

FROM MOTHERS' ALLOWANCE TO MOTHERS NEED NOT APPLY: CANADIAN WELFARE LAW AS LIBERAL AND NEO-LIBERAL REFORMS[©]

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In this paper we examine changes in the form and content of Canadian welfare law through a historical, feminist lens using the exemplar of mother-headed families. Our analysis of how the state dealt with sole support mothers in several provinces throughout the twentieth century reveals important continuities, as well as discontinuities, between the past and the present that have shaped and reshaped the lives and experiences of poor women and their children. In doing so, it helps to illuminate how they have been rendered “undeserving” or “never deserving” with the neo-liberal (re)formation of the Keynesian state in Canada.

Dans le présent article nous examinons les modifications dans la forme et dans le contenu de la législation sociale canadienne selon une perspective historique et féministe qui recourt à l'exemple des familles dirigées par la mère. Notre analyse de la manière dont l'État a abordé le problème des mères qui sont l'unique soutien de leur famille dans plusieurs provinces tout au long du XXe siècle, révèle d'importantes continuités et également discontinuités entre le passé et le présent qui ont façonné et remodelé les vies et les expériences des femmes pauvres et de leurs enfants; cette analyse contribue ainsi à mettre en lumière la manière dont ces femmes ont été rendues « non méritantes », voire « jamais méritantes » dans le cadre de la formation (et de la réforme) d'un État néo-libéral keynésien au Canada.

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“The origins of income security in Ontario begin with motherhood.”¹

“[T]he beauty of the system [Chicago’s Court of Domestic Relations in 1920], from the perspective of its officials, was that all of that money came from delinquent husbands—not the public coffers.”²

“The parenting needs of the children of sole mothers appear singularly unaddressed in the welfare reform debate.”³

I. INTRODUCTION

In Canada, as elsewhere, extensive welfare law and policy reforms that effectively erased the category of “deserving poor” marked the neo-liberal (re)formation of the Keynesian state during the late twentieth century. In this article, we examine the contemporary changes in the form and content of Canadian welfare law through a historical, feminist lens using the exemplar of mother-headed families. Although public spending on the poor has always been grudging, within the dominant discourses of welfare sole-support mothers were historically considered to be among the most deserving recipients of public assistance. Therefore, an analysis of how they have been rendered “undeserving” or “never deserving” can help illuminate the profound changes that occurred in Canada and other jurisdictions since the 1970s with the ascendancy of neo-liberalism.

¹ James Struthers, *The Limits of Affluence: Welfare in Ontario, 1920–1970* (Toronto: University of Toronto Press, 1994) at 19.

² Michael Willrich, “Home Slackers: Men, the State, and Welfare in Modern America” (2000) 87 *J. Am. Hist.* 460 at 486 [Willrich, “Home Slackers”]. See also Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003) [Willrich, *City of Courts*].

³ Maggie Walter, “Working Their Way Out of Poverty? Sole Motherhood, Poverty, Welfare and Material Well-Being” (2002) 38 *J. Sociology* 361 at 377.

Our point of departure is the burgeoning extant literature centred on discrete substantive and theoretical concerns related to women and welfare. We draw liberally on a large body of feminist historical work that traces the socio-legal roots and administration of mothers' allowances or pensions in five Canadian provinces during the first half of the twentieth century. This research tells us much about the development of pre-Keynesian state formation in Canada. In the contemporary context, we begin with the use of history and historiography in feminist analytical work on women, welfare, and neo-liberalism. Our primary focus is on the social policy and welfare reform in Ontario in the mid-1990s, which was arguably the most dramatic in the Canadian context. This was achieved through a restructuring of welfare law, reduction of rates, rejection of long-term need based on reasons of parental responsibility, and redefinition of welfare (as fraud).⁴ In these ways, the provincial Conservative government's legislation heralded a major break from some of the historic premises of and rationales for social assistance. Of particular relevance to our analysis is the theoretical work premised upon assertions of a shift from the past to the present, expressed, for instance, as "a shift from public responsibility to private self-reliance, from social welfare rights to individualized support obligations."⁵

Feminists who write about women (or mothers) and welfare have tended to conceptualize the issues in an either/or manner. They look at women in the family or women in the market; they focus on history or history of the here and now; they examine the discursive change or the structural change. These bifurcated forms of framing arguably distort important issues in two ways that we attempt to avoid in our analysis.

⁴ *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A [*Ontario Works Act*].

⁵ Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169 at 170-71. Cossman observes the following:

... the privatization of the costs of social reproduction is hardly a new phenomenon in Canada. Family law and social welfare law have long been implicated in constituting a familial ideology that casts women's economic dependency as naturally located within the realm of the nuclear family ... [but]... there is something distinctive about the current phase of privatization[:] ... Through the dual strategies of reprivatization and familialization, once-public goods and services are being reconstituted as naturally located within the realm of the family.

First, they implicitly accept the dominant construction of welfare as policy that relates only to poor people. This acceptance has the unintended consequence of obscuring the fact that those once characterized by David Lewis as “corporate welfare bums”⁶ have also fared well by Canadian social and economic policies, enjoying all manner of incentives, land grants, favourable tariff policies, tax incentives, tax breaks, and so on.⁷ So, while our article is devoted primarily to the emergence, development, and transformation of the way in which welfare and state support have been structured in relation to poor mothers in Canada, we resist the construction of the poor as the only recipients or beneficiaries of “state welfare.”

Second, we attempt to avoid the other pitfall of an either/or—“that was then, this is now”—approach to women and welfare that neglects the important historical continuities by which welfare for the poor has been defined and administered. We therefore identify and attend to continuities as well as discontinuities in Canadian social policy, both in history and in the present.

There are some striking continuities between the first wave of mothers’ allowance legislation and the neo-liberal reforms of the 1990s. Both periods were ones of structural change and reformation of the relationships between the state, the market, and the family, including a particular concern about the “crisis” of the (nuclear) family. However, we also identify important discontinuities including the different forms of liberal state (pre-Keynesian and post-Keynesian), as well as the different forms of welfare law and policy in the two periods.

In particular, we analyze the larger structural contexts in which welfare law and policy have been developed and reformed. Drawing on feminist critiques that demonstrated the ideological nature of the public/private divide,⁸ we argue that the relationships between public

⁶ David Lewis, *Louder Voices: The Corporate Welfare Bums* (Toronto: James Lewis & Samuel, 1972).

⁷ See e.g. Elisabeth Wallace, “The Origin of the Welfare State in Canada 1867-1900” (1950) 16 *Can. J. Econ. & Pol. Sci.* 383; Claire F.L. Young, *Women, Tax, and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System* (Ottawa: Status of Women Canada, 2000); Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002). In the United States context, see Mimi Abramovitz, “Everyone is Still on Welfare: The Role of Redistribution in Social Policy” (2001) 46 *Social Work* 297.

⁸ See e.g. Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997); Frances E. Olsen, “The Family and the

and private in liberal states have been reformed rather than transformed. Specifically, we investigate two questions through an analysis of official documents, law reform and policy initiatives, and case law. First, given that most women have straddled the so-called public/private divide, how have their relationships to state, market, and family influenced the constructions of single mothers in Canadian welfare law and policy? And second, to what extent do changes in legal and other discourse, as well as changes in social and economic relations, reflect and shape those constructions?

Our argument proceeds with the following four parts of the article. In the next part, we examine the pre-Keynesian development of welfare for single mothers and their children, and demonstrate the longstanding relationship between women's labour (both paid and unpaid) and mothers' allowances (welfare). We then provide an overview of the constitutional and social policy context of liberal welfare law reform in Canada during the transitional Keynesian moment, illustrating the close connection that welfare reform has had with fiscal policy, rather than social policy. In Part IV, we analyze the recent era of neo-liberal welfare reform, which we argue is shaped by the principle that "no mothers need apply," in which responsibility for children has been rendered invisible (at best) and been relegated to no one (at worst). In the concluding part, we synthesize welfare law reform "then and now" and identify the continuities and discontinuities that have shaped and reshaped the lives and experiences of poor women and their children.

II. WOMEN AND WELFARE THEN: PRE-KEYNESIAN FOUNDATIONS

Viewed retrospectively, welfare reforms that were implemented from the late nineteenth to the mid-twentieth century collectively reformed the public/private divide (state/family/market), and constructed the foundations of a pre-Keynesian state in Canada and other jurisdictions. This reshaping of social legislation and policy

Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497; Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation" (1987) 25 Osgoode Hall L.J. 485; Margaret Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 18 J.L. & Soc'y 448.

occurred in the context of massive structural change marked by industrialization, urbanization, and the establishment of universal (white) suffrage during and after the First World War. While it is important to bear in mind the unevenness of change both within and across cultures Liberal states experienced a growing concentration of people along class lines in specific urban areas that made the poor (especially the racialized and immigrant poor) more visible, fuelling middle class and elite fear of potential threats to social order. Apparent increases in the number of “deviant” families—including sole-support mothers and their children—at different times throughout the period from the 1880s to the 1940s supported perceptions that the (nuclear) family was in crisis and under siege.⁹ Conviction among the middle and elite classes that the nuclear family was the means of achieving integration and “social control” in mass society focused attention on the role of mothers in the social reproduction of “good” citizens.¹⁰ Deviant families had to be prevented if possible and rehabilitated if necessary. To that end, reformers demanded forms of state intervention (for instance fiscal, legal) to shore up nuclear family life in the community.¹¹

Two types of gendered welfare legislation and policy resulted from these efforts. The first category included legislation aimed primarily at male providers, incorporating laissez-faire conceptions of the poor and of poverty as an individual responsibility, with a new emphasis on the legal obligations of husbands and fathers to support their dependants and the role of the state in enforcing these patriarchal obligations. From the late nineteenth century on, legislation was enacted in Canada to force husbands and fathers to support their wives and their children. The new laws included *Criminal Code* provisions criminalizing the failure to provide the necessaries of life, and a spate of provincial legislation pertaining to the maintenance of deserted wives (later

⁹ Threats to “the family” emanated from various sources including the decline of the white, middle-class, Anglo-Celtic birthrate; extensive non-Anglo-Celtic immigration; the death and incapacitation caused by two world wars; epidemics and contagious diseases (*e.g.*, post-First World War influenza, tuberculosis, and venereal disease); and the impact of the economic collapse of the 1930s.

¹⁰ Dorothy E. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992); Jacques Donzelot, *The Policing of Families* (New York: Pantheon, 1980); David Garland, *Punishment and Welfare* (Brookfield, VT: Gower, 1985).

¹¹ Chunn, *ibid.*; Ann Vandepol, “Dependent Children, Child Custody, and the Mothers’ Pensions: The Transformation of State-Family Relations in the Early 20th Century” (1982) 29 *Social Problems* 221.

deserted wives and children), children of unmarried parents, and indigent parents.¹²

This legislation also placed an onus on individual women to conform to the criteria historically associated with the “deserving poor.” Although male judges showed disdain for men who were “home slackers,”¹³ they were also less than receptive to “undeserving” women. As we outline and demonstrate more fully below, in order to be eligible for assistance, a wife was required to have been abandoned and not responsible for the separation, to be morally impeccable as a mother, and to have made every effort to locate her absconding spouse prior to seeking help from the courts. Similarly, an unmarried mother, although morally compromised, was expected to pursue the (putative) father of her child(ren) for support.¹⁴ However, women’s notable lack of success in obtaining support from their husbands and the fathers of their children generated both internal and external pressure on the provinces to help local governments to create and finance specialized tribunals to deal with non-support.

