated section 15(1) of the *Charter* in drawing a discriminatory distinction between children of married and unmarried parents. Roslak J. acknowledged that children born outside of marriage, like all children, are vulnerable because they lack political and social power. He also acknowledged, however, that their vulnerability is exacerbated by the stigma historically attached to them by their parents' marital status.

***Massingham-Pearce*, *supra* at para 38 – Tab 32 of the Applicant Mother's Book of Authorities**

57. In addition to finding discrimination against young children, Roslak J. found that the Act expressly discriminated against adult children of common-law spouses who were unable to support themselves, including by reason of mental or physical disability:

> Furthermore, the MOA also discriminates against illegitimate destitute children 16 years of age or older. This group includes illegitimate persons at least 18 years of age that has nowhere else to turn for an Order of support by a family member. By destitute, I mean that class of persons who is unable to support themselves: the full class of persons described in MOA s. 2(1). Their vulnerability comes not from youth, but from their inability to support themselves. It is a vulnerability and powerlessness, in my view, that is analogous to the vulnerability of youth. Discriminating against such a vulnerable group based on their illegitimate status violates s. 15(1) of the Charter for exactly the same reasons that discrimination against illegitimate young children violates the Charter.

The class of persons included under section 2(1) of the *Maintenance Order Act* included the "old, blind, lame, mentally deficient or impotent," as well as "any other destitute person who is not able to work."

***Massingham-Pearce*, *supra* at para 40 – Tab 32 of the Applicant Mother's Book of Authorities**

58. In *PT v. RB*, the Alberta Court of Appeal was asked to consider the appropriate test to determine whether a child of unmarried parents was entitled to support once he or she reaches the age of majority. Writing for the Court, Justice Paperny held that any test for entitlement needed to comply with Charter values and, as such, could not treat children of married and unmarried spouses differently. Paperny J. subsequently found that test articulated in the *Divorce Act* was the appropriate framework for determining entitlement, paired with jurisprudence developed as to whether a child remains dependent.

***PT v RB*, *supra* at para 13 – Tab 54 of the Applicant Mother's Book of Authorities**

59. The status of children born outside of marriage has drastically improved following the enactment of the *Charter* and the recognition of their equality under section 15. However, the prejudice historically associated with notions of "illegitimacy" continues to linger in pieces of legislation such as section 31 of the *FLA* that mark children born to unmarried parents as less deserving of legal protection and support than their "legitimate" counterparts.

60. The denial of child support to dependent “illegitimate” children with disabilities suggests that parental obligation outside of marriage are less important and should be less long-lasting, perhaps because unmarried relationships are discriminatorily viewed as less important and lesslong lasting than married ones. All dependent children deserve their parent’s support. In Ontario, in 2016, there is no place for categories of entitlement for children based on their parents’ marital status.

c) Stereotyping

61. The notion that children born outside of marriage are less wanted, less valued, less loved, and consequently less deserving of parental support is a stereotype that the *FLA* perpetuates by denying child support to adult children with disabilities on the basis of their parent’s marital status.

62. This stereotype flows from the prominent position that the institution of marriage has traditionally held within society and, by extension, the historical disadvantage suffered by unmarried cohabitating spouses. As Justice McLachlin, as she was then, noted in ***Miron***, “[t]here is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits.”

***Miron*, *supra* at paras 41 and 152 - Tab 34 of the Applicant Mother’s Book of Authorities**
***Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 at paras 41-42, [2002] 4 SCR 325 – Tab 14 of Book of Authorities**

63. The Courts have repeatedly recognized the flawed and antiquated nature of this stereotypein several provincial jurisdictions. Some legislative change has also occurred. However, the Ontario Legislature has not been consistent in

upholding the equal status of all children irrespective of parentage, as evidenced by section 31 of the *FLA*.

