

1995

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## Citation Information

Morrison, Ian and Pearce, Gwyneth. "Under the Axe: Social Assistance in Ontario in 1995." *Journal of Law and Social Policy* 11. (1995): 1-18.

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol11/iss1/1>

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# “UNDER THE AXE: SOCIAL ASSISTANCE IN ONTARIO IN 1995”

IAN MORRISON AND GWYNETH PEARCE\*

## RÉSUMÉ

L'aide sociale en Ontario est en situation de crise. Dans cet article, on étudie les développements dans les domaines législatifs, des politiques et des litiges de l'année électorale 1995. Il était nécessaire de se concentrer sur le programme dévastateur de réductions sauvages du nouveau gouvernement provincial. Les auteurs examinent les nombreuses façons dont seront touchés les demandeurs et les bénéficiaires par les réductions du gouvernement, font part des diverses initiatives reliées aux litiges sur divers fronts et donnent un aperçu de la situation de l'Ontario dans une perspective nationale et internationale.

## 1. INTRODUCTION

1995 was a watershed year for social assistance recipients in Ontario, the year in which the “war on the poor” began in earnest. We write this article just months after a Conservative majority was elected in the June 1995 Ontario election, following an election campaign in which attacks on the welfare system and welfare recipients were a major plank. Many of the political and legal struggles of the past year are now little more than historical footnotes, as the new government moves swiftly with sweeping changes to Ontario's social assistance system. The government made its agenda clear when it announced its first strike, a brutal 21.6 per cent cut to assistance rates.

A truly staggering number of people will be affected by these changes. Although the rate of increase in Ontario's social assistance caseloads has slowed dramatically since the early years of the recession, the overall caseload has not dropped. The number of “employable” welfare recipients is down slightly, reflecting slight improvements in the labour market, but the numbers of sole support

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parents on welfare and disabled recipients have remained constant and even increased slightly. There are still 1.3 million people in families on social assistance in Ontario. Short of wholesale disqualifications (and it would be premature to discount any options for the new government), there is simply no chance that this number will drop significantly. Pending changes to the federal Unemployment Insurance (UI) scheme, following steady cutbacks to UI since 1990, mean that tens of thousands of Ontarians either will no longer be covered by UI or will get less benefits for a shorter time. These changes alone will put renewed pressure on the social assistance system, pressure that will be greatly increased if, as many economists predict, Ontario enters another recession in 1996 or 1997.

## 2. THE DEMISE OF THE CANADA ASSISTANCE PLAN

Before turning to the details of social assistance issues at the provincial level, we must mention a national development of fundamental importance for the future of social assistance programs in Canada. We refer of course to the demise of the *Canada Assistance Plan (CAP)*,<sup>1</sup> the federal-provincial cost-sharing mechanism for social assistance enacted during Canada's brief flirtation with a "war on poverty" in 1966/67. As discussed in previous articles,<sup>2</sup> the federal government began to renege from its contractual obligations under the *CAP* in 1990, when it unilaterally altered the cost-sharing formula with some provinces, including Ontario. In 1995, the *CAP* was given the *coup de grace*. As part of massive federal budget cuts, all federal contributions to provincial cost-sharing have been rolled into a single program, the *Canada Social and Health Transfer (CSHT)*. The *CSHT* is a block transfer incorporating previous separate transfers for social assistance, post-secondary education and health care.

Although the brutality of Ontario's welfare cuts has directed the attention of most advocates and anti-poverty activists to the provincial government, we should remember that the charge of "rewarding the rich on the backs of the poor" applies equally to the federal government in its funding of social programs. Few areas of government spending emerged unscathed from the 1995 federal budget, but programs aimed at the alleviation of unemployment and disadvantage saw drastically greater cuts than most other program areas. For example, one expert has calculated that while the total value of federal support for health and post-secondary education will decline by 4.4 percent from 1993-94 to 1997-98, federal support for social assistance will decline 39 percent during the same

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1. R.S.C. 1985, c. C-1.

2. See R. Ellsworth, I. Morrison, J. Keene, P. Rapsey and G. Pearce, "Poverty Law in Ontario: The Year in Review" (1994), 10 *J.L. & Social Pol'y* 1 at 6-9 [hereinafter *Review 1994*].

period.<sup>3</sup> This wholesale abandonment of any responsibility for income redistribution or alleviation of need is literally unprecedented in Canadian history.

The abolition of *CAP* means more than just a loss of monies for social assistance. The *CAP* cost-sharing arrangement required provinces to agree to a number of conditions to qualify for federal contributions, an arrangement which made *CAP* a guarantor of some minimal national standards for social assistance programs. These included an obligation to provide assistance to persons in need on the basis of prescribed categories; an inferential prohibition against “workfare”, the process of forcing applicants to “work for welfare”;<sup>4</sup> an obligation, admittedly more honoured in the breach, to calculate allowances in accordance with need; and, significantly from the perspective of advocates, an obligation to establish an appeals system and to make its existence known to persons adversely affected by welfare decisions. Under the *CSHT*, the only remaining condition on cost-sharing of social assistance is a prohibition on residency requirements for social assistance, which is virtually unenforceable for practical purposes.