The result was the establishment of domestic relations divisions in the traditional criminal courts and new family courts to enforce family welfare legislation.¹⁵ Among other things, these socialized tribunals helped “deserving” women track down deserting husbands and collected support on their behalf. While many reformers advocated such tribunals as a more humane and effective way to deal with problem families, government bureaucrats and politicians were concerned primarily with the monetary bottom line. This is to say that individual men, and not the state, bore the primary responsibility for family maintenance. Enforcement and collection always remained a problem, but that

¹² Chunn, *ibid.* See also Willrich, “Home Slackers,” *supra* note 2; Willrich, *City of Courts*, *supra* note 2. Examples from the Canadian legal context include the *Criminal Code*, R.S.C. 1927, c.36, ss. 238, 239, 242 regarding the duty to provide necessaries (see especially the patriarchal responsibility and liability imposed in s. 242(3)(a) on a man “as a husband or head of a family”); *Married Women (Maintenance in Case of Desertion) Act*, S.O. 1888, c. 23; *Deserted Wives’ Maintenance Act, 1901*, S.B.C. 1901, c. 18; *Children of Unmarried Parents Act*, R.S.O. 1927, c. 188; and *Children of Unmarried Parents Act*, R.S.B.C. 1922, c. 9.

¹³ Willrich, “Home Slackers,” *ibid.*

¹⁴ Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969* (Toronto: The Osgoode Society/University of Toronto Press, 2007); Chris Clarkson, *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862-1940* (Vancouver: UBC Press, 2007).

¹⁵ Chunn, *supra* note 10.

phenomenon never displaced the location or relation of the primary responsibility.¹⁶

The second type of legislation and policy, aimed at shoring up flawed versions of the nuclear family, provided forms of financial assistance to sole-support mothers. In a departure from laissez-faire conceptions of poverty as strictly an individual problem, both the political right and left came to agree that the state should provide some financial support for poor, sole-support mothers.¹⁷ However, differences emerged about the social policy, about the form and content of the legislation, and about who would assume the fiscal responsibility for such assistance. In Canada, the entire period from the late nineteenth century to the mid-twentieth century was marked by ongoing strained relations between different levels of government about who should pay for what. The assumption of local fiscal responsibility for welfare by the provincial and federal governments was grudging, slow, and uneven. This trajectory of welfare development is illustrated by the implementation of two types of social legislation that benefited sole-support mothers: one was rights-based, and employment or service-related as exemplified by provincial workers' compensation laws and the Canadian Patriotic Fund;¹⁸ the other, as exemplified by the provincial statutes dealing with mothers' pensions or allowances, was needs-based and means-tested.¹⁹

During the First World War, proponents of state aid to sole-support mothers often characterized such support as analogous to pensions for soldiers' service rather than as "an extension of private charity,"²⁰ and some sought a federal-level mothers' pension.²¹ The most

¹⁶ Willrich, "Home Slackers," *supra* note 2 at 486, found the same emphasis on individual (male) responsibility for family maintenance. See also Chunn, *ibid.*

¹⁷ Nancy Christie, *Engendering the State: Family, Work, and Welfare in Canada* (Toronto: University of Toronto Press, 2000).

¹⁸ The Canadian Patriotic Fund (CPF) "originated during the Boer War as a private organization to help the wives and children of volunteer recruits." See *ibid.* at 50. However, the CPF became a large-scale national relief organization with semi-official status when a centralized national fund was established in 1914. See *ibid.* at 51-52.

¹⁹ A related family welfare initiative was the means-tested old age pension, introduced by the federal government in 1927, which theoretically worked in tandem with provincial parents' maintenance legislation aimed at enforcing children's obligations to support their parents. See *Old Age Pensions Act*, R.S.C. 1927, c. 156.

²⁰ Christie, *supra* note 17 at 132.

radical advocates of such policies also sought legislation that would entrench a breadwinner-homemaker model based on the concept of a male family wage, albeit for different reasons. Whereas feminists sought to reinforce the woman's role as full-time homemaker and envisaged state funding that would enable sole-support mothers to devote all their energies to mothering, organized labour supported state aid to single mothers as a means of protecting men's position in paid labour by keeping such women from competing with men for jobs and undercutting men's wages.

During the inter-war period, however, movements for provincial mothers' allowances gained momentum.²² Ultimately, social conservatives who embraced old ideas about poverty prevailed. Feminists on the political right,²³ together with state bureaucrats, politicians, and others concerned about undermining self-reliance and encouraging pauperization, successfully argued against the idea that the state should provide single mothers with funding equivalent to the missing husband's contribution to the family wage. This much more circumscribed vision of state assistance was the one ultimately incorporated into the mothers' allowance legislation that was implemented by most provincial governments in Canada during the inter-war period.²⁴

²¹ In British Columbia, for example, Helena Gutteridge, a feminist trade-unionist, persuaded the Vancouver Trades and Labour Council to lobby for a national pension in 1915. See Margaret Little, "Claiming a Unique Place: The Introduction of Mothers' Pensions in B.C." (1995) 105-06 *B.C. Studies* 80 at 88 [Little, "Claiming a Unique Place"].

²² Christie, *supra* note 17.

²³ For example, Charlotte Whitton, Executive Director of the Canadian Council on Child Welfare (CCCW), later the Canadian Council on Child and Family Welfare (CCCFW), had initially evinced fierce opposition to mothers' pensions and allowances. See Dennis Guest, *The Emergence of Social Security in Canada* (Vancouver: UBC Press, 1980) at 56-57; Christie, *supra* note 17 at 162-64.

²⁴ Megan Davies, "'Services Rendered, Rearing Children for the State': Mothers' Pensions in British Columbia 1919-1931" in B.K. Latham & R.J. Pazdro, eds., *Not Just Pin Money: Selected Essays on the History of Women's Work in British Columbia* (Victoria: Camosun College, 1984) 249; Little, "Claiming a Unique Place," *supra* note 21; Margaret Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998) [Little, *No Car, No Radio*]; Veronica Strong-Boag, "Wages for Housework: Mothers' Allowances and the Beginnings of Social Security in Canada" (1979) 14 *J. Can. Stud.* 24; Veronica Strong-Boag, "Canada's Early Experience with Income Supplements: The Introduction of Mothers' Allowances" (1979) 4:2 *Atlantis* 35. Legislation was enacted in Manitoba (1916); Saskatchewan (1917); Alberta (1919); British Columbia (1920); Ontario (1920); Nova Scotia (1930); Quebec (1937); and New Brunswick (1944). See e.g. *The Mothers' Allowance Act*, S.O. 1920, c.89 [MAA

A. *Poor Single Mothers and Pre-Keynesian Welfare Reform*

As feminists from across a range of disciplines have demonstrated, legislation and policies of liberal capitalist states have long contemplated and supported a particular family form—heterosexual, patriarchal, and nuclear—with a breadwinner husband, a stay-at-home wife, and “legitimate” children.²⁵ In this part, we demonstrate and emphasize that the commitment to this model of family and, to a certain extent, its needs informed the pre-Keynesian welfare state. Our review of Canadian income security legislation illustrates the primacy of the patriarchal family form over this period; the plans were designed to compensate for its losses or failures rather than to transform or alter its shape or place. We have reviewed the first mothers’ allowance/pension legislation enacted in five Canadian provinces (British Columbia, Alberta, Saskatchewan, Ontario, and Nova Scotia) between 1917 and 1930.²⁶ Our review demonstrates that while the five provincial regimes contained many congruities, there were also interesting differences, not the least of which were the dates of enactment.²⁷

It is clear that despite their regional and population differences, the statutes in this first wave of provincial mothers’ allowance legislation each imposed detailed and demanding conditions for entitlement upon indigent mothers seeking to avail themselves of the modest allowances

(Ontario)]; *An Act to Provide for the Payment of Allowances towards the Maintenance of the Dependent Children of Certain Mothers*, S.N.S. 1930, c.4. Likewise, 39 of 48 American states had similar legislation by 1920. See Little, “Claiming a Unique Place,” *supra* note 21 at 81; Christie, *supra* note 17.

²⁵ See e.g. Mary McIntosh, “The State and the Oppression of Women” in Annette Kuhn & Ann Marie Wolpe, eds., *Feminism and Materialism* (London: Routledge & Kegan, 1978) 254; Elizabeth Wilson, *Women and the Welfare State* (London: Tavistock, 1977); Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, 1880-1960* (New York: Penguin Books, 1989); Linda Gordon, *Women, the State, and Welfare* (Madison: University of Wisconsin Press, 1990); Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (Cambridge: Harvard University Press, 1995); Nancy Fraser, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (New York: Routledge, 1997) at 41.

²⁶ These provinces represent three western provinces, home to many new immigrants who were not British subjects, one maritime province, and Ontario (Canada’s most populous province). We recognize that our list neglects the important contribution of the province of Manitoba, which enacted the first mothers’ allowance legislation, the cultural specificity of the Quebec experience, and other maritime provinces of the period (New Brunswick and Prince Edward Island). We intend to address the legislation and social policy of these provinces in subsequent work.

²⁷ Of these five provincial regimes, Nova Scotia’s first legislation was enacted in 1930, more than a full decade later than the others.

provided by the state.²⁸ The eligibility hurdles were high and numerous, including long waiting periods, requirements concerning marital status, residency, number and age of children, and specified reasons for the absence or incapacitation of the husband.

All five provincial statutes required women to provide evidence of both Canadian and provincial residency, although the precise length of the residency requirement varied by province. While immigrant women were not formally precluded from accessing mothers' allowance, some provinces required women to be British subjects (*i.e.*, born in Canada or elsewhere in the British Empire) or wives or widows of British subjects.²⁹ Conversely, the prairie provinces, home to many European immigrants, did not require the mothers to be British subjects.³⁰ First Nations women were excluded by two provinces—at first expressly,³¹ and later implicitly³²—ostensibly because of the federal government's constitutional responsibility for Indians.

Widows figured significantly in the early legislation, though benefits were gradually extended to women whose husbands were institutionalized in mental hospitals, or in penitentiaries, or were incurably ill.³³ Even when the benefits appeared to be available only to

²⁸ *MAA (Ontario)*, *supra* note 24, s. 3(g); *Mothers' Allowances Act*, S.N.S. 1930, c. 4, s. 5(1)(b) [*MAA (N.S.)*]; *Mothers' Pensions Act*, S.S. 1917, c. 68, s. 2 [*MPA (Saskatchewan)*]; *Mothers' Allowances Act, 1922*, S.S. 1921-1922, c. 73 [*MAA (Saskatchewan)*]; *Mothers' Pensions Act*, S.B.C. 1920, c. 61, s. 4(d) [*MPA (B.C.)*]. Alberta's legislation was couched in slightly different terms. See *Mothers Allowance Act*, S.A. 1919, c. 6, s. 4 [*MAA (Alberta)*], which provided that if a female widow or a wife of a man committed to a hospital for the insane was unable to "take proper care" of her sons under the age of 15 and/or her daughters under the age of 16, she was permitted to apply for assistance under this legislation.

²⁹ *MAA (Ontario)*, *ibid.*, s. 3(e); *MPA (B.C.)*, *ibid.*, s. 4(a); *MAA (N.S.)*, *ibid.*, s. 5(1)(g).