***AAv BB*, *supra* at paras 20-21- Tab 2 of the Applicant Mother's Book of Authorities**

d) Conclusion of section 15 analysis

64. Section 31 of the FLA violates Joshua's equality right under section 15(1) of the *Charter* on the three grounds of marital status, disability, and sex. By foreclosing entitlement to child support for disabled adult children whose parents never married, this provision engenders significant legal, economic, symbolic and social disadvantage to adults with disabilities and their caregiver parent. It perpetuates prejudice against Canadians with disabilities, children born outside of marriage and women. Ultimately, the impugned provision expresses the stereotype that children born to unmarried parents are less worthy of parental support than children born to married spouses.

65. It is time to end this discrimination. As McLachlin J. said in *Miron v Trudel*, marital status was not a reasonable criterion-even in 1980.

***Miron*, supra at para 183 - Tab 34 of the Applicant Mother's Book of Authorities**

Issue Three: Is Joshua's right to security of the person as guaranteed by 7 of the *Charter* infringed by the provisions of section 31 of the *FLA*?

66. Section 7 of the *Charter* guarantees that everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principals of fundamental justice.

67. The section 7 analysis involves two steps. The first step relates to the individual values at stake and considers whether the impugned state action has violated them. The second step focuses on the possible limitations of these values when considered in conformity with the principles of fundamental justice.

***Chaoulli v Quebec (Attorney General),* 2005 SCC 35 at para 29,[2005] SCR 791 - Tab 14 of the Applicant Mother's Book of Authorities**
***Carter v Canada (AG)*, 2015 SCC 5 at para 55, [2015] 1 SCR 331 – Tab 13 of the Applicant Mother's Book of Authorities.**

a) Background of parental rights and section 7 of the Charter

68. Historically, the concept of *"parental rights"* impacted on the formation and integrity of the family unit. The 1950's Supreme Court trilogy articulated this principle.

***Martin v Duffell*, [1950] SCR 737, [1950] 4 DLR 1 – Tab 11 of Book of Authorities.**
***Hepton v Maat*, [1957] SCR 606, 10 DLR (2d) 1 – Tab 9 of Book of Authorities.**
***McNeilly v Agar*, [1958] SCR 52, 11 DLR (2d) 721 – Tab 12 of Book of Authorities.**

69. The Courtin *Hepton v Maat* stated:

> 1 It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: prima facie the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. As parens patriae the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility, as if, for example, he were a homeless orphan wandering at large.
>
> 2 The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.

***Hepton v Maat*, *supra* at paras 1-2 – Tab 9 of Book of Authorities.**

70. It is clear that the parents have the right to raise their child; the child has a corresponding and reciprocal right to be part of the family unit. While the Trilogy predates the *Charter*, the Supreme Court has continued to recognize membership in the family unit as part of the security of the person protected under section 7 of the *Charter.*

***G(J), supra* at paras 61-62 – Tab 36 of Applicant Mother's Book of Authorities.**

***B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 at paras 83, 85, 122 DLR (4th) 1 – Tab 1 of Book of Authorities.**

71. With any set of rights comes responsibilities.

***C (R) v Children's Aid Society of Hamilton* (2004), 70 OR (3d) 618 at paras 37-38, 4 RFL (6th) 98 (Sup Ct) – Tab 3 of Book of Authorities.**

72. A number of rights and responsibilities accrue to the members of a family unit, including the right to support, and the obligation to support. However, these rights are not unlimited or open-ended, as evidenced by the provisions of the *Divorce Act* and the *FLA,* both of which provide for the termination of child support. The question becomes "where is the limit?"

73. The Supreme Court has recognized that individuals' economic rights may be protected under section 7 of the *Charter.*

***Irwin Toy v Quebec*, [1989] 1 SCR 927 at para 96, 58 DLR (4th) 577 [*Irwin Toy*] – Tab 24 of Applicant Mother's Book of Authorities.**

74. The Court in *Irwin Toy* comments on the nature of economic rights which may be protected:

> Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to

> human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights**.**
>
> ***Irwin Toy supra* at para 96.**

75. In ***Gosselin v Quebec****,* the Court held that while the courts have not yet recognized section 7 as providing a positive obligation to create or protect economic rights, such an obligation is not foreclosed. The *Charter* is constantly evolving.