There is a further consequence to the pending repeal of *CAP*. Every moment of apparent momentum towards new social assistance legislation in Ontario over the past decade has faltered in the face of provincial-municipal squabbling, internal labour tensions, economic problems and sheer lack of political will to move in such a political minefield. A full social assistance legislative package has not been before the Legislature since the current skeletal legislative scheme was enacted in the 1960s in response to the advent of the *Canada Assistance Plan*. Ironically, the death throes of *CAP* now make some form of legislative action inevitable. Ontario’s *Family Benefits Act* on its own terms ceases to operate with the repeal of *CAP* on April 1, 1996.<sup>5</sup>

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3. Estimated by Professor Novick, Ryerson University: *Civic Solidarity: Foundations of social development for the 21st century*, Address to the Annual General Meeting of the Social Planning Council of Metropolitan Toronto, 18 May 1995 (Toronto: SPC). The calculations assume the value of health and post-secondary transfers as the combined value of cash transfers and fixed tax points, and assume a same-share allocation of total federal tax transfers (arguably an unrealistic assumption in light of political pressures to preserve health spending). Professor Novick also notes that cash transfers for social spending will decline in the same period from 2.4% of GDP in 1993-94 to 1.2% of GDP in 1997-98.
  4. There is a common misconception that *CAP* actually contained an express prohibition against workfare, a misconception which arises from a misreading of s. 15(3) of the Act, which is in an unrelated Part. In fact, while it is accepted that *CAP* does prohibit workfare, the prohibition arises, as stated in the text, inferentially from the obligation to provide assistance to persons determined to be in need in Part I of the Act, the part that governs social assistance cost-sharing.
  5. *Family Benefits Act*, R.S.O. 1990, c. F.2, s.2.

### 3. LEGISLATIVE AND POLICY DEVELOPMENTS

#### 3.1. *Welfare Cops out in Force*

Aggressive policing of social assistance files was a favourite tactic of both Ontario governments this year, compounding the sense of stigmatization and abuse felt by most recipients.

Last year, the notorious "Enhanced Verification and Casefile Investigation" initiative was extended to municipalities as the centrepiece of the New Democratic Party (NDP) government's campaign against supposedly rampant welfare fraud.<sup>6</sup> In the spring of 1995, the Ministry of Community and Social Services (MCSS) distributed a package on a new branch of that initiative, "Priority Verification", designed to target social assistance cases which present a high risk of error or fraud. Participation in "Priority Verification" is not yet mandatory across the province, but has been implemented in several test municipalities. Under "Priority Verification", quarterly reports are produced identifying social assistance clients with certain factors, including: missing or duplicate Social Insurance Numbers (SINs), duplicate telephone numbers, five or more address changes in a year, one or more dependent children aged 16 or over, combined gross earnings of more than \$750 (single person), and shelter costs of 70 percent or more of total "disposable" income. Clients who appear in two or more of these reports are then subject to file verification.

After the provincial election, the new Tory government eagerly took up the campaign against supposedly widespread abuse of the system. Riding the wave of public hysteria over anti-fraud rhetoric, the new Social Services Minister, David Tsubouchi, announced that MCSS is setting up a special team to combat fraud province-wide, as well as a 1-800 "snitch-line" which will be operational in October 1995, for members of the public to report cases of suspected welfare fraud. He also announced moves to automate information sharing with other provinces and federal income security programs in order to eliminate double-dipping. As an added measure to verify eligibility, mandatory home visits will be instituted for all social assistance applicants.

Although "Enhanced Verification" succeeded this year in making many recipients' lives miserable and the Tory anti-fraud campaign will be even worse, the available evidence is overwhelming that welfare fraud "crackdowns" achieve little beyond this.<sup>7</sup> An interim report on the "Enhanced Verification"

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6. See *Review 1994* at 8-9.

7. Comparative evidence is neatly summarized in a Quebec study of that province's "welfare police": J.I. Gow et al., *Choc des valeurs dans l'aide sociale au Québec? Pertinence et signification des visites a domicile* (Department de science politique, Univ. de

campaign released in October 1994 simply confirmed that there was no evidence of widespread fraud in the social assistance system. Only a tiny percentage of the investigated cases was ever even referred for police review.<sup>8</sup> The single largest area of savings came from identifying situations where people were eligible for other government benefits for example Canada Pension Plan (CPP) benefits, and ensuring that they obtained those benefits, a saving to the Ontario government perhaps but hardly to the taxpayer. As always, of course, no effort was ever made to estimate the amount of *underpayments* to eligible recipients. The new government's proposed centralized snitch line is especially ironic, as a number of Ontario municipalities actually closed down their local snitch lines in 1995, citing lack of cost-effectiveness as a major reason.<sup>9</sup>

### 3.2 *Revenge of the "Man in the House"*

The Tory government has moved swiftly to tighten the eligibility rules for single persons living in shared accommodation. Under the current definition of "spouse", which has been in effect since 1987, where there are no support obligations,<sup>10</sup> two people may live together for three years before they are considered to be "spouses". After three years, they may still challenge a spousal determination on the basis that they are not in a relationship amounting to "cohabitation".