³⁰ Their legislation was silent in this respect.

³¹ Nova Scotia's legislation expressly excluded mothers who were Indians, as defined by the federal *Indian Act*, R.S.C. 1927, c.98. See *MAA (N.S.)*, *supra* note 28, s. 5(1)(h).

³² In 1956, Alberta restricted eligibility to persons who, for the purposes of health and welfare services, were the responsibility of the federal government. See *Mothers' Allowance Act*, S.A. 1956, c. 35, s. 4.

³³ Saskatchewan and British Columbia extended eligibility to women whose husbands had been sentenced to a penitentiary, had been committed to an institute for incurables, or were permanently incapacitated by reason of incurable disease or insanity. See *MAA (Saskatchewan)*, *supra* note 28; *MPA (B.C.)*, *supra* note 28. The British Columbia statute also extended benefits to women whose husbands were sick or were in an accident while the women were residing in British Columbia. Ontario provided that women who were widows or wives of inmates of mental hospitals or whose husbands were permanently disabled were eligible to apply. Nova Scotia limited eligibility to widows with at least two dependent children. See *MAA (N.S.)*, *supra* note 28, s. 5(1).

widows, these provinces demonstrated legislative ingenuity in expanding the definition of a widow.³⁴ Although deserted wives were expressly encompassed by some provinces from the earliest days,³⁵ these women nonetheless faced onerous, indeed punitive, requirements in the form of waiting periods of as long as five³⁶ or seven years.³⁷ Remarriage resulted in the termination of assistance,³⁸ which was relevant only for the handful of deserted wives who could manage to obtain a divorce in the period prior to 1968 and the enactment of Canada's first federal *Divorce*

³⁴ Nova Scotia and Alberta maintained the category of "widow" as the criterion for eligibility, but they were prepared to broaden its definition. As other provinces amended their legislation to allow mothers with one child to apply for assistance, Nova Scotia steadfastly limited mothers' allowances to widows with two dependent children until 1943 when, by regulation, the definition of "widow" was expanded to include women whose husbands were unable to support their family due to permanent physical or mental disability. See *Mothers' Allowances Act*, S.N.S. 1943, c. 26, s. 3. In 1936, Alberta allowed deserted wives to apply and extended the definition of "widow" in its mothers' allowance legislation to include "any married woman who by order of a District Court Judge is declared to have been deserted, without reasonable cause, by her husband for a continuous period of five years or upwards" See *Mothers' Allowance Act*, S.A. 1936, c. 38, ss. 2(b), 3. In 1942, Alberta broadened the definition of "widow" to include wives who had obtained a judicial order declaring that they had been deserted by their husbands, without reasonable cause, for a continuous period for five years or more. See *An Act to Aid Indigent Widows and Wives of Insane Person in the Support of Children*, R.S.A. 1942, c. 302, s. 2(e).

³⁵ From the beginning, British Columbia expressly encompassed a deserted wife within its mothers' allowance legislation. See *Mothers' Allowance Act*, S.B.C. 1920, c. 61, s. 2. Ontario followed suit in 1921, making it possible for "abandoned" women with children under the age of sixteen to receive an allowance; *Mothers' Allowance Act*, S.O. 1921, c. 79, ss. 2, 6. It should be noted as well that Saskatchewan, and later Ontario, made it possible for "dependent husbands" to apply for assistance under social assistance legislation. Saskatchewan's legislation provided that allowances were to be made available to indigent persons or to a person in "necessitous circumstances" for the support or partial support of a dependent child. See *Social Aid Act*, S.S. 1944, c. 61, as am. by S.S. 1946, c. 92, s. 2 [*Social Aid (Saskatchewan)*] and *Social Aid Act*, S.S. 1947, c. 95. Saskatchewan's 1949 regulations under this statute provided that an allowance could be paid to either a mother or a father. In order to be eligible, a father had to be "incapacitated" and his wife had to be deceased, in a mental hospital, in prison, or otherwise absent by having deserted the household. The Saskatchewan regulations defined "incapacitated" as a "condition of physical or mental illness or disability from which there appears to be no prospect of improvement for a period of nine months from the date of application for an allowance, of such a nature as to render a person incapable of maintaining himself or his family." See S. Reg. 127/1949, Schedule "A" [S. Reg. 127]. Ontario's legislation also provided for a widowed or dependent father whose wife was a patient in a sanatorium or hospital or in a similar institution. See *Mothers' and Dependent Children's Allowance Act*, R.S.O. 1960, c. 247, s. 2(b). In Saskatchewan, a woman's marriage or remarriage had the effect of terminating her entitlement to an allowance. See S. Reg. 127, s. 22(a).

³⁶ See e.g. Alberta's *Mothers' Allowance Act*, *supra* note 34, s. 2(e).

³⁷ *Child Welfare Act*, S.S. 1930, c. 70, s. 1.

³⁸ See S. Reg. 127, *supra* note 35, s. 22(a).

Act.³⁹ Many feminists have focused on another moral criterion in this early legislation: most provinces included an explicit requirement that the mother be a fit and proper person to have care and/or custody of her children.⁴⁰ While this legislative requirement has been an obvious target for feminist critique, it is important to note that it was not, as some have intimated,⁴¹ an expression or an extension of the British subject requirement. The “fit and proper” requirement was linked directly to the woman’s abilities as a mother; the British subject requirement, under those provincial schemes that required it, was a separate limiting condition.

No discussion of the early social assistance legislation is complete without a consideration of family law support measures, which provinces also began to enact in the post-First World War period in order to impose child support obligations on parents (read: fathers) of illegitimate children.⁴² This is partly because, as discussed above, provinces began to require women to pursue their husbands and the fathers of their children for financial support in order to be eligible for social assistance.⁴³

³⁹ S.C. 1968, c. 24.

⁴⁰ In Ontario, the phrase was “fit and proper person to have the care and custody of her children.” See *MAA (Ontario)*, *supra* note 24, s. 3(f). In Nova Scotia, the mother had to be “... in every respect a fit, proper and suitable person to have the custody and care of her children.” See *MAA (N.S.)*, *supra* note 28, s. 5(1)(a). Saskatchewan’s first statute to deal with this issue made no mention of the “fit” criterion. See *MPA (Saskatchewan)*, *supra* note 28, s. 2. However, *MAA (Saskatchewan)*, *supra* note 28, s. 3(2)(d) included the criterion of a “fit and proper person to have care and custody of such child or children.” In British Columbia the phrase was “a fit and proper person to have the custody of her child or children.” See *MPA (B.C.)*, *supra* note 28, s. 5(a). Alberta’s legislation was couched in slightly different terms, containing no explicit reference to this criterion, although by s. 4, an inspector was mandated to do a thorough investigation to ensure that the case was a “proper one for assistance.” See *MAA (Alberta)*, *supra* note 28, s. 5.

⁴¹ See *e.g.* Little, “Claiming a Unique Place,” *supra* note 21.

⁴² This legislation took the form of deserted wives and children’s maintenance legislation and, later, legislation to impose support obligations upon unmarried parents. See the authors and legislation cited in *supra* note 12.

⁴³ A relationship between eligibility for benefits or allowances and the pursuit of remedies or support under other statutes began to appear as early as 1945, when Saskatchewan replaced abandonment as one criterion for eligibility and instead provided that a deserted wife could claim under the statute if she had made reasonable efforts to execute an order from the court under the provincial *Deserted Wives’ and Children’s Maintenance Act*, R.S.S. 1940, c. 234 or the *Criminal Code*, R.S.C. 1927, c. 36. See *Child Welfare Act*, S.S. 1945, c. 100, s. 26(6) [*Child Welfare (Saskatchewan)*]. The reference to the *Criminal Code* in this section refers to the criminal offence of failing to provide the necessities of life to one’s wife and children, for which husbands in the period could be prosecuted. (Today, prosecutions under this section tend to involve parents who have failed to

The other important aspect of *Deserted Wives'* initiatives was the legislative restrictions on who could make applications. For instance, Ontario's legislation required that a woman had to be living separately from her husband because of his cruelty or his failure (without sufficient cause) to support her and their children. Also, the woman herself could not be "guilty" of adultery, nor could she make a claim against an adulterous husband if she had condoned his adultery.⁴⁴

In sum, from this overview of the first wave of mothers' allowance and social assistance legislation, one can see that the overriding policy of the legislation was to provide for indigent wives or widows and their children when the husband/father was deceased, incapacitated, incarcerated, or had deserted the family. The family unit had to include dependent children in the custody of the mother who had to be a fit and proper person to care for children. As the criteria for eligibility gradually and unevenly expanded, so too did the requirements imposed on women, such as waiting periods and mandatory efforts to pursue absconding husbands for support. Clearly, these allowances contemplated and circumscribed a particular family unit with a missing or defective breadwinner. Support for the family was a (patriarchal) responsibility of a husband or father. The family had to be supported, and when he was not able to provide, for either good or bad reasons, the state responded with modest support that came bundled with conditions.

B. *Pre-Keynesian Welfare Reform and the "Principle of Less Eligibility"*

The means-tested nature of the first wave of mothers' allowance and related post-First World War welfare legislation left intact not only

provide proper medical care for their children or who have failed to protect their child from an abusive parent or spouse.) This requirement was continued in *Social Aid (Saskatchewan)*, *supra* note 35. Under that statute, a mother was only eligible for social assistance if her husband had deserted the family for at least one year and the husband was convicted for non-support, a court order for support had been issued, or the Welfare Board was satisfied that a reasonable effort has been made to obtain support. See S. Reg. 127, *supra* note 35, s. 4(g). Divorced mothers were also eligible for social assistance, subject to the same requirements. See S. Reg. 127, *supra* note 35, s. 4(j). Similarly, an unmarried mother with a dependent child was eligible if she could satisfy the Director of Child Welfare that reasonable effort to obtain support from the father had failed. See S. Reg. 127, *supra* note 35, s. 4(f).

⁴⁴ This was the case as early as 1888 in Ontario. See *Married Women (Maintenance in Case of Desertion) Act 1888*, S.O. 1888, c. 23, s. 5.

the distinction between the deserving and undeserving poor discussed above, but also the “principle of less eligibility” that characterized the nineteenth-century residual concept of welfare.⁴⁵ In relation to poverty, this principle implicitly requires that those deemed to be worthy of assistance, including mothers who receive state aid, should not be better off materially than the least affluent families among the working poor. While this principle has many implications, two in particular merit discussion. First, “less eligibility” meant that the rates of assistance for mothers who qualified for allowances remained at subsistence levels. Although more minimal in some provinces than others, all rates for mothers’ allowances were dramatically lower than rates for other welfare measures of the era, such as the Canadian Patriotic Fund and Workmen’s Compensation. The latter were rights-based pensions, which generated benefits for wives and mothers because of past (male) services to the war effort or to the paid labour force.⁴⁶ In contrast to mothers’ allowances, these welfare measures also provided money to the wife-recipient in her own right as well as money for her children.

Second, “less eligibility” meant that recipients of mothers’ allowances were expected to generate supplemental income. Research indicates that this was the norm among women in working, poor families where both husbands and wives may have embraced the sexual division of labour, but lacked the family wage that would enable them to live in conformity with the breadwinner-homemaker model.⁴⁷ Denyse Baillargeon’s research on working poor families in Montreal during the depression of the 1930s suggests, for instance, that “the image of the homemaker wholly dependent on the male wage and exclusively dedicated to housework and child care represented a virtually

⁴⁵ Guest, *supra* note 23 at 36.