***Gosselin v Quebec*, 2002 SCC 84 at para 82, [2002] 4 SCR 429 [*Gosselin*] – Tab 23 of the Applicant Mother's Book of Authorities.**

76. While the Court held that the then-current interpretation of section 7 was that it prevented or restricted state action which interferes with security of the person, it did not foreclose the possibility that section 7 may be used to create positive economic rights and obligations.

***Gosselin supra* at paras 80-83, 209 – Tab 23 of the Applicant Mother's Book of Authorities.**

77. The right to the security of the person protects the physical and psychological integrity of the individual. Psychological integrity is affected where the state action causes "greater than ordinary stress and anxiety."

***R v Morgentaler*, [1988] 1 SCR 30 at para 22, 44 DLR (4th) 385 – Tab 17 of Book of Authorities**
***Chaoulli, supra* at paras 116-117 – Tab 14 of Applicant Mother's Book of Authorities.**

78. Section 31 of the *FLA* violates the right to security of the person of disabled adult children of common law spouses by precluding their continued entitlement to child support. The government support programs in place to ensure that Ontarians with disabilities receive the financial support they require are grossly inadequate. This inadequacy subsequently translates into increased levels of poverty among people with disabilities and their caregiving parent, which in turn impairs their physical and psychological integrity.

SSAH Passport Provincial Coalition, Social Exclusion? How Government Programs are Failing Persons with Developmental Disabilities (SSAH Passport Coalition: June 2012) at pp. 3-4 online: SSAH Passport Provincial Coalition http://family-alliance.netfirms.com/family-alliance.com/pdfdocs/Social%20Exclusion%20-SSAHPC%20June2012.pdf (date accessed: October 30, 2016) – Tab 28 of Book of Authorities.

Bruce G. Link & Jo Phelan, "Social Conditions As Fundamental Causes of Disease" (1995) 35 Journal of Health and Social Behaviour 80 – Tab 27 of Book of Authorities.

Jo C. Phelan, Bruce G. Link & Parisa Tehranifar, "Social Conditions as Fundamental Causes of Health Inequalities: Theory, Evidence, and Policy Implications" (2010) 51 (S) Journal of Health and Social Behaviour – Tab 28 of Book of Authorities.

Dennis Raphael, "Barriers to Addressing the Societal Determinants of Health: Public Health Units and Poverty in Ontario, Canada" (2003) 18 Health Promotion International 397 – Tab 23 of Book of Authorities.

Dennis Raphael, "Poverty, Income Inequality, and Health in Canada" (Toronto: CSJ Foundation for Research and Education, June 2002), online: <http://www.povertyandhumanrights.org/docs/incomeHealth.pdf> (date accessed: November 6, 2016) – Tab 26 of Book of Authorities.

79. The impact of the impugned legislation interferes with Joshua's ability to support himself, and in effect, his overall ability to survive. The effect of the legislation is to deny his economic right to sustain himself in a fundamental sense.

***R v Banks*, 2007 ONCA 19 at para 81, 84 OR (3d) 1 – Tab 42 of Book of Authorities.**

b) The recognition of Joshua's right to continued support represents the preservation of an already-recognized economic right rather than the creation of an economic right

80. The Federal Government in exercising its jurisdiction over divorce recognizes that immediate familial responsibility extends to the continued support of disabled adult children, those in programs of education, and spouses. Moreover, it recognizes the continuity of the obligation even after the marriage ends. The province also recognizes support obligations between and among family members, including the obligation for adult children to support dependent parents who have cared for or provided support to the children.