The new government has announced that, as of October 1995, two people sharing a residence will be treated as "spouses" regardless of how long they have lived together if they are considered to have a relationship of financial interdependence and mutual support.<sup>11</sup> A sole-support parent on Family Benefits found to be living with her "spouse" may be disqualified altogether. If a welfare

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Montreal, 1993). The study found that the government's claims about the savings from its anti-fraud campaigns were wildly exaggerated and that the welfare police in fact cost more than they recovered in fraudulently obtained benefits. The authors noted that American experience suggested that improved administrative practices in welfare offices was far more effective in ensuring proper benefit payments.

8. *Managing Social Assistance in Ontario: Finding the Problems and Fixing Them* (MCSS: 1994).
9. Claims about the effectiveness of snitch lines vary tremendously from place to place. However, we are not aware of any place where claims of massive savings have ever been supported with any hard evidence.
10. A person who has an obligation to support a recipient or any of his or her dependent children either by the terms of a court order or domestic contract, or under the *Family Law Act*, is by definition a "spouse" regardless of the duration of cohabitation. Thus, if a single mother is living with the father of her children, she is automatically considered to be living with her "spouse".
11. Currently, only persons who have lived together for three years in a relationship of "cohabitation" may be found to be "spouses".

recipient is found to be living with her "spouse", she may not apply for assistance as a single person, instead, she and her "spouse" must apply as a couple, and their combined income will be taken into account in the assessment of eligibility.

This change, combined with the new government's anti-"fraud" rhetoric, the drastic October 1995 rate reductions and determined efforts to scapegoat social assistance recipients, signals a new round of misery for poor women in Ontario. Single mothers on social assistance have always been subject to a degree of intense scrutiny, moral regulation and invasions of privacy. The history of Mother's Allowances in Ontario, as in many other jurisdictions, is the history of constant surveillance, degrading investigations, random early morning and late night raids on houses and apartments, constantly responding to anonymous denunciations by "concerned citizens" and so on.<sup>12</sup> While the enactment of the three-year cohabitation rule and related amendments by no means ended all such intrusive and degrading treatment, it unquestionably improved the situation for many recipients. The grace period is now clearly over and we face a return to pre-1987 conditions.

Whether the Tories will succeed in implementing this new definition remains to be seen. This is probably a politically popular move. However, the current definition was enacted in 1987 to settle a constitutional challenge to the longstanding definition of "spouses" as people who lived together "as husband and wife". While the Ontario challenge was never judicially decided because of the settlement, the Nova Scotia Supreme Court last year struck down<sup>13</sup> an almost identical definition as a violation of the *Canadian Charter of Rights and Freedoms*.<sup>14</sup> While the precise wording of the new Tory definition has not been revealed, it appears that it will strongly resemble the "old" definition as glossed by judicial interpretation.<sup>15</sup> Whether the new

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12. While this history has been largely undocumented in Canada, recent scholarship is making more evidence of these historical practices available: see M. Little, "'Manhunts and bingo blabs': The moral regulation of Ontario single mothers" (1994), 19 *Cdn. J. of Sociology* 233; M. Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario 1920-93* (York University, 1994) [unpublished Ph.D. Thesis]; J. Struthers, *The Limits of Affluence* (Toronto: University of Toronto Press, 1994).
  13. *R. v. Rehberg* (1993), 127 N.S.R. (2d) 331 (N.S.S.C.).
  14. S.33 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
  15. The leading decision on the "old" definition was *Re Warwick and Minister of Community and Social Services* (1978), 21 O.R. (2d) 528 (C.A.), rev'g. 15 O.R. (2d) 682 (Div. Ct.). In that case, the Ontario Court of Appeal held that:

Marriage involves a complex group of human interrelationships—conjugal, sexual, familial and social as well as economic. In more than the romantic sense, cohabitation and consortium are regarded as basic elements of marriage. It would be wrong to say that these elements are not present

definition could withstand constitutional challenge, and whether one will be brought, are open questions.

### 3.3 *Family Violence*

After lengthy consultation and delays, MCSS finally approved an important policy on family violence early in 1995, before the provincial election. The purpose of the policy is to provide a consistent framework for responding to applicants and recipients who have been abused. The policy was released in conjunction with a plan to have all social assistance workers in the province participate in training sessions on recognizing and responding to violence and abuse. The existence of family violence is relevant to a wide range of issues in social assistance administration, including the ability to provide information to determine eligibility, the obligation to seek support, the existence of "special circumstances" for teens, and the reduction of assistance payable to some sponsored immigrants.

The new policy is, overall, a progressive initiative with stated goals to ensure that the social assistance system provides support and encouragement to victims of violence and minimizes further risks to their safety. It directs workers to respect the choices of individual victims and to provide referrals and information about community resources. It also permits for waiver in limited circumstances of obligations to provide identification and "documentation" of abuse and to pursue financial resources. There are, however, a number of aspects of the policy which give serious cause for concern.