⁴⁶ Christie, *supra* note 17 at 51-52.

⁴⁷ Denyse Baillargeon, “Indispensable But Not a Citizen: The Housewife in the Great Depression” in R. Adamoski, D.E. Chunn & R. Menzies, eds., *Contesting Canadian Citizenship: Historical Readings* (Peterborough: Broadview Press, 2002) 179; Eileen Boris & S. J. Kleinberg, “Mothers and Other Workers: (Re)Conceiving Labor, Maternalism, and the State” (2003) 15 *J. Women’s History* 90; Christie, *supra* note 17; Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917-1942*. (Ithaca: Cornell University Press, 1995); Joy Parr, *The Gender of Breadwinners: Women, Men, and Change in Two Industrial Towns, 1880-1950* (Toronto: University of Toronto Press, 1990); and Joan Sangster, *Earning Respect: The Lives of Working Women in Small-Town Ontario, 1920-1960* (Toronto: University of Toronto Press, 1995).

unattainable ideal for the majority of these poor working-class households.”⁴⁸

Without a family wage, “family survival depended by necessity on intensive domestic production and the extremely close management of the household budget, to which were often added the earnings from paid work of the mother of the family.”⁴⁹ Notwithstanding the social disapproval of and the legal restrictions on wage-earning (married) women,⁵⁰ many mothers with young children often engaged in paid employment and/or a range of other paid work, including sewing; knitting; taking in laundry, boarders, or other people’s children; selling home-baked goods; performing domestic work in other people’s homes; engaging in forms of prostitution; and making “moonshine.”⁵¹

The many mother-supported families among the working poor were equally important to the link between “less eligibility” and mothers’ allowances. Suzanne Morton found that between 1921 and 1931, sixteen per cent of all Halifax families with children were headed by a single woman (mostly widows), many of whom engaged in the types of paid work outlined above.⁵² Joy Parr’s research on the gendered labour force in the industries in two southern Ontario towns revealed that female wage-earners in the Penmans knitting mill in Paris included a large number of single mothers with children. In 1936, for example, more than twenty-five per cent of female employees lived in single-headed households, most of which included children.⁵³ Moreover, because of low textile wages, the acute financial need in single mother-headed households made lone mothers reliant on the wages of their

⁴⁸ Baillargeon, *ibid.* at 182. Baillargeon’s qualitative research is based on 30 interviews with francophone women.

⁴⁹ *Ibid.*

⁵⁰ See Judy Fudge, “From Segregation to Privatization: Equality, the Law, and Women Public Servants, 1908–2001” in Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 86.

⁵¹ See Janice Acton, Penny Goldsmith & Bonnie Shepard, eds., *Women at Work: Ontario, 1850-1930* (Toronto: Canadian Women’s Educational Press, 1974) on making “moonshine”; Sangster, *supra* note 47; and *ibid.*

⁵² Suzanne Morton, “Women on Their Own: Single Mothers in Working-Class Halifax in the 1920s” (1992) 21:2 *Acadiensis* 90. See Morton’s discussion of Jessie Muir (a widow and her seven children) who “survived the way most widows did before the welfare state: she used her home to generate income, and perhaps also accepted occasional day work in the critical period before she could depend on her children’s labour.” (at 90).

⁵³ Parr, *supra* note 47 at 28-29.

children.⁵⁴ According to Parr, “[m]any women lived alone with their children. Some were widowed, deserted, or never-married mothers who moved to Paris with their children because it was a place where they, with help from their teenagers, could assemble a family wage in the absence of a male breadwinner.”⁵⁵

Given the precarious economic situation of the working poor, it is hardly surprising that early mothers’ allowance legislation implicitly or explicitly contemplated that women would supplement their “allowance” with money from paid work even when their children were of tender years, since the rates did not differentiate on the basis of children’s age. From a policy standpoint, the provision of such state assistance was based on the express policy that it was temporary, it was supplementary to home-based or other earnings, and it was intended to help worthy single mothers until they were able to (re)marry or to receive money from wage-earning children, especially sons.⁵⁶ Therefore, it is important to be aware of the class-based aspects of legislation. At that time—and still to this day—middle-class women were exhorted to be homemakers and were criticized if they engaged in paid work. In contrast, the working poor and/or single mothers received contradictory messages. They were told that they should engage in paid labour either to stay off the dole or to demonstrate that they were not idle and lazy; ironically, those who engaged in paid labour at that time were criticized for doing so.⁵⁷

In Nova Scotia, for example, there was “a general prejudice against wage-earning mothers.”⁵⁸ There, the Report of the Commission on Mothers’ Allowances adopted a contradictory position: it stated that engaging in wage labour and taking in boarders was “inappropriate” for

⁵⁴ *Ibid.* at 83.

⁵⁵ *Ibid.*

⁵⁶ Christie, *supra* note 17 at 154-55; Morton, *supra* note 52 at 96-97; and Sangster, *supra* note 47 at 129.

⁵⁷ These contradictions were also evident in other jurisdictions. Gwendolyn Mink cites a 1919 US study which found 69 per cent of the children of wage-earning mothers were between five and fifteen years old. As a result, maternalists made recommendations that both recognized and discouraged the need for wage work by women; it was recommended that while women could seek part-time, outside employment, they should be barred from industrial home work, night work, and part-time work when they had two or three children under the age of sixteen, and from any outside work if they had five or more children under the age of sixteen. For maternal feminist leaders, “the real solution to poverty and its consequences was a husband for every woman and a family wage for every father.” See Mink, *supra* note 47 at 44, 46.

⁵⁸ Morton, *supra* note 52 at 96.

mothers, but “accepted the belief that a mother should be able to support at least one child.”⁵⁹ Joan Sangster has also identified the social stigma as well as the economic marginalization suffered by single mothers, and even widows. If women were on mothers’ allowance and took on supplementary wage work, “they were criticized for ‘taking jobs away from others’” and “criticized by other citizens, including women, for taking state money rather than working!”⁶⁰

The strong adherence of many women on mothers’ allowance to familial ideology and the breadwinner ideal was equally contradictory. Noting that eighty-nine per cent of mothers’ allowance applicants in Ontario “reported that they had had no employment outside the domestic sphere,”⁶¹ Nancy Christie concluded that in the absence of a male breadwinner, married women “preferred to receive government welfare assistance rather than to seek work for wages and thereby transgress on the breadwinner’s role.”⁶² She also argued that “[i]t is in the context of *women’s* wages, not the wages of the male breadwinner, that the economic contribution of mothers’ allowances must be assessed.”⁶³ For widows in particular, “[b]ecause work was an enforced necessity, it was not seen as an expression of self-worth and economic independence when it conflicted with responsibilities in the home.”⁶⁴ We accept the argument advanced by Christie that the nuclear family model became hegemonic among working class as well as middle-class families during the early twentieth century. However, we also think the analysis needs to address the question of the double day—an often implicit, if not ubiquitous, implication of women’s participation in the labour market, and the extent to which the challenges of childcare or leaving children alone, for example, may have made the male breadwinner model attractive.⁶⁵

⁵⁹ *Ibid.* at 100, citing Nova Scotia, Royal Commission on Mothers’ Allowances, *Report*, in *Journals of the House of Assembly* (Halifax: King’s Printer, 1921).

⁶⁰ Sangster, *supra* note 47 at 131.

⁶¹ Christie, *supra* note 17 at 146.

⁶² *Ibid.* at 314.

⁶³ *Ibid.* at 147 [emphasis in original].

⁶⁴ *Ibid.* at 148.

⁶⁵ In contrast, Gwendolyn Mink’s research shows that in mid-1920s Pennsylvania, although women who received pensions were supposed to be full-time mothers, many recipients were “moonlighting.” Less than half of recipients’ income came from pensions; 56.5 per cent came from mothers’ and children’s wage work and rent from boarders/lodgers. Moreover, notwithstanding

In Canada, the reformation of the laissez-faire form of state from the late nineteenth to the mid-twentieth century was both discursive and material. On the discursive level, the distinction between crime as a state responsibility and poverty as an individual problem shifted as new discourses about poverty emerged and competed with old ones that linked public assistance to pauperization and a pauper class.⁶⁶ Thus, in the pre-Keynesian state poverty came to be viewed, to a limited extent, as a private moral failing, as well as a collective, public problem: the appropriate response was state intervention and/or assistance. At the level of actual welfare provision, the change over time was clearly more discursive than substantive. Economic welfare has always been conceptualized in terms of the poor. Although state subsidization of business has been a constant in Canada, it is never defined as such.⁶⁷

Nonetheless, mothers' allowances did represent a qualitative moment in Canadian welfare's legal history, inasmuch as the provinces assumed some direct fiscal responsibility for supporting some poor, sole-support mothers. Much of the new legislation incorporated provisions that were designed to ameliorate some forms of stigmatization. Significantly, mother-recipients were constituted discursively not as charity cases, but rather as government employees on contract, who were charged with the responsibility of raising "good" citizens. Efforts were also made to avoid public exposure and identification of recipients; in many jurisdictions, for example, allowance cheques were mailed, thereby sparing a woman the indignity of having to collect her cheque at a public welfare office.

Mothers' allowance legislation did not fundamentally depart from residual conceptions of welfare,⁶⁸ despite factors including diversity in rates and qualifying criteria.⁶⁹ The legislation was clearly aimed at reinforcing "private family welfare and self-support in the future," which

maternalist policy-makers' expectations that local policies would subsidize domesticity, states permitted recipients to work outside the home under limited circumstances. The state of Illinois even factored women's potential wages into determining eligibility and grant levels; two out of three recipients between 1913 and 1915 worked for wages. See Mink, *supra* note 47 at 42.

⁶⁶ Chunn, *supra* note 10; Garland, *supra* note 10; and Willrich, *City of Courts*, *supra* note 2.

⁶⁷ Wallace, *supra* note 7. See also Abramovitz, *supra* note 7.

⁶⁸ Guest, *supra* note 23 at 1-2 defines a residual concept of social security as a "minimal, temporary type of service, offered at the discretion of the social welfare agency, meeting need only after evidence had been presented that all other avenues of help had been explored"

⁶⁹ Christie, *supra* note 17 at 132-35; Little, *No Car, No Radio*, *supra* note 24 at 39.

was a rejection of the maternal feminist argument “that poverty and gender were linked.”⁷⁰ In sum, the introduction of mothers’ allowances and pensions challenged the notion that sustaining families was an individual responsibility in such a way that reasserted that the primary responsibility was an individual one. The state’s assumption of a role in providing for women—and later children—was minimal, grudging, and always residual. Moreover, as Christie argues, “the notion that welfare was primarily a private and family responsibility continued to animate the discourse on welfare even during the Second World War when the modern social security state was being created.”⁷¹

III. SOCIAL WELFARE POLICY IN CANADA: THE TRANSITIONAL MOMENT

The Keynesian welfare state in Canada was very much the outcome of ongoing political and constitutional struggles both within and between local, provincial, and federal governments regarding public responsibility for welfare generally, and social assistance in particular. As the quote from James Struthers at the outset of this article indicates, the origins of income security in Canada began with motherhood, through the introduction of mothers’ allowance statutes. This legislation represented the historic success of feminists, labour leaders, and other reformers in pressuring the provinces to relieve local governments, in full or in part, for the costs of providing financial assistance to qualifying sole-support mothers. The mothers’ allowance legislation remained in place when the federal government ushered in the *Canada Assistance Plan Act* (CAP) in 1966.⁷² The CAP was the Canadian version of the 1960s “War on Poverty”—a federal cost sharing plan that established general criteria for social assistance programs across Canada, which were designed to remove “arbitrary eligibility restrictions.”⁷³ Introduced

⁷⁰ Christie, *ibid.* at 149.