***Divorce Act*, *supra*, s 15.1 – Tab 36 of Book of Authorities.**
***FLA*, *supra*, s 32 – Tab 37 of Book of Authorities.**

81. For each of the parties, the rights and obligations are inchoate until triggered. The trigger event may be separation, ongoing educational dependency, spousal dependency, parental dependency, and in the case of divorce, continued dependency by illness or disability. The government, in adopting the *Child Support Guidelines,* recognizes the individual nature of the intra-familial right and obligation.

***Child Support Guidelines,* O Reg 391/92 – Tab 33 of Book of Authorities.**
***Federal Child Support Guidelines*, SOR/97-175 – Tab 38 of Book of Authorities.**

82. The Ontario legislation has the effect of arbitrarily removing financial security in the case of disabled children. Joshua, in theory, has an obligation to contribute to the support of his mother, and to the support of his father should they require it and if he is in a position to provide it.

***FLA*, *supra*, s 32 – Tab 37 of Book of Authorities.**

83. The fact that his obligation is inchoate should not render Joshua's reciprocal right any less real, as he remains a member of the family unit. He receives payments under the *Ontario Disability Support Program Act* (ODSP). The fact that Joshua receives ODSP may impact the quantum of any support award he receives, but does not alter the liability to pay it. Moreover, the fact that Ontario will end the child support dollar for dollar claw back program for ODSP recipients as of January 1st 2017 acknowledges the social problem of child poverty and the importance of Joshua's continued need for support. Wayne's obligation to pay support stems from the family relationship, whereas ODSP is part of the general social contract between the state and its citizens. The Act itself recognizes that the support for disabled individuals is a shared responsibility between families, the state, and disabled individuals to the extent that they are capable of supporting themselves.

***Ontario (Director of Disability Support Program)v Ansell*, 2011 ONCA 309**

at para 9, 333 DLR (4th) 489 – Tab 15 of Book of Authorities.

***Ontario Disability Support Program Act,* SO 1997, c 25, s 1 [*ODSP Act*] – Tab 40 of Book of Authorities**

News Release, Ontario Ensuring that Vulnerable Families Keep Child Support Payments, Ministry of Community and Social Services, June 29, 2016, online: https://news.ontario.ca/mcss/en/2016/06/ontario-ensuring-that-vulnerable-families-keep-child-support-payments.html (date accessed: October 31, 2016) – Tab 25 of Book of Authorities.

84. Moreover, the *FLA* in its preamble recognizes the mutuality and reciprocity of the rights and responsibilities that go with membership in a family unit:

> *"Whereas it is desirable….to provide for other mutual obligations in family relationships including the equitable sharing by parents of responsibility for their children."*
>
> ***FLA*, *supra,* preamble – Tab 37 of Book of Authorities.**

85. Accordingly, there exists a strong legal basis and an underlying social basis for recognizing ongoing disability as triggering a right to ongoing support from the family unit as well as from the state.

86. Joshua submits that the application of section 7 of the *Charter* does not create an economic right for him; it simply preserves the financial security that would otherwise accrue to him had his parents been married and divorced. Denial of child support, or inadequate support provision, directly promotes poverty, especially in lone-parent families headed by women.

The Vanier Institute of the Family, *Families Count Profiling Canada's Families* (Ottawa:2010) at 104-105 – Tab 30 of Book of Authorities.

C) Section 31 of the *FLA* is arbitrary

87. According to the Supreme Court of Canada in *Chaoulli* it is a well-recognized principle of fundamental justice that laws should not be arbitrary. Further, the state is not entitled to arbitrarily limit its citizens' right to life, liberty and the security of

person. A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]" (*Chaouilli)*.

***Chaoulli, supra* at paras 129-130 – Tab 14 of Applicant Mother's Book of Authorities.**

See also *Carter, supra* at para 83 – Tab 13 of Applicant Mother's Book of Authorities.