MCSS rejected a clinic proposal to incorporate a definition of "family violence" in the social assistance regulations, and instead indicated in the policy that, as a guiding principle, "family violence" should include: physical abuse, sexual abuse, and words, actions or gestures which cause an applicant to fear for personal safety or the safety of his or her children. Beyond that introductory statement, the policy and accompanying training materials appear to use different definitions of abuse depending on the class of recipient. For example, the guidelines on what constitutes family violence where the victim is a woman are more narrowly drawn than where the victim is elderly or disabled.<sup>16</sup>

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when persons, not legally married, live together as husband and wife. Considering these elements as part of the marriage or *quasi*-marriage relationship does not imply a moral judgment on the conduct of parties, but rather recognizes the reality that marriage is more than a matter of economics and involves elements broadly described by the words cohabitation and consortium.

16. The guidelines are also much narrower than those used by many professionals, counselors, community agencies and others concerned about abuse against women.



Another key reason for concern about the new policy is that it does not recognize that family violence should be a relevant and potentially mitigating factor for recipients charged with overpayments or fraud. The policy leaves this entire issue open to future review with the *status quo* to be maintained in the meantime.<sup>17</sup> It would be a sad and perverse result if the establishment of a Family Violence policy were to actually make life worse for some abuse victims.

### 3.4 *Teens and Special Circumstances*

The eligibility of 16 and 17-year-olds for welfare assistance in their own right has long been a contentious issue,<sup>18</sup> even though single teens make up only about 1 percent of the total number of welfare cases in Ontario.<sup>19</sup> The regulations currently state that teenage applicants are eligible as single adults if they can demonstrate "special circumstances".<sup>20</sup> In April 1995, MCSS issued new policy guidelines, which contain a lengthy and detailed definition of "special circumstances". According to the new guidelines, "special circumstances" include: physical, emotional or sexual abuse; irreconcilable differences and withdrawal of parental support; and inability of parents to provide adequate care and support. However, these new guidelines may have little real impact. The Tory government has targeted teen recipients for its first wave of cuts, and has announced that changes will be made to the regulations and policy in October 1995. The effect of the changes will be to require that teenagers living outside their parents' home not only demonstrate "special circumstances" to obtain welfare assistance, but also attend school or approved training, take part in a family assessment and demonstrate that their living arrangements include adult supervision.

### 3.5 *Employables*

In one of its last moves on social assistance while in office, the outgoing NDP government made significant changes to the rules governing employable welfare recipients. The definition of "self-employment", as it has been shaped in the jurisprudence, was formalized in the regulations.<sup>21</sup>

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17. An earlier draft of the policy had disapproved of treating overpayments as unrecoverable in situations of family violence, suggesting that this approach would result in "inequitable treatment between recipients who live with spouses who are not abusive and those who live with spouses who are abusers".

18. See *Review 1994* at 17-8.

19. I. Morrison, "GWA Eligibility & Entitlement Issues: 'Special Circumstances' - Teens" (CRO: May 1995).

20. Section 7(4)(b) of O.Reg. 537, RRO 1990 [hereinafter *General Welfare Regulations*], made under the *General Welfare Assistance Act*, R.S.O. 1990, c. G.6.

21. Section 1(1) of the *General Welfare Regulations*, *ibid.* In conjunction with this amend-

The NDP also introduced Self-Employment Development Programs (SEDPs), under which recipients may obtain approval to attempt to start up their own business, as an alternative to conducting a job search.<sup>22</sup> Together with its directives on self-employment, MCSS made policy changes to permit employable applicants to take part in “employment preparation activities”, such as literacy training, development of an employment plan, counselling and educational upgrading, as alternatives to the traditional job search.<sup>23</sup>

It should be emphasized that while these new initiatives are promising overall, they are likely to be shortlived. The Tories campaigned on a pledge of universal and mandatory “workfare”, and, although there have been hints of softening on the details of the “workfare” regime<sup>24</sup>, there is no question that the new government remains committed to the concept. The commitment to workfare was reaffirmed in the provincial Throne Speech on September 27, 1995. However, implementation of a comprehensive workfare scheme of this magnitude is completely unprecedented in Canadian social assistance history and it is not likely that the full details of the new program will be worked out for several months or even longer.

### 3.6 *Other Developments*

Although overshadowed by the impact of the Tory axe, there were a few clear victories to report this year on the legislative front.

In October 1994, the welfare regulations<sup>25</sup> were amended to prohibit administrators from disclosing the identity of applicants or recipients to any member of the municipality without prior approval. This change was intended to prevent repeats of earlier crises in which local politicians attempted to acquire lists of welfare recipients in order to police the rolls.<sup>26</sup>

In December 1994, social assistance benefits became legally protected from garnishment in Ontario, even once paid into a recipient’s bank account.<sup>27</sup>

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ment, s. 1(9) of the *General Welfare Regulations* was formally qualified to permit self-employed applicants to remain eligible as long as they are not engaged in their own business on a full-time basis and are still making reasonable efforts to find other work.