⁷¹ *Ibid.* at 4. In Christie’s view, the province of Manitoba was the worst in using mothers’ allowances “to bolster a widow’s incentive to work” (at 165). In 1917, only 56 per cent of Manitoba beneficiaries earned supplemental wages; by 1926-27, 80 per cent worked outside the home.

⁷² *Canada Assistance Plan Act*, S.C. 1966-67, c.45.

⁷³ Judy LaMarsh, Minister of Health & Welfare, quoted by Struthers, *supra* note 1 at 233. Struthers notes the “tepid support” (at 233) for the Canada Assistance Plan from its inception, arguing that only as a result of Prime Minister Lester Pearson’s political commitment to the War

by the same federal Liberal government that introduced the *Medical Care Act* in 1966,⁷⁴ the CAP used federal funds (in the form of transfer payments to the provinces) to support and deliver provincial programs.⁷⁵

The enactment of the CAP was thus a defining moment in the history of the Canadian welfare state. For the first time, the federal government assumed a degree of ongoing fiscal responsibility for social assistance programs that fell within provincial jurisdiction under the Constitution's division of powers.⁷⁶ Struthers argued:

The main significance of the plan lay not in defining national standards, which in the political context of the mid-1960s was unlikely in any case, but in markedly expanding the scope of federal financing for social assistance costs across the country. Here, the provinces, including Ontario, played a leading role in pushing Ottawa far beyond its initial willingness simply to include mothers' allowance cases within a new general assistance scheme.⁷⁷

In both this part and the following part of this article, we pay particular attention to the form and content of welfare law reform in the province of Ontario. We do this not only because Ontario played a prominent role in making the case for the CAP, but also because when the foundations of the CAP began to crack, Ontario was one of two provinces that was most affected by it.⁷⁸ In the wake of the CAP's demise, Ontario Premier Mike Harris's Conservative government led an unrivalled initiative to redefine and restructure the nature and scope of public assistance.

on Poverty, "the Canada Assistance Plan became a core component of Ottawa's pledge to eliminate poverty in the April 1965 Speech from the Throne." (at 234).

⁷⁴ *Medical Care Act*, S.C. 1966-67, c. 64. This first federal health statute established a formula for federal transfers to the provinces based on the provinces' health insurance expenditures. See currently *Canada Health Act*, R.S.C. 1985, c. C-6.

⁷⁵ Sylvia Bashevkin, *Welfare Hot Buttons: Women, Work, and Social Policy Reform* (Toronto: University of Toronto Press, 2002) at 17.

⁷⁶ The federal government had contributed millions of dollars to the provinces for public relief during the depression era of the 1930s, but this assistance was viewed as a temporary rather than an ongoing fiscal commitment.

⁷⁷ Struthers, *supra* note 1 at 235.

⁷⁸ The other province was British Columbia. Regarding British Columbia, see Seth Klein & Andrea Long, *A Bad Time to Be Poor: An Analysis of British Columbia's New Welfare Policies* (Vancouver: Canadian Centre for Policy Alternatives, 2003); Gwen Brodsky *et al.*, *Human Rights Denied: Single Mothers on Social Assistance in British Columbia* (Vancouver: The Poverty and Human Rights Centre, 2006), online: <<http://www.povertyandhumanrights.org/docs/denied.pdf>>.

Under the CAP, the federal government's payments were based on the principle of matching funds: each provincial dollar spent was matched by a federal dollar. The new terrain of federal cost sharing also incorporated child welfare and social administration goals, over "fierce opposition" by federal finance officials.⁷⁹ Child welfare was successfully included as a result of its intimate connection with mothers' allowances, which the federal government had agreed to include under the CAP.⁸⁰

With the arrival of funds from the CAP, many provinces began to consolidate their social assistance programs. Ontario, for example, introduced new legislation in 1967 that repealed the mothers' allowance legislation and consolidated all the "existing categorical programs for the old, the blind, the disabled, for elderly widows and unmarried women, and for women with dependent children into one single long-term assistance program administered by the province."⁸¹ Mother-led families formed the largest part of the rising numbers in welfare caseloads; in Ontario alone, this number "jumped by 302 per cent" between 1961 and 1973.⁸² This was an increase to "exactly a third of the province's entire welfare caseload by 1973" that was "fuelled by liberalized eligibility requirements and a rising rate of family fragmentation."⁸³ Moreover, while mother-led families declined as a proportion of all welfare recipients between 1973 and 1991,⁸⁴ the decrease was numerical, not ideological; notwithstanding their reduced numbers, single mothers on welfare continued to figure prominently in the public and political imagination.

⁷⁹ Struthers, *supra* note 1 at 235.

⁸⁰ Saskatchewan had long since incorporated mothers' allowance into its child welfare legislation, and later into its social assistance legislation. In 1945, Saskatchewan extended benefits to unmarried mothers and their "illegitimate" children. See *Child Welfare (Saskatchewan)*, *supra* note 43, s. 26(2). This was renewed in the *Social Aid (Saskatchewan)*, *supra* note 35, which replaced the *Child Welfare Act*. See also S. Reg. 127, *supra* note 35, s. 4.

⁸¹ Struthers, *supra* note 1 at 237. The legislation to which Struthers refers was the first *Family Benefits Act*, S.O. 1966, c. 54. See also *Family Benefits Act*, R.S.O. 1990, c. F.2. The *General Welfare Assistance Act*, R.S.O. 1990, c. G.6 was also amended by S.O. 1967 c. 31 to provide assistance for single employable men and the families of employable men. This latter piece of legislation was to be administered by local municipalities, which promised to pose problems with consistency and fairness across the province. Unfortunately, that promise was realized.

⁸² Struthers, *ibid.* at 242.

⁸³ *Ibid.*

⁸⁴ Maureen Baker & David Tippin, *Poverty, Social Assistance, and the Employability of Mothers: Restructuring Welfare States* (Toronto: University of Toronto Press, 1999).

The Keynesian period of “liberalization” proved to be relatively short-lived—just under a decade. That duration was scarcely long enough to be regarded as an “era.” Indeed, some have argued that the Keynesian welfare state began to come undone even at the moment when it appeared to be expanding.⁸⁵ Rice and Prince have argued that the growth of the Canadian welfare state came to an end by the mid 1970s:

The old economic ideas of laissez-faire began to have greater impact on the thinking of policy makers, and a new attitude developed which called for dramatic changes to the existing [and only just established] system. In response, governments cut some programs, froze others, and allowed for limited new initiatives over the 1970s and 1980s. ... There was resistance by policy making elites to introduce any further major reforms such as national child care, and various social programmes were changed to those with a more residual character.⁸⁶

Two conclusions can be drawn here. First, the life of the CAP—which rested on the weak foundation of the young Canadian welfare state—was as precarious as it was short-lived. Second, the “privatization agenda” (of concern to feminists) was but a part of larger monetarist policies. Thus, it is important to note this short life of the CAP within the only slightly longer history of state-sponsored social welfare provision for poor mothers in Canada. Additionally, as we will illustrate below, the dismantling of the “liberal” welfare system took less than half that time; by 1995, in Ontario, the neo-liberals seemed to be the only form of liberals remaining.

During the 1984 federal election campaign, the leader of the Progressive Conservative Party, Brian Mulroney, characterized Canada’s social programs as a “sacred trust,” promising that “no social program ... affecting anyone in need ... [would] be touched by a Progressive Conservative government.”⁸⁷ Once elected, the Mulroney-era federal Tories introduced policies intended to encourage “work readiness” programs for social assistance recipients. But perhaps the most significant decision of the Conservative government was to impose a “cap on CAP” payments to the three wealthiest provinces: Ontario, British Columbia,

⁸⁵ Judy Fudge & Brenda Cossman, “Introduction: Privatization, Law, and the Challenge to Feminism” in Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism*, (Toronto: University of Toronto Press, 2002) 3.

⁸⁶ James J. Rice & Michael J. Prince, *Changing Politics of Canadian Social Policy* (Toronto: University of Toronto Press, 2000) at 234.

⁸⁷ As quoted by Bashevkin, *supra* note 75 at 28.

and Alberta. This decision had a particularly strong impact on the social democratic governments in British Columbia and in Ontario.

The government of British Columbia unsuccessfully challenged the constitutionality of the “cap on CAP,”⁸⁸ and later imposed a three-month residency requirement as a condition of eligibility for social assistance. In Ontario, the federal “cap on CAP” was triggered by the newly elected New Democratic Party (NDP) government’s decision to implement the recommendations for wide-ranging, liberal reforms of the province’s welfare system contained in *Transitions*, the 1988 Report of the Social Assistance Review Committee.⁸⁹ The federal government was particularly concerned about *Transitions*’ recommendation for higher, fully indexed welfare benefits.⁹⁰ This report would prove to be the final rallying call for higher welfare benefits during this transitional period. Its other major recommendation, controversial among welfare rights activists at the time, called for the creation of a discrete child’s benefit. This recommendation was regarded as controversial because it separated children’s needs from those of the caregiving custodial parent. *Transitions* was one of the first public documents to identify and characterize children’s poverty and needs as (potentially) discrete and capable of being calculated (and remedied) separately from those of their parents.⁹¹ As we will discuss below, in 2007, the Ontario government would revisit the creation of a separate children’s benefit. The government proposed to sever the child’s benefit from his or her parent’s social assistance, which would be paid to the parent on behalf of the child.

Bashevkin notes that the “cap” imposed on Ontario “cost the Ontario treasury an estimated \$10 billion over five years ... [as] the federal government’s share of social assistance costs in Ontario had fallen from roughly 50 per cent to less than 30 per cent.”⁹² She argues

⁸⁸ *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.

⁸⁹ Ontario, Ministry of Community & Social Services, Social Assistance Review Committee, *Transitions* (Toronto: Queen’s Printer, 1988). See Dorothy E. Chunn & Shelley A.M. Gavigan, “Welfare Law, Welfare Fraud, and the Moral Regulation of the ‘Never Deserving’ Poor” (2004) 13 Soc. & Leg. Stud. 219, for a discussion of the Social Assistance Review Committee’s recommendations in relation to welfare fraud. See also Dianne L. Martin, “Passing the Buck: Prosecution of Welfare Fraud; Preservation of Stereotypes” (1992) 12 Windsor Y.B. Access Just. 52.

⁹⁰ See Bashevkin, *supra* note 75 at 33.

⁹¹ *Ibid.* at 114-119.