88. Section 31 of the *FLA* extends the right to support to some adult children. It is arbitrary and manifestly unfair to limit the right to support on the basis of disability and Joshua's parent's marital status. The legislation impliedly places value on the future ability of able-bodied children to one day become independent financial contributors to society. However, because of Joshua's disability, he will never be able to contribute financially to society and therefore the legislation implies that his needs (and his contributions) are, in effect, less worthy of support. Albeit assumptions that lead to the design of exclusionary laws and policies may be unintentional. However, they are still unacceptable.

***Chaoulli, supra* at para 131 – Tab 14 of Applicant Mother's Book of Authorities.**

***Advancing Substantive Equality, supra* at 42-45 – Tab 41 of Book of Authorities.**

89. Denying Joshua support would have a devastating impact on his well-being and standard of living to the extent that it would breach his section 7 *Charter* right to his security of person.

Issue Four: If section 31 of the *FLA* violates sections 7 or 15 of the *Charter*, is it saved by section 1?

90. As a first step, it is useful to examine the cultural and legal context as a backdrop to the current litigation. The case law and legislation over the past several years have aimed at removing distinctions based on characteristics such as marital status, sexual orientation, and gender.

***Miron, supra* [common law spouses] – Tab 34 of Applicant Mother's Authorities.**

***Halpern v Toronto* (2003) 65 OR (3d) 201, 225 DLR (4th) 529(CA) [same sex marriage] - Tab 8 of Book of Authorities.**

***Rutherford v. Ontario*(2006), 81OR (3d) 81, 292, 270 DLR (4th) 90 (Sup Ct) [lesbian co-mothers and *Vital Statistics Act*] – Tab 20 of Book of Authorities.**

***AA v BB*, *supra* [declaration of parentage – same sex couples] – Tab 2 of Applicant Mother's Book of Authorities.**

***Civil Marriage Act,* SC 2005, c 33 [same sex marriage] – Tab 43 of Book of Authorities.**

Bill 28, All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016 [equal treatment of different types of families] – Tab 31 of Book of Authorities.

91. The Court of Appeal for Ontario in *AA v BB* commented on the evolution of the equal treatment of children of unmarried partners as follows:

> 20 The *CLRA* was intended to remove disabilities suffered by children born outside of marriage. As the Ontario Law Reform Commission observed in its 1973 Report on Family Law at p. 1: "These disabilities arise at the moment of birth and may remain with the child throughout his lifetime." The Commission therefore "accorded high priority to finding a means by which the child born outside marriage may be allowed to enjoy the same rights and privileges as other children in our society". The Commission's central recommendation was that Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law. The Commission's recommendations were enacted into legislation in the form of Parts I and II of the *CLRA*. The Commission's central recommendation concerning equality of children is found in the Act's first section:
>
> (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 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 therefrom shall be determinedfor the purposes of the common law in accordance with this section.

***AA v BB, supra* at para 20 – Tab 2 of Applicant Mother's Book of Authorities.**

92. It is axiomatic that each case and each set of facts represents a step in the evolution of the law and the continuing development of the principle of equality. The facts of this case, which contrasts the statutory rights of adult

disabled children of married as opposed to unmarried partners, provides the potential for another step in the direction of equality.

95 The Supreme Court in *DBS* specifically recognized that the provinces have the constitutional competence to legislate child support outside the *Divorce Act*. However, that competence is not without limits. As Justice Bastarche noted:

> ***52*** *The provincial power to regulate child support matters in contexts not involving divorce must therefore remain unfettered. While it is desirable that the federal and provincial governments treat children of married and unmarried parents the same, this does not mean that the Guidelines should trump the legislative will of the provinces. To the contrary, symmetry for married and unmarried parents can be achieved both ways: provinces may choose to adopt the federal regime, but Parliament may also decide to accept provincial solutions. Accordingly, the Divorce Act presently ensures consistency within the province by allowing certain provincial regimes to apply to divorces within the province: s. 2(5). It is not for courts to take it upon themselves to create a single, national system of child support.*
>
> ***53*** *Thus, within constitutional limits, provincial governments are free to adopt a different approach than the one found in the Divorce Act and in the Guidelines. For instance, a province may choose to implement a regime wherein both parents have joint and several responsibility to support their children according to their needs. In such a situation, any deficit in payment from the payor parent would need to be made up by the recipient parent, such that the child would never be left with an unfulfilled entitlement. To the extent the recipient parent picks up this deficit, then, the child could not seek further compensation from the deficient payor parent. In such a case, the difference between the federal and provincial regimes could mean the difference between finding that the payor parent has an unfulfilled obligation towards his/her children, and finding that no such unfulfilled obligation exists*.