22. Sections 7(3.1) and 7(3.2) of the *General Welfare Regulations*, *supra*.

23. Draft directives issued in April of 1995.

24. K. Toughill, “Minister softens on workfare”, *The Sunday Star* (17 September 1995) A1, A13.

25. General Welfare Regulation, *R.R.O. 1990, Reg. 537*.

26. See *Review 1994* at 13.

27. Section 143.1(1) of the *Courts of Justice Act*, *R.S.O. 1990, c. 43*.

Unfortunately, some financial institutions appeared to be unaware of the change in the law, as clinics continued to report incidents of garnishment. Ironically, the amendment came into force just as MCSS was circulating a revised "direct deposit" policy in response to pressure from legal clinics. The revised policy acknowledges that it would be advisable for a client to receive his or her allowance by cheque rather than direct deposit where the allowance is at risk of being garnished, or where the client does not have reasonable access to a financial institution.

#### 4. LITIGATION DEVELOPMENTS

##### 4.1 *Financial Eligibility*

In December of 1994, the Ontario Court of Appeal released its decision in a case dealing with the important issue of whether government benefits received by social assistance recipients should be assessed as income on a net or gross basis: *Wedekind v. Ontario (Ministry of Community & Social Services)*.<sup>28</sup> The specific fact situation in the appeal was that the appellant was receiving Family Benefits and Unemployment Insurance benefits, which were subject to tax deductions at source. The majority of the Court of Appeal held that the Director was correct in including the gross amount of the UI benefit entitlement in the appellants' income, and not the actual amount received.<sup>29</sup> Leave to appeal this decision to the Supreme Court of Canada was subsequently refused,<sup>30</sup> and the focus of the net/gross battle has now turned to ways of distinguishing *Wedekind*.

Some SARB panels have proven to be more willing to test the limits of *Wedekind* than others. *Wedekind* is arguably not strictly binding except with respect to the precise issue at stake: the treatment of tax deductions from UI benefits under FB regulations. However, it is clear that GW appellants are more likely to succeed in persuading SARB that *Wedekind* should be distinguished than FB

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28. (1994), 21 OR (3d) 289 (C.A.). The appellants were represented by the Windsor-Essex Bilingual Legal Clinic together with Gowling, Strathy & Henderson of Toronto.

29. One aspect of the *Wedekind* decision which is easily overlooked is that the Court of Appeal expressly approved of the much-used principle of statutory interpretation that ambiguity in social assistance legislation should be resolved in favour of the recipient. Shortly after the release of *Wedekind*, the Court of Appeal issued its decision in *Kerr v. Metropolitan Toronto (Department of Social Services)* (1995), 22 O.R. (3d) 588 (C.A.), reversing the substantive decision of Campbell J., (1991), 4 O.R. (3d) 430 (Div. Ct.) on the issue of student assistance, but again, leaving untouched the key interpretative principle as to interpretation of ambiguities. The respondent in the *Kerr* case was represented by Scarborough Community Legal Services.

30. In June 1995.

appellants. This is because of a key difference between the GW and FB regulations. The GW regulations specifically provide that welfare administrators are to take into account only “available” income in determining eligibility,<sup>31</sup> while the FB regulations contain no “availability” test.

Since the release of the Court of Appeal decision, SARB has distinguished *Wedekind* and ordered net treatment of benefit income in cases involving garnishment of CPP benefits,<sup>32</sup> garnishment of workers’ compensation benefits,<sup>33</sup> and overpayment set-off against UI benefits.<sup>34</sup> SARB has applied *Wedekind* and ordered gross treatment of benefit income in cases involving garnishment of UI benefits,<sup>35</sup> garnishment of workers’ compensation benefits,<sup>36</sup> and tax deductions from UI benefits.<sup>37</sup> However, clients hoping to distinguish *Wedekind* on appeal face an uphill battle, as SARB now appears to be refusing interim assistance in appeals involving any kind of net/gross issue.

Two post-*Wedekind* appeals are currently before the Divisional Court, one involving overpayment set-off, garnishment and tax deductions from UI benefits,<sup>38</sup> and the other involving garnishment of CPP benefits.<sup>39</sup> These may serve to clarify the reach of the *Wedekind* decision and resolve the uncertainty at SARB.

There were significant decisions on other income inclusion issues this year. In what is apparently being treated by MCSS as a test case, SARB held, consistently with previous decisions, that a non-economic loss (NEL) award under the *Workers’ Compensation Act*<sup>40</sup> amounted to compensation for pain and suffering

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31. Section 4(1)(a) of O. Reg. 537, *supra*.

32. *SARB N-03-16-03* (January 15, 1995; Zinger).

33. *SARB N-03-30-10* (February 13, 1995; Allen).

34. *SARB N-09-22-46* (June 5, 1995; Cardinal).

35. *SARB N-07-07-08* (April 3, 1995; O’Connell).

36. *SARB M-04-22-16* (March 30, 1995; Quamina).

37. *SARB N-03-28-09* (April 10, 1995; Roy); *SARB L-07-27-12R* (April 25, 1995; Solomon).

38. *Administrator, Department of Social Services, Regional Municipality of Peel v Moschella* (File No. 409/93). The respondent in this case is represented by Mississauga Community Legal Services.