⁹² *Ibid.* at 33.

that “[t]he cap on CAP combined with more experience in office took the shine off the Ontario NDP’s critique of punitive, pro-workfare attitudes.”⁹³ The NDP government went on to introduce a range of punitive welfare policies, including the euphemistic “enhanced verification measures” and the infamous “snitch lines.”⁹⁴

Official and public concerns with government deficits (created by government policies) also led to a reorientation of the federal Liberals during the 1990s. They became preoccupied with the costs of the welfare state, a development that facilitated the effective transfer of responsibility for social policy to then-Minister of Finance, and future prime minister, Paul Martin.⁹⁵ Under Martin’s leadership, the Department of Finance “went about redefining the contours of the welfare state.”⁹⁶ The agenda of this Liberal government was clearly more “neo” than liberal, and was a Canadian version of the downsizing and off-loading of welfare that occurred in the United States under Democratic President Bill Clinton.⁹⁷ The federal Liberals pursued, indeed were wedded to, what Rice and Prince have characterized as a “monetarist” agenda of policies. This included “free trade pacts, deficit reduction, the deregulation of certain markets, the privatization of some public services, the limitation of collective bargaining and union powers, a reduction in the number of public employees, the transformation of the tax system, the restructuring of local governance structures ... and the promotion of charities and other community groups as vehicles for meeting social needs”—in short a “downsizing” of the state.⁹⁸

For our purposes, the “downsizing” of federal responsibility is best illustrated by the new Canadian Health and Social Transfers provisions, which, when introduced, reconfigured the nature of federal transfer payments in Canada. In 1995, this legislation replaced the CAP and facilitated deep cuts to federal spending (transfer payments to provinces) which, in turn, ensured the wholesale restructuring of

⁹³ *Ibid.*

⁹⁴ Chunn & Gavigan, *supra* note 89.

⁹⁵ Bashevkin, *supra* note 75 at 81.

⁹⁶ *Ibid.*; see also Rice & Prince, *supra* note 86.

⁹⁷ Bashevkin, *ibid.*; Abramovitz, *supra* note 7.

⁹⁸ Rice & Prince, *supra* note 86 at 138-39; see also Fudge & Cossman, *supra* note 85.

provincial social assistance programs.⁹⁹ As we will discuss below, nowhere was this phenomenon more clearly expressed than in the new welfare legislation of the neo-liberal common sense revolutionaries, led by Premier Mike Harris of Ontario who was elected in 1995. Almost immediately, Ontario's thirty-year-old welfare legislation was repealed, and replaced by the exhortatory *Ontario Works Act*.¹⁰⁰

The Ontario Conservatives restructured provincial welfare legislation along explicitly neo-liberal lines. The legislation expressed all the hallmarks of neo-liberal discourse: "family benefits" and "general welfare assistance" ceased to exist as legal forms. The *Ontario Works Act* suggested that discourse theorists were alive and well as crafters of Ontario's welfare policy. The stated purpose of the legislation truly reads like a neo-liberal credo.¹⁰¹

Entitlements to "welfare" and "family benefits" were replaced by a form of "short term financial assistance" which placed the emphasis on individual responsibility and self-reliance through employment. Only those Ontarians who are permanently disabled (under what is now a higher threshold for and narrower definition of disability) remain eligible for long term assistance.¹⁰² Everyone else on "assistance" is deemed to be employable, including elders and single mothers of

⁹⁹ Bashevkin, *supra* note 75; Rice & Prince, *ibid.* at 234; Baker & Tippin, *supra* note 84; Allan Moscovitch, "The Canada Health and Social Transfer" in Raymond B. Blake, Penny E. Bryden & J. Frank Strain, eds., *The Welfare State in Canada: Past Present and Future* (Toronto: Irwin Publishing, 1997) 105. See also, Janet Mosher & Joe Hermer, *Welfare Fraud: The Constitution of Social Welfare as Crime* (Ottawa: Law Commission of Canada, 2005) at 17 [Mosher & Hermer, *Welfare Fraud*].

¹⁰⁰ *Ontario Works Act*, *supra* note 4. See Chunn & Gavigan, *supra* note 89; Janet Mosher *et al.*, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System* (Final Report of Research Findings from the Woman and Abuse Welfare Research Project, 5 April 2004) [*Walking on Eggshells*]; Ian Morrison & Gwyneth Pearce, "Under the Axe: Social Assistance in Ontario in 1995" (1995) 11 J. L. & Soc. Pol'y 1; Ian Morrison, "Ontario Works: A Preliminary Assessment" (1998) 13 J. L. & Soc. Pol'y 1.

¹⁰¹ In s. 1 of the *Ontario Works Act*, *supra* note 4, the purpose of the legislation is expressed in four subsections. The Act:

- (a) recognizes individual responsibility and promotes self reliance through employment;
- (b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed;
- (c) effectively serves people needing assistance; and
- (d) is accountable to the taxpayers of Ontario.

See also Cossman, *supra* note 5; Mosher & Hermer, *Welfare Fraud*, *supra* note 99.

¹⁰² *Ontario Disability Support Program Act*, S.O. 1997, c. 25, Sch. B.

school-aged children. Also, as others have noted,¹⁰³ for the Harris conservative government any job was a good job.

The enactment of this legislation was followed by a relentless crackdown on “welfare fraud”¹⁰⁴ and immiseration of thousands of poor people. The discursive construction of welfare recipients, including single mothers, as people who “do nothing” and as a result are “paid for doing nothing” is significant to this article. Since the early days of mothers’ allowance, when mothers were regarded as having a job to do in raising children, single mothers on welfare have been reconstructed as layabouts who do not labour and are rewarded for their indolence. As Struthers notes, notwithstanding “its important accomplishments,” the CAP which symbolizes the Keynesian moment in Canada “ultimately failed to alter, in any fundamental way, longstanding approaches to the needs of the poor either in Ontario or in other provincial jurisdictions.”¹⁰⁵ In the next section of this article, we consider the expression of the more recent construction of welfare mothers, who need not apply for welfare.

IV. WOMEN AND WELFARE LAW REFORM: MOTHERS NEED NOT APPLY NOW

Canadian feminist socio-legal scholars have begun to grapple with the form and implications of the restructuring of the Canadian welfare state for feminist analyses of law.¹⁰⁶ In particular, the ascendance of the neo-liberal discourse of, and preoccupation with, privatization has been the focus of much recent work. This new literature has tended to reflect the disciplinary and research

¹⁰³ The explicit thinking behind the *Ontario Works Act*, *supra* note 4 is that “any job is a good job” and employment opportunities are available if people are pressed to find employment. Any job is thought to be preferable to “dependency” on social assistance. Entry-level jobs, even if they are “bad” jobs, are believed to give a person an entry point to the labour market, from which they can move up the earnings ladder. Online: Workfare Watch <<http://www.welfarewatch.toronto.on.ca/promises/intro.htm#earnings>> [accessed 22 May 2005, site offline].

¹⁰⁴ Chunn & Gavigan, *supra* note 89; Mosher & Hermer, *Welfare Fraud*, *supra* note 99; and Kiran Mirchandani & Wendy Chan, *Criminalizing Race, Criminalizing Poverty: Welfare Fraud Enforcement in Canada* (Halifax: Fernwood Publishing, 2007).

¹⁰⁵ Struthers, *supra* note 1 at 231.

¹⁰⁶ See Boyd, *supra* note 8; Marlee Kline, “Blue Meanies in Alberta: Tory Tactics and the Privatization of Child Welfare,” in Boyd, *supra* note 8, 330; Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

preoccupations of the scholars, and it is marked neither by a deep immersion in nor by an appreciation of the history of the relationship between women and welfare or of the history of the relationship between welfare law and family law.¹⁰⁷

Feminist legal scholars, whose primary research interests lie in family rather than welfare law, have been particularly attentive to the “familial ideological” dimensions of welfare law, as expressed most clearly in the much amended definition of “spouse.”¹⁰⁸ Not surprisingly, much of their focus, informed by family law concerns, has been on the various “spouse in the house” reforms and the extension of the definition of spouse in welfare law to an ever-widening net of cohabiting relationships, including same-sex cohabitation. In the current context, Janet Mosher’s research especially stands out because of her interrogation of the impact of welfare law and welfare law policy on the lives of women attempting to leave abusive relationships.¹⁰⁹

Through interviews with welfare mothers, Mosher and her colleagues were able to identify a number of implications of the Ontario government’s cuts to welfare rates and restructuring of welfare for women attempting to flee abusive relations. Mosher’s research made a number of key thematic findings, not the least of which was that “women’s safety has been further compromised” by the welfare reforms, which resulted in “grossly inadequate benefits, workfare, increased scrutiny, and the changed definition of spouse, [that] have all operated to make it even harder for women to leave their abusers and re-establish

¹⁰⁷ For a notable early contribution, see Mary Jane Mossman & Morag MacLean, “Family Law and Social Welfare: Toward a New Equality” (1986) 5 Can. J. Fam. L. 79.

¹⁰⁸ See e.g. Brenda Cossman, “Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project” in Brenda Cossman & Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169; Susan B. Boyd, “(Re)Placing the State: Family, Law and Oppression” (1994) 9 C.J.L.S. 39; Shelley A.M. Gavigan, “Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law” (1993) 31 Osgoode Hall L.J. 589; and Shelley A.M. Gavigan “Legal Forms, Family Forms, Gender Norms: What is a Spouse?” (1999) 14 C.J.L.S. 127 [Gavigan, “Legal Forms”].

¹⁰⁹ Mosher *et al.*, *supra* note 100. See also Janet E. Mosher, “Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other” in Sheila M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice, and Everyday Life* (Toronto: Oxford University Press, 2000) 30; Janet E. Mosher, “Welfare Reform and the Re-making of the Model Citizen” in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 119.

their lives.”¹¹⁰ The threat of welfare fraud was found to be empowering for the “louse in the house” men.¹¹¹

Despite the feminist scholarly preoccupation with the “spouse in the house” issue, it appears that for the abused, poor women who were interviewed, the “spouse in the house” issue is just one of many concerns. Rather, in *Walking on Eggshells*, Mosher and her colleagues found that abused women experienced many forms of abuse; their abuse was not confined to an abusive spouse, and their abuse could occur both inside and outside of their homes. They also identified the depth and range of neo-liberal welfare law reform’s adverse impacts: these included inadequate benefits and a resulting inability to both feed the kids and pay the rent; the empowerment of abusive men who used welfare, such as using fraud snitch lines, as a means to harass their former spouses; a myriad of impenetrable and changing eligibility rules; and the debilitating effects of living under constant surveillance.¹¹²

Additionally, *Walking on Eggshells* confirms that extremely low welfare rates and the alleged “culture of fraud” that has been created extend beyond the discourse of “welfare cheats” to encompass everyone who is on welfare—the never deserving poor.¹¹³ Even abused women on welfare who are “walking on eggshells” express the belief that they are also “stealing from the government” when they are forced to rely on social assistance.¹¹⁴

¹¹⁰ Mosher *et al.*, *supra* note 100 at 5.

¹¹¹ This refers to men who could be found to be a spouse for the purposes of welfare law, but in no other family law context. In the words of one woman interviewed by Mosher *et al.*:

He’s got all kinds of thing to could do with me: report me to welfare for fraud. ... He can get away with assaulting me, you know. ... He lived off me, sponged off me. I had no way to um, I had absolutely no way to get off the system. And not only that, the pressure of the system. I couldn’t even tell what was going on because they would cut my cheque. I couldn’t even tell them that this guy was sponging off me ... I mean you can’t even get a guy outta’ your house because now he has all the power in the world. Welfare fraud, welfare, that’s what it’s all about. They just gained the biggest stronghold they could ever gain and there’ll be so many women that will be um, affected by that.” (Mosher *et al.*, *ibid.* at 57-58).