DBS, supra **at paras 52-53 – Tab 48 of Applicant Mother's Book of Authorities.**

96. The key themes in the passage above are the desirability of equal treatment even though the means may be different [para 52], and the Constitutional limits on the powers of the provinces to legislate [para 53].

97. To stand in the face of a *prima facie* breach, the impugned legislation must be demonstrably justified in a free and democratic society. Section 15(2) of the *Charter* provides guidance forthe sorts of preferential or discriminatory

acts that society will tolerate. For the rest, Justice Dickson in *R v. Oakes* has the following:

> 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.

***R v. Oakes*, [1986] 1 SCR 103 at para 67, 26 DLR (4th) 200 – Tab 42 of Applicant Mother's Book of Authorities.**

98. Joshua submits that the distinction in treatment between disabled dependent adult children of married parties and disabled dependent adult children of parties who were not married cannot be justified by any reasonable interpretation of section 1 of the *Charter.* The sole distinction is his parents' marital status.

99. The test for interpreting whether a statutory provision that violates the *Charter* may be saved by section 1 has been articulated as follows:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. 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 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.

***Egan, supra* at para 182 – Tab 5 of Book of Authorities.**

100. Joshua submits that none of these criteria are satisfied on the facts of this case.

The objective of the legislation

101. The parent-child relationship gives rise to both moral and legal obligations.

***DBS, supra* at para 37 – Tab 48 of Applicant Mother's Book of Authorities.**

102. Both the *Divorce Act* and the *FLA* impose a child support obligation. The economic and social goal of child support legislation is both pressing and substantial. However, it is the creation of this objective, not its limitation which is both pressing and substantial, given the effects of inadequate support on separated or divorced families.

***Michie v Michie*,(1997), 36 RFL (4th) 90, 1997 CarswellSask 608 (WL Can) at paras 22-25 (QB) – Tab 13 of Book of Authorities.**

Reasonable and demonstrably justifiable?

103. Both the *Divorce Act* and the *FLA* limit the support obligation. The question becomes whether the limitation is "*reasonable and demonstrably justifiable in a free and democratic society."* Applying the three-part test from *Oakes*:

(c) Is the rights violation rationally connected to the aim of the legislation*?*

104. The legislative aim is to provide support for dependents, which typically include children. This goal is clear from the provisions of the *Divorce Act*, the *FLA* and the statement of objectives within the Federal *Child Support Guidelines*.

***Divorce Act*, *supra,* s. 15.1(1)(a) – Tab 36 of Book of Authorities.**
***FLA, supra,* s. 32(7) – Tab 37 of Book of Authorities.**
***Federal Child Support Guidelines,* SOR/97-175, s 1 – Tab 38 of Book of Authorities.**

105. Joshua submits that there is no connection between the limitation on his right to support and the overarching objective of the legislation. On the contrary, the limitation conflicts with the legislative objective. On this ground alone any

argument attempting to save the *FLA* limitation under section 1 of the *Charter* must fail.

(b)Does the impugned provision minimally impair the Charter guarantee?

106. The effects of inadequate support are so well documented and well known that they are and have been the subject of judicial notice for nearly 20 years.