39. *Heyliger v Administrator, Metropolitan Toronto* (File No. 415/94). The appellant in this case is represented by Cassels, Brock in Toronto.

40. R.S.O. 1990, c. W-11, as amended.

and was therefore not considered income for social assistance purposes.<sup>41</sup> The SARB decision is under appeal to the Divisional Court.<sup>42</sup>

The Divisional Court also upheld a decision that a tort damage award which does not make a specific allocation of damages constitutes compensation for pain and suffering unless proven otherwise.<sup>43</sup> While this was a relatively fact-specific decision, the court's view of the scope of "pain and suffering" would appear to be broader than that of MCSS.

#### 4.2 *Sole Support Parents*

As discussed above, sole support parents, who were specifically targeted for investigation under the Enhanced Verification initiative,<sup>44</sup> have also been singled out for the first round of Tory cuts. By eliminating the three-year cohabitation period as a pre-requisite for spousal status, the government hopes to save \$20 million.

The challenge for advocates in the coming year will be to adapt the body of caselaw which has accumulated on the test for cohabitation and on the meaning of the related phrase "living with...a spouse" to the government's new test, without losing legal ground in the process.

##### 4.2.1. "Living With"

The most recent addition to the caselaw arsenal is the decision of the Divisional Court in *Director, Income Maintenance Branch, Ministry of Community and Social Services v. Nicolitsis*; *Director, Income Maintenance Branch, Ministry of Community and Social Services v. Arbour*.<sup>45</sup>

This was a joint Ministry appeal of two decisions in which SARB held that the issue of whether a person was "living with" her spouse could not be decided without evidence as to the nature of their relationship. In the first decision, the recipient had moved into the home of her ex-husband, who was in a common-law relationship with her sister at the time. In the second decision, the father of the recipient's child had refused to move out of her apartment despite her attempts to remove him from the premises. The majority of the Divisional Court

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41. *SARB M-11-14-23* (April 25, 1995; Cardinal). The social assistance regulations specifically exempt from income "an amount received as damages or compensation for...pain and suffering".
  42. *Director of Income Maintenance Branch of the MCSS v. Tremblay*. The applicant is represented by Renfrew County Legal Clinic. MCSS has also appealed at least one subsequent SARB decision adopting the test case conclusion.
  43. *Gratton v. City of London* (1995), 21 O.R. (3d) 641 (Div. Ct.); aff'g. (1994), 18 O.R. (3d) 354.
  44. See *Review 1994* at 20-21.
  45. (July 24, 1995), Ottawa #945/95, #946/95; Toronto #777/92, #674/93 (Div. Ct.) [unreported].

dismissed the appeals, holding that persons living under the same roof can be living separate and apart, and that mere proof of spouses living under the same roof is not proof that they are “living with” each other. The court found that it was open to SARB in the unusual circumstances of these two cases to find that the recipient was not living with her spouse although they resided in the same dwelling. In dissent, Bell J. took a “plain-meaning” approach and held that “living with” meant simply “sharing a dwelling with”, and nothing in the use of the words required any consideration of the nature of the parties’ relationship.

#### 4.2.2 Joint Custody

There is a substantial body of SARB caselaw on the impact of joint custody on receipt of social assistance. Joint custody is a difficult issue principally because it was not anticipated when the current regulations were drafted. Although the decisions have been far from consistent over the past few years, there has been a clear recent trend at SARB toward finding both joint custodial parents eligible for assistance as sole-support parents where the evidence demonstrates that the children in question are in fact dependent on both parents. SARB has been quite consistent on one point—that Ministry policy linking eligibility with receipt of child tax credits is arbitrary and unreasonable. SARB has had more difficulty determining how assistance should be calculated, but generally favours some sort of pro-rating to take into account the fact that neither parent has full custody. Several joint custody cases, under appeal by MCSS, are now before the Divisional Court, and are expected to be heard in the fall of 1995.<sup>46</sup>

### 4.3 *Social Assistance and Immigration*

A considerable number of SARB appeals continued this year to involve restrictions on assistance payable to non-Canadians<sup>47</sup> and, in particular, to sponsored immigrants.<sup>48</sup>

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46. One of these cases is *Director of Income Maintenance, Ministry of Community and Social Services v. Wilkinson*. The respondent is represented by Dundurn Community Legal Services.
47. Persons subject to deportation orders or effective departure or exclusion orders are currently categorically ineligible for assistance unless they can demonstrate that they have applied for admission to Canada on humanitarian or compassionate grounds or are unable to leave the country for reasons wholly beyond their control. SARB proved to be receptive this year to arguments that persons waiting for word or action from Immigration officials were entirely powerless to leave the country and were therefore not ineligible for assistance: see *SARB M-08-29-05* (March 13, 1995; Solomon) and *SARB M-09-22-05* (March 20, 1995; Heath). Also categorically ineligible are “visitors” who have not claimed refugee status or applied for permanent residence, and “tourists”. Many of the legal issues related to these provisions involve references to status under the federal *Immigration Act* and the relevance of *Immigration Act* definitions. Some of the specific legal issues which remain unresolved are the meanings of the terms “visitor” and “tourist” in the social assistance regulations.
48. Sponsored immigrants living apart from their sponsors are now subject to a mandatory

In the meantime, constitutional challenges against cuts targeted at the immigrant population started to take shape.