Another woman spoke of her experience as follows:

...he feels like he has the upper hand, because like I said they were harassing me because he kept calling and saying that he was living with me when he wasn’t. And you know, when he wasn’t, but they were harassing me though. ... (Mosher *et al.*, *ibid.* at 58).

¹¹² *Ibid.*

¹¹³ Chunn & Gavigan, *supra* note 89.

¹¹⁴ Mosher *et al.*, *supra* note 100.

Recent feminist analysis of women and welfare, especially of the “spouse in the house” amendments in Ontario, has invoked the discourse of privatization to characterize the 1990s welfare reforms.¹¹⁵ According to this argument, in the restructuring of the welfare state along leaner and meaner neo-liberal lines, the focus of welfare policy has shifted. The state is now said to be “reinforcing certain private familial responsibilities for women’s poverty ... while diminishing public societal commitment to alleviating that poverty.”¹¹⁶ In this context, Brenda Cossman has observed that “[f]amily law is displacing social welfare as the primary source for persons without market income.”¹¹⁷ Relying on scholarship on the gendered nature of privatization, Cossman argues that there are in fact two “stories” in the reprivatization strategy: the dislocation of the “public” in favour of “private support” in family; and the fact that social welfare law coexists with a “rearticulation of the ‘traditional family.’”¹¹⁸

We do not deny the social, economic, and rhetorical force of neo-liberal attacks on welfare law, nor are we suggesting that the 1995 reforms in Ontario, for instance, were anything less than a full-out assault on the poor. However, for us two questions remain. First, when did the provision of social welfare ever dislocate or displace the patriarchal family in fact, law, or social policy as the primary site of responsibility for the support of family members? Second, when was welfare ever more than at best a residual reinforcement of and support for patriarchal responsibilities for the nuclear family?

In the decade following the initial neo-liberal reforms, litigation, research, and advocacy campaigns attempted to restrain and redirect welfare law and policy, with mixed results. Litigation based on the *Canadian Charter of Rights and Freedoms*¹¹⁹ that challenged the constitutionality of the dramatic reduction in welfare rates was

¹¹⁵ See Cossman, *supra* note 5 at 170 regarding the discursive nature of “[t]he shift from public responsibility to private self-reliance, from social welfare rights to individualized support obligations ... [I]t is important to emphasize that this shift operates at the level of the discursive and not necessarily at the concrete level of women and children’s lives.”

¹¹⁶ *Ibid.* at 173, quoting Susan B. Boyd.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11 [*Charter*].

unsuccessful,¹²⁰ whereas the challenge of the definition of “spouse” ultimately enjoyed more success.¹²¹

¹²⁰ See *Masse v. Ontario (Ministry of Community & Social Services)* (1996), 89 O.A.C. 81 (Ont Div. Ct.). This deferential judicial approach to the substantive components of welfare policy was supported by the Supreme Court of Canada in *Gosselin v. Québec (Attorney-General)*, [2002] 4 S.C.R. 429, where the Court effectively empowered provincial governments to set whatever limitations on welfare programs they saw fit, even if it meant immiseration of welfare recipients. The majority of the Court rejected any claims based on s. 15 and s. 7 of the *Charter*, *ibid*.

¹²¹ *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 59 O.R. (3d) 481 (Ont. C.A.). The definition of the word “spouse” was challenged in this case, and was declared unconstitutional by the Ontario Court of Appeal. The provincial government received leave to appeal this decision to the Supreme Court of Canada, but following a change of government, the new Attorney-General announced that the Liberal government would not appeal the decision. Instead, it amended the regulations under the *Ontario Works* legislation to meet the Ontario Court of Appeal’s requirements. The different relevant definitions of the word “spouse” were contained in the regulations below:

Family Benefits Act, R.R.O. 1990, Reg. 366, s. 1:

- (1) “spouse” means ... (d) a person of the opposite sex to the applicant or recipient who has resided continuously with the applicant or recipient for a period of not less than three years.
- (2) In determining whether or not a person is a spouse within the meaning of this Regulation, sexual factors shall not be investigated or considered.
- (3) Clause (d) of the definition of “spouse” in subsection (1) does not apply to a person who has resided continuously for a period of not less than three years with the applicant or recipient and the applicant or recipient provides evidence to the Director that the economic, social and familial aspects of the relationship between the person and the applicant or recipient were such that the continuous residing did not amount to cohabitation.

The *Family Benefits Act* replaced the *Ontario Works Act*; however, as noted by the Ontario Court of Appeal, the “1995 definition [under the *Family Benefits Act* regulations] remain[ed] in force in substantially the same form” in the *Ontario Works Act*. Note that opposite sex partners are defined in a separate definition in the regulation, but are also covered by subsection (2). O. Reg. 134/98 amended to O. Reg. 231/04, s. 1 defined “spouse” as follows:

- (1) “spouse”, in relation to an applicant or recipient, means,
 - (a) a person of the opposite sex to the applicant or recipient, if the person and the applicant or recipient have together declared to the administrator or to the Director under the *Ontario Disability Support Program Act, 1997* that they are spouses,
 - (b) a person of the opposite sex to the applicant or recipient who is required under a court order or domestic contract to support the applicant or recipient or any of his or her dependants,
 - (c) a person of the opposite sex to the applicant or recipient who has an obligation to support the applicant or recipient or any of his or her dependants under section 30 or 31 of the *Family Law Act*, whether or not there is a domestic contract or other agreement between the person and the applicant or recipient whereby they purport to waive or release such obligation to support, or
 - (d) a person of the opposite sex to the applicant or recipient who has been residing in the same dwelling place as the applicant or recipient for a period of at least three months, if,
 - (i) the extent of the social and familial aspects of the relationship between the two persons is consistent with cohabitation, and
 - (ii) the extent of the financial support provided by one person to the other or the degree of financial interdependence between the two persons is consistent with cohabitation.
- (2) For the purpose of the definitions of “spouse” and “same-sex partner”, sexual factors shall not be investigated or considered in determining whether or not a person is a spouse or same-sex partner.

In roughly the same time period, while the government of Ontario, in particular, was pursuing an aggressive campaign against people on welfare, the federal and provincial governments increased the Canadian Child Tax Benefit for low income families in Canada by adding a new National Child Benefit Supplement (NCB). The NCB was said to have been created “to prevent and reduce child poverty.”¹²² However, the very poorest families never received the NCB because of a provincial clawback that resulted in a deduction from the benefits of parents on assistance.¹²³ Despite the previous promise of the Ontario Liberals, this clawback did not end with their first electoral victory.

Following the defeat of the provincial Conservative government in the fall of 2003, the new Liberal government did, however, adopt a different tone in relation to those people who are extremely poor. The Minister of Community and Social Services condemned the previous Conservative government for treating people on welfare as a “typical punching bag” and she immediately committed the Liberal government to a “series of [welfare] reforms.”¹²⁴ Although the new Liberal government invoked the now axiomatic incantation of all governments—“no tolerance for welfare fraud”—it also repealed the legal expression of the Conservative government’s punitive “zero tolerance” policy that had been introduced in 2000. In January 2003, the permanent ineligibility sections of the regulations under the *Ontario Works Act* were repealed.¹²⁵ In December 2004, the Liberal government also introduced a series of amendments to the regulations, which ameliorated some of the worst excesses of the previous administration. For instance, under the amended regulations the earnings of a dependent child ceased to be considered an asset in determining the eligibility of a benefit unit,¹²⁶ and Registered Education Savings Plans

¹²² Online: The National Child Benefit <<http://www.nationalchildbenefit.ca/ncb/thenational1.shtml>>. See also online: Hands Off our Baby Bonuses <<http://www.incomesecurity.org/campaigns/HandsOff/>> [accessed May 22, 2005, site offline].

¹²³ See Wanda A. Wieggers, “The National Child Benefit: Social Inequality Under the New ‘Social Union’” (2001-2002) 33 *Ottawa L. Rev.* 25.

¹²⁴ Ontario, Legislative Assembly, Official Report of Debates (Hansard), 17A (17 December 2003) at 868 (Hon. Sandra Pupatello).

¹²⁵ O. Reg 456/03.

¹²⁶ O. Reg. 395/04, s. 6(3). These changes, among others, had been recommended to the Minister of Community and Social Services by Deb Matthews, Parliamentary Assistant to the Minister, in her Review of Employment Assistance Programs in Ontario Works & Ontario Disability Support Program (December 2004). This report, and the response to its

also became exempt from the determination of assets (and thus no longer needed to be cashed before the benefit unit became eligible for benefits).¹²⁷ In June 2004, the Liberal government announced a modest increase in benefits under the statutes.¹²⁸

Two welfare rights campaigns expressed the ongoing struggles against the ideology and impact of neo-liberal welfare reform: “Feed the Kids and Pay the Rent” and “Hands Off!” These welfare rights campaigns—led by welfare mothers, their advocates, and their allies—drew attention to the impact of extremely low welfare rates and the targeted clawback of the NCB from the very poorest families. At the same time, these campaigns reasserted the need for a form of “mothers’ allowance” in order to meet the needs of children with mothers on welfare.¹²⁹ These campaigns reinserted the relationship between poor mothers and their children into the public discourse about social assistance and reminded the public of the vulnerability of single parent families, mostly mother-led, who continued to be relegated to the lowest ranks of the poor.¹³⁰

recommendations by the Income Security Advocacy Centre in May 2005 can be found online: Income Security Advocacy Centre <<http://www.incomesecurity.org/campaigns/past.html>>.

¹²⁷ O. Reg. 395/04, *ibid.*, s. 12(1), 13(4).

¹²⁸ Ontario Ministry of Community and Social Services, “Ontario Social Assistance Rate Increase and Special Payments” (30 June 2004), online: Ontario Ministry of Community and Social Services <<http://www.cfcs.gov.on.ca/CFCS/en/newsRoom/factSheets/040630.htm>>.

¹²⁹ These campaigns were commenced and coordinated by an Ontario legal clinic, the Income Security Advocacy Centre (ISAC), in collaboration with a number of community partners. The campaigns involved a multi-pronged, integrated law reform strategy that included a postcard campaign, addressed to Premier Dalton McGuinty, urging him to honour an election promise to end the clawback of the NCBS made prior to his first election; intervention in electoral campaigns; all-candidates meetings; community education and organization; a media strategy; and litigation on *Charter* issues in the case of *Chomolkin, Lance & Prine v. Her Majesty the Queen in Right of Canada, et al.* For information on this still pending litigation, see online: Income Security Advocacy Centre <<http://www.incomesecurity.org/challenges/ChokomolinLancePrincev.HerMajestytheQueeninRightofCanadaetal.html>>. For information and an assessment of the campaign, see online: Income Security Advocacy Centre <<http://www.incomesecurity.org/campaigns/HandsoffCampaign.html>> [Hands Off].

¹³⁰ It is axiomatic to note the extent of the poverty of poor mother-led families in Canada. They account for 90 per cent of all poor single-parent families and continue to have the highest poverty rate out of all the most common family types. Their incomes are less than half of the poverty line, according to Statistics Canada’s low income cut-offs. See e.g. National Council of Welfare, *Poverty Profile, 2002-2003* (Ottawa: Minister of Public Works and Government Services Canada, 2006) Figure 1.6 at 12. See also Wanda Wieggers, *The Framing of Poverty as “Child Poverty” and its Implications for Women* (Ottawa: Status of Women Canada, 2002).