Thibaudeau v Canada, [1995] 2 SCR 627 at paras 182 - 185, 124 DLR (4th) 449 – Tab 57 of the Applicant Mother's Book of Authorities.
Willick v Willick, [1994] 3 SCR 670 at paras 52-54, 119 DLR (4th) 405 – Tab 68 of the Applicant Mother's Book of Authorities.

Michie v Michie, supra at para 22 - Tab 13 of the Applicant Mother's Book of Authorities.

Moge v Moge, [1992] 3 SCR 813 at paras 91-92, 99 D.L.R. (4th) 456 - Tab 35 of the Applicant Mother's Book of Authorities.

107. In this context, Joshua submits that the *FLA*, in excluding him from support entitlement, fundamentally impairs the security of his person. Similarly, it has the effect of creating multiple classes of dependent children with little or no rationale for distinguishing hence discriminating, between them. The identified classes for the purpose of comparison in this argument:

(i)Disabled adult children of unmarried, separated parents; contrasted with disabled adult children of divorced parents;

(ii) Disabled adult children of unmarried, separated parents; contrasted with dependent adult children of Divorced or unmarried parents who are pursuing education;

(iii) Disabled children of Married but separated parents who have chosen not to Divorce, contrasted with disabled adult children of divorced parents.

c. Is there 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?

108. The effect of the limitation in section 31 of the *FLA* is to exclude Joshua and others like him from the support he might otherwise expect as a member of a family unit. Courts and legislatures recognize that some support obligations are open ended. Generally, child support obligations will be terminable on the happening of some event, usually connected to financial independence or maturity of the child. However, this is not always the case given the provisions of the *Divorce Act,* which allow for ongoing support for disabled adult children. Joshua submits that the *FLA's* legislative limits are disproportionate to the impact on him and other disabled adult children, and fail to recognize that the obligation to support is a partnership between the individual, the family and the state as articulated in the statement of purposes of the *Ontario Disability Support Program Act.*

***ODSP Act, supra* – Tab 40 of Book of Authorities.**

109. Accordingly, Joshua submits that section 31 of the *FLA* violates both section 7 and section 15 of the *Charter*, *and* is not saved by the application of section 1.

Remedies sought

110. Joshua submits that the appropriate remedy is an order reading the definition of "Child of the Marriage" as defined in the *Divorce Act* into section 31 of the *FLA*. This will have the effect of putting him on an equal footing with disabled children of divorced parents and will cure the mischief that arises from the allocation of rights depending on the marital status of one's parents. It will further achieve the legal and social objectives outlined in the purpose

statements and text of the *FLA* and the *Ontario Disability Support Payments Act*.

PART V – TIME ESTIMATE

111. Counsel for Joshua Coates expects their portion of oral argument to last for approximately 2 hours.

PART VI – LIST OF AUTHORITIES

1.	B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315
2.	Benner v. Canada (Secretary of State), [1997] 1 SCR 358
3.	C. R. v. Children's Aid Society of Hamilton, (2004) 70 O.R. (3d) 618
4.	Eaton v. Brant County Board of Education, [1997] 1 SCR 241
5.	Egan v. Canada, [1995] 2 SCR 513
6.	Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624
7.	G (MJ) v. M (KT) (1990), 96 NSR (2d) 366, 253 APR 366 (NS Fam Ct)
8.	Halpern v. Canada (Attorney General), (2003) 65 O.R. (3d) 161
9.	Hepton v. Maat, [1957] S.C.R. 606
10.	M.(N.) v. British Columbia (Superintendent of Family & Child Services), 1986 CarswellBC 22
11.	Martin v. Duffell, [1950] S.C.R. 737
12.	McNeilly v. Agar, [1958] S.C.R. 52
13.	Michie v. Michie, 1997 CanLII 11212 (SK QB)
14.	Nova Scotia (Attorney General) v. Walsh, [2002] 4 SCR 325
15.	Ontario (Disability Support Program) v. Ansell, 2011 ONCA 309 (CanLII)
16.	P (CE) v V (G) (1993), 45 RFL (3d) 424
17.	R. v. Morgentaler, [1988] 1 SCR 30
18.	Ramsay v. Ramsay, (1976) 13 O.R. 2d 85 (C.A.)
19.	Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519
20.	Rutherford v. Ontario (Deputy Registrar General), 2006 83 O.R. 3d 201 (C.A.)
21.	W. (D.S.) v. H. (R.) 1988 CarswellSask 341
22.	Williams v Haugen 1988 CarswellSask 248, [1988] 2 W.W.R. 269, 65 Sask. R. 207
23.	Dennis Raphael, “Barriers to Addressing the Societal Determinants of Health: Public Health Units and Poverty in Ontario, Canada” (2003) 18 Health Promotion International 397.