An application taking broad aim at the provisions deeming sponsored immigrants to be in receipt of income from their sponsors regardless of whether it is actually available was launched in the Ontario Court (General Division) in early 1995.<sup>49</sup> *Re Jeevaratnam and The Attorney General of Ontario*<sup>50</sup> was commenced as a class proceeding on behalf of all sponsored immigrants subject to deductions as a result of the 1993 amendments. A motion for certification of the classes of applicants and respondents is pending. The application challenges the provisions as discriminatory contrary to s. 15 of the *Charter*.

#### 4.4 *Social Assistance and the Charter*

A potentially important case was argued this year in an Ontario court involving the rights of social assistance recipients under the *Charter*. In *Clark and Baker v. Peterborough Utilities Commission*,<sup>51</sup> the applicants challenged the right of a municipal utilities commission to demand substantial deposits from tenants as a condition of hooking up services, arguing that the policy had a devastating impact on poor tenants. The applicants were ultimately successful in preventing the Commission from requiring deposits. Justice Howden of the Ontario Court (General Division) held that the Commission and its staff had been arrogant and unreasonable in administering its deposit policy. However, the judge dismissed the applicants' *Charter* arguments, holding that s. 7 did not apply as the case involved a plea for economic assistance, and that the evidence did not clearly establish an adverse impact against poor people which would amount to discrimination under s. 15. Significantly, Justice Howden declined to tackle the core issue, whether s. 15 of the *Charter* prohibits discrimination on the basis of "poverty" or the receipt of social assistance.

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minimum \$100 deduction, regardless of the sponsor's actual ability to pay. Sponsored immigrants living with their sponsors or in accommodation "owned or controlled in whole or in part" by the sponsor are entitled to a basic needs allowance only. There are exemptions where the sponsor is also on assistance or in cases of "family violence".

49. The Sponsored Immigrant Charter Committee formally announced the proceeding at a news conference on April 17, 1995—the 10th anniversary of section 15 of the *Canadian Charter of Rights and Freedoms*.
50. (File No. RE 4874/95). The applicants in this case are represented by Scott & Ayles of Toronto, together with Scarborough Community Legal Services.
51. (15 June 1995) No 6605/91; 7045/91 (Ont. Ct. Gen. Div.). The applicants in this case were represented by Peterborough Community Legal Services and Scott & Ayles of Toronto.

Meanwhile, the Manitoba Court of Appeal struck down, on jurisdictional grounds, a lower-court declaration that a City of Winnipeg policy requiring persons under 18 to show inability to return to the parental home constituted age discrimination under s. 15 of the *Charter*.<sup>52</sup>

SARB is currently wrestling with a similar case involving teen eligibility in Ontario. SARB heard arguments in November 1994 on the issue of whether the rule that teenaged welfare applicants must demonstrate “special circumstances” constitutes age discrimination. The panel’s decision is still reserved.<sup>53</sup>

#### 4.5 *Welfare Fraud and the Criminal Process*

Fraud prosecutions have become so common that a working knowledge of the law of criminal fraud is becoming a prerequisite for poverty law practice. Workshops were held around Ontario this year for social assistance advocates on the criminal law of fraud, and the Continuing Legal Education section of the Law Society held the first ever specialist session for criminal lawyers on defending welfare fraud.

One defence to social assistance fraud charges which proved successful in an Ontario court this year was the newly-developed “battered woman” defence. In *R. v. Lalonde*,<sup>54</sup> the accused was a mother of five children who had received an allowance as a deserted mother over a period of ten years. The court heard evidence that, on and off during those ten years, the father of four of the accused’s children lived in her home. He was a violent and possessive alcoholic who made no contribution to the household and, throughout their relationship, physically and emotionally abused the accused. He threatened to take the children from her if she left him or laid charges against him, and she was afraid to inform Family Benefits of her true living situation. In a cruel twist of “justice”, when the accused finally did leave him and moved to a women’s shelter, he somehow obtained custody of the children, and she was charged with fraud. Trainor J. accepted<sup>55</sup> that the accused was a “battered wife” and found her not guilty, stating in part:

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52. *City of Winnipeg v. Clemons* (21 February 1995) No. AI94-30-01857 (Man. C.A.) [unreported]; rev’g. *Clemons v. City of Winnipeg* (28 April 1994) No. CI-94-01-78835 (Man. Q.B.) [unreported]. See discussion in *Review 1994*.

53. *SARB L-11-24-19*. The applicant in the case was represented by Hastings and Prince Edward Legal Services.

54. (1995), 22 O.R. (3d) 275 (Ont. Ct. Gen. Div.).

55. Trainor J. expressly rejected the Crown’s submission that he was not entitled to consider “battered wife syndrome” without the benefit of expert evidence.



The issue here is, was this accused justified in making the false statements that she made, in the sense that her purpose was not to defraud the public but to preserve herself and her children.