In many ways, the most telling illustration of the neo-liberal agenda in recent Canadian history continues to be Ontario's dramatic cuts to benefit levels in order to save the public purse from paying people "to do nothing." The sharply reduced welfare rates implemented by the Conservative government in 1995 have witnessed only marginal increases, while the reporting requirements, the scrutiny and discretion of welfare workers, and the dearth of community and social supports remain ongoing.

In our view, the implications of "Feed the Kids," "Hands Off!," and *Walking on Eggshells* for feminist analyses of welfare, family law, and neo-liberalism are significant. It is clear that the impact of neo-liberal welfare law reform on the concrete lives of poor women and their children extended further and deeper than the "spouse in the house" definitions.

The two-year long "Hands Off!" campaign against the clawback of the NCB experienced a bittersweet victory of sorts in March 2007, when the provincial government announced the creation of a new Ontario Child Benefit for all low-income families in Ontario. The provincial government also promised that poor families will receive the Ontario Child Benefit in addition to the NCB.¹³¹ The introduction of the Ontario Child Benefit was combined with a "rate restructuring," which lowered social assistance rates and allocated items that were previously covered by those rates (*e.g.*, winter clothing allowance) to the separate NCB. The formal separation of children (as beneficiaries) from their parents is both discursive and material.

In our view, analyses of "privatization" and "re-privatization" in the context of welfare law do not sufficiently attend to the way in which poverty, welfare, and family have historically been framed in liberal states. The Keynesian form of privatization is rendered invisible by the public support for the private sector and the family, which witnessed a broadening support, together with the assumptions of patriarchal familial ideology being more firmly embedded. Under this view,

¹³¹ "The implementation of the Ontario Child Benefit, and the resulting restructuring of social assistance that will happen in July, 2008, reduces the clawback of the National Child Benefit Supplement (NCBS) but doesn't end it. As of July, 2008, the NCBS will no longer be deducted from the monthly cheques of families on Ontario Works (OW) or the Ontario Disability Support Program (ODSP)." See Hands Off, *supra* note 129.

bolstering the family is the goal (*e.g.*, health care and education).¹³² Recent feminist literature speaks of the Keynesian welfare state as if the public realm really supplanted the private—when all it ever did at best was to shore it up.

While the definition of spouse has expanded to include same-sex relationships, the nuclear form of the family has retained its hegemony.¹³³ Through its emphasis on marriage and its asserted importance to the children of same-sex couples, the same-sex marriage campaign has in fact contributed to the further marginalization of single mother families.¹³⁴ Thus, what we are seeing is a reformation of the privatization principle, which is always patriarchal. We do not share the view that there is a new gender order.¹³⁵ Rather, we believe there is a reformed gender order in which patriarchal norms and values remain unchanged (even if modified, as attested by the successful same-sex marriage campaign in Canada).

Legislation that was gender and sex specific made the patriarchal basis of the Keynesian form of welfare state transparent. What was less obvious, but still remained, were longstanding ideas about individual responsibility. With respect to women, their role as mothers was explicit. The legislation also entrenched the individual responsibility of mothers to supplement their benefits (see the first *Ontario Mothers' Allowance Act*); and later, under Keynesianism, the express principle was that mothers' work was women's work, and that the payment of the allowance itself was for a form of motherwork available only to certain mothers. With gender neutral legislation, the individual responsibility of everyone, including mothers, to become engaged in wage labour is articulated, while the individual responsibility for domestic labour becomes less visible and less articulated. Women's unpaid labour is increasing. This is especially the case since the words "health care" have been redefined to include only urgent care, early discharges from hospitals, and the increasing use of homecare for the sick and the elderly.

¹³² See McIntosh, *supra* note 25.

¹³³ Gavigan, "Legal Forms," *supra* note 108.

¹³⁴ See also, Shelley A.M. Gavigan, "Equal Families, Equal Parents, Equal Spouses, Equal Marriage: The Case of the Missing Patriarch" (2006) 33 *Sup. Ct. L. Rev.* (2d) 219.

¹³⁵ See Janine Brodie, *Politics on the Margins: Restructuring and the Canadian Women's Movement* (Halifax: Fernwood Publishing, 1995).

As Cossman has argued, there could be more of a discursive shift—and on this we might agree; however, we need to interrogate the discursive shift within the material context. In our view, within the Keynesian welfare state there was a discourse of helping the poor that translated into alleviating (but not supplanting) the historical expectation that people are responsible for their own poverty and that it is up to them to seek assistance from their own family, friends, and community before they go to the state.

The new rhetoric and policies of privatization are linked to the notion of reduced public spending. Yet, clamping down on welfare fraud does not save the state any money since there is an increase in state-initiated intervention and state expenditure. What has shifted is the extent of privatization—but that is different from saying that privatization is completely new. There is a reorganization and retrenchment of the state, a renegotiating of the public/private divide, and a redefinition not simply of where the line is drawn, but also of what “content” belongs in each sphere.

Despite the important insights of feminist family law scholars who are analyzing forms of privatization in family and social welfare law,¹³⁶ it appears that important sites of privatization remain un- or under-theorized.¹³⁷ In particular, compelling illustrations of privatization in family law may be seen in the context of the increasingly permissive approach to “private ordering” in family law, such as mediation and arbitration. This also includes approval at the highest level of the Canadian judiciary permitting the “contracting out” of family law and holding spouses to their “freely contracted bargains.” In many ways, the emerging dominant discourse in family law (but not welfare law) is “freedom of contract”—the *sine qua non* of the private.

V. WELFARE LAW REFORM, THEN AND NOW: SOME CONCLUSIONS

In this article, we have analyzed two important waves of welfare law reform and the implications thereof for poor lone mothers and their

¹³⁶ Susan B. Boyd, *Child Custody, Law, and Women's Work* (Toronto: Oxford University Press, 2003) at 215-19; Cossman, *supra* note 5.

¹³⁷ See especially *Miglin v. Miglin*, [2003] 1 S.C.R. 303; *Hartshorne v. Hartshorne* (2004), 236 D.L.R. (4th) 193.

children. We do not suggest that we have covered the entire history of the construction and regulation of poor mothers and their relationship to forms of social assistance—from mothers' allowances, to family benefits, to new notions of workfare: that larger project awaits us on another day. However, our analysis here leads us to the conclusion that the continuities, as well as the discontinuities, between "then" and "now" need to be acknowledged and understood.

There are some striking continuities or similarities between the first wave of mothers' allowances and the neo-liberal reforms of the 1990s. Both periods were ones of structural change and reformation of the public and the private (state/market/family). Both periods were marked by concern about a "crisis" of the (nuclear) family. Both periods saw the enactment of welfare legislation that assumed the participation of (female) beneficiaries in paid labour, in conjunction with the implementation of other legislation (child support guidelines, maintenance acts) aimed at enforcing individual male responsibility to provide for dependent women and children. Both periods saw feminists push for welfare reforms that had mixed impact. While these reforms challenged the patriarchal status quo and (re)formed the gender order, feminists were ultimately unable to control the content, form, and administration of the legislation.

However, we have also identified important differences and discontinuities in the periods we have examined. The reformation of the public and private produced different forms of liberal state (both pre- and post-Keynesian), and of welfare law and policy. The earlier "crisis" of the family revolved around concern about "white" Canada, specifically a concern about bolstering the nuclear family (especially in the wake of the First World War and the influenza epidemic). The late twentieth-century "crisis" of the family reflected anxiety about perceived threats to the traditional (white) nuclear family posed by the proliferation of opposite and same-sex common law relationships and more recently by the legalization of same-sex marriage.

In the early twentieth century, welfare reforms (such as mothers' allowances and pensions) prioritized women's unpaid labour over their paid labour. The basis of women's citizenship thus derived from their status as mothers. In the late twentieth century, welfare reforms prioritized paid labour and assumed the performance of unpaid labour. Women and mothers disappeared and were replaced by the gender-neutral worker whose basis of citizenship is participation in paid employment.

In the pre-Keynesian state, welfare legislation and policy were premised on the family wage—a sexual division of labour in which the male is the breadwinner and the female is the homemaker. This model of social and familial relations constructed women as the “natural” economic dependants of men. Mothers/wives were conceptualized and regulated primarily in terms of their relationships to the (private) family and not their relationship to the (public) market. The reverse was true for fathers/husbands. This commitment to a family wage rarely translated into a living wage for members of low income households, and consigned women to poverty, unemployment, or socially invisible forms of (under)employment.¹³⁸

For single mothers, the implications of this emphasis on the (dependant) homemaker role were expressed and experienced through (1) legislation and welfare policies that required them to pursue the (putative) fathers of their children for support; and (2) after the First World War, the limited government provision of allowances to destitute, widowed, and later to abandoned mothers in recognition solely of their role in the social reproduction of future citizens, and not as women *per se*. This form of state financial assistance was means-tested, based on the “principle of less eligibility,” contingent on closely scrutinized “fit and proper” behaviour, and enforced, if need be, through disqualification and/or criminalization. Moreover, the provision of such assistance was based on the express policy that it was temporary, as well as supplementary to home-based earnings, to help worthy single mothers until they were able to (re)marry.

The welfare legislation and policy of the neo-liberal state are premised on the formal equality and gender neutrality of the freely choosing, self-reliant actor (and more substantively worthy and equal taxpayer). Women are now expected to be employed. The “feminization” of paid labour, together with the restructuring of the welfare state, has “equalized” the experience of (under)employment for many people, forcing both men and women to accept “bad” jobs, and making it imperative that both spouses in a family earn money in one way or another. Thus, like men and fathers, women and mothers are conceptualized and regulated primarily in terms of their relationship to

¹³⁸ Baillargeon, *supra* note 47; Boris & Kleinberg, *supra* note 47; Mink, *supra* note 47; Parr, *supra* note 47; Sangster, *supra* note 47.

the labour market. Now women's relationship to the (private) family is taken for granted and rendered as invisible as their relationship to employment used to be.

A major implication of recent welfare reforms is that single parents (mothers) have disappeared as a category of social assistance recipient. While there is continuing emphasis on mothers pursuing the putative fathers of their children for support under state legislation and policies, the formal rationale is couched in a different form of discourse. These mothers now have the role of the independent, self-sufficient, "choosing" market citizen who is responsible for her bad choice of husband/father. Therefore, rather than looking to the state for support, they are required to take advantage of welfare-to-work programmes that will prepare them for paid employment and end their "dependency" on the state. The importance of social reproduction in raising and caring for their children has vanished as a social good. State financial assistance is stringently means-tested, based on even narrower "principles of less eligibility," contingent on moral behaviour (now conceptualized as industrious and asexual), and increasingly time-restricted and enforced, if need be, through disqualification and/or criminalization. State financial assistance is no longer formally conceptualized as welfare or assistance; its provision is still temporary, but is now designed solely to move unemployed workers into the labour market.

The erasure of sole support parents, initially penciled into Canadian welfare law only as mothers, has been completed. Their needs as mothers with responsibility for the care and upbringing of children have become as anachronistic as the very notion of social welfare itself. The challenge for those who remain committed to the principle of substantive equality and to the possibility of progressive social change is to continue to work to create social conditions and relations in which the poverty of single mothers and their children is neither inevitable nor denied. Until then, mothers need not apply.