24.	M. David Lepofsky, “The Long, Ardous Road to a Barrier-Free Ontario for People with Disabilities: The History of Ontarians with Disabilities Act – The First Chapter” (2004) 15 NJCL 125 at 133-137
25.	News Release, Ontario Ensuring that Vulnerable Families Keep Child Support Payments, Ministry of Community and Social Services, June 29, 2016, https://news.ontario.ca/mcss/en/2016/06/ontario-ensuring-that-vulnerable-families-keep-child-support-payments.html
26.	Dennis Raphael, Poverty, Income Inequality, and Health in Canada (Toronto: CSJ Foundation for Research and Education, June 2002), online: < http://www.povertyandhumanrights.org/docs/incomeHealth.pdf>
27.	Bruce G. Link & Jo Phelan, “Social Conditions As Fundamental Causes of Disease” (1995) 35 Journal of Health and Social Behaviour 80.
28.	Jo C. Phelan, Bruce G. Link & Parisa Tehranifar, “Social Conditions as Fundamental Causes of Health Inequalities: Theory, Evidence, and Policy Implications” (2010) 51 (S) Journal of Health and Social Behaviour
29.	SSAH Passport Provincial Coalition, Social Exclusion? How Government Programs are Failing Persons with Developmental Disabilities (SSAH Passport Coalition: June 2012) at pp. 3-4 online: SSAH Passport Provincial Coalition http://family-alliance.netfirms.com/family-alliance.com/pdfdocs/Social%20Exclusion%20-SSAHPC%20June2012.pdf (date accessed: October 30, 2016).
30.	The Vanier Institute of the Family, Families Count Profiling Canada’s Families (Ottawa: Vanier Institute of the Family, 2010) at 104-105
31.	Commission for the Review of Social Assistance in Ontario: Discussion Paper: Issues and Ideas June 2011; Francis Lankin, Munir Sheikh – commissioners p. 13
32.	Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Toronto: September 2012)
33.	R. v. Banks, 2007 ONCA (CanLII)

PART VII – LEGISLATION

1.	*Child Support Guidelines*, O Reg 391 97
2.	*Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 1 and 2
3.	*Constitution Act*, 1982, R.S.C. 1985, App. II, No. 44, Sched. B, Pt. I, ss. 1, 7 and 15
4.	*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), Ss 2 and 15.1
5.	*Family Law Act*, R.S.O. 1990, c. F.3, Preamble and ss. 31-32
6.	*Federal Child Support Guidelines*, SOR 97-175
7.	*Maintenance Order Act*, RSA 2000, c M-2
8.	*Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sched. B, s. 1
9.	*Civil Marriage Act,* SC 2005, c 33
10.	Bill 28 - An Act to amend the Children's Law Reform Act

PART VIII: ORDERS SOUGHT

112. An order that section 31 of the Ontario *FLA* violates Joshua Coates's rights under sections 7 and 15 of the *Charter of Rights and Freedoms*.

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113. An order reading the definition of "Child of the Marriage" as defined in the *Divorce Act* in to section 31 of the *FLA*.

114. Costs.

All of which is respectfully submitted

November 7, 2016

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Andrew Sudano

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Shelley M. Kierstead

Counsel for the added respondent Joshua Coates