The battered wife syndrome, in addition to going to the *mens rea* of fraud, is relevant to the common law defence of necessity in my view. Why is Lise Lalonde in any different position than the mother who steals a loaf of bread to feed her children, or a mother who steals a loaf of bread every month to feed her children.<sup>56</sup>

Although, as discussed above, MCSS does not now consider abuse to be grounds for waiving overpayment recovery, appeals to SARB on this issue have often been successful. In at least two decisions over the past year, SARB has been receptive to arguments that it would be unfair to recover an overpayment where the appellant was a victim of spousal abuse, which prevented her from meeting her responsibilities to report or from otherwise coping with her circumstances.<sup>57</sup> One of these decisions is now under appeal to the Divisional Court,<sup>58</sup> and the outcome of that appeal will clearly be of utmost importance.

## 5. FUTURE DIRECTIONS – MARCHING BACKWARDS

The new provincial government, although only a few months into its mandate, has begun to announce its first round of changes to social assistance programs. We have already discussed many of the specific eligibility and administrative changes. These changes pale, however, in the face of the most brutal social assistance cuts since the inception of Ontario's current social assistance regime. As of October 1, 1995, social assistance rates for all recipients except those receiving FB disability or old age allowances will be slashed a staggering 21.6 percent. Such a concentrated attack on the economic situation of the poor has not been seen in Ontario for decades, and not since the Depression have we seen such a percentage of the population dependent on the social program of last resort. A full review of the utterly predictable devastation that will result for social assistance recipients would add little to this article.<sup>59</sup> Suffice it to say that the new rates will provide many families with less than even the far-right Fraser

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56. *Ibid.* at 285.

57. In *SARB M-01-15-10R* (December 1994; McCormick), SARB held that an overpayment was not recoverable even though there had been deliberate misrepresentation, in view of the extreme duress under which the appellant was living. In *SARB M-01-13-54* (April 1995; McCurdy), SARB found that no overpayment had been incurred in a case where the appellant's abusive spouse had forced his way back into her home.

58. *SARB M-01-13-54, ibid.*

59. See Ontario Social Safety Network, "Welfare Rate Cuts: The Real Issues", a series of background papers prepared in response to the Tory cuts announcement in the summer of 1995.

Institute considers the basic minimum necessary for survival.<sup>60</sup> At the time of writing, litigation challenging the rate cuts decision on both administrative law and *Charter* grounds has been commenced in Ontario.<sup>61</sup>

The harsh truth is that the near future holds little for Ontario's most vulnerable citizens but despair and grinding hardship. The axe that is slashing through the welfare system is being wielded with equal enthusiasm against almost all the programs that offer other kinds of help and hope to the poor: child care, employment programs, training programs, social housing, shelters, services of every kind to the disadvantaged.

One of these services is of course the provision of legal assistance itself. We cannot conclude a review of developments in social assistance law without noting that the very existence of such a category of analysis and practice is in doubt. As we write, the future of the Ontario Legal Aid Plan, including the community legal clinic system which has been by far the most important site for social assistance advocacy and the development of a social assistance jurisprudence,<sup>62</sup> is in jeopardy. Cuts to funding are certain, and there are no guarantees that Ontario's unique system for delivering poverty law services—system that has received both national and international praise—will survive.

While the Tory government has so far favoured funding cuts as its weapon of choice, advocates should be prepared for the possibility of more insidious attacks on legal assistance. In the United States, after decades of slashing legal services, Congress is now attempting to muzzle all welfare advocacy. An appropriations bill now before the Senate would defund the Center on Social Welfare Policy and Law,<sup>63</sup> ban all challenges to the constitutionality and legality

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60. *Ibid.* For example, the Fraser Institute has suggested that a two-person family needs a minimum of \$587 a month for shelter in Toronto. The Tories intend to cut the maximum shelter allowance for a two-person family to just \$511.
  61. *Masse et al. v. Ontario* (Ont. Ct. (Gen. Div.)) File No. 590/95, filed September 26, 1995. Clinics across the province represent clients involved in this action. Barristers in the matter are Eberts, Symes and Street of Toronto.
  62. There is of course private bar involvement in legal issues arising from the social assistance system, both through the issuance of legal aid certificates for social assistance work and some *pro bono* work by private counsel. However, not only has the vast bulk of social assistance litigation been carried out through and by clinic representatives, clinics have been the only site of systemic advocacy on legal issues in social assistance law and administration. Widely available legal advocacy cannot exist for social assistance recipients within a private market economy of legal services.
  63. The Center on Social Welfare Policy and Law (CSWPL) has been in existence for 30 years and has been at the forefront of welfare litigation in the United States. It is now being forced to close its Washington office and cut staff in its New York headquarters. The CSWPL may lose all national support funding in 1996.

of state welfare legislation, prohibit class actions on behalf of the poor against welfare agencies and prohibit any advocacy on pending legislation.<sup>64</sup> It would be foolhardy not to anticipate that the Tories may try to adopt American-style tactics in Ontario.

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64. "Federal Legal Services Funding Being Slashed and Restricted Welfare a Special Target", *Welfare News* (Center on Social Welfare Policy and Law: August 1995) 8.