Indexed as:

Phillips v. Social Assistance Appeal Board (N.S.)

Between
Charles Phillips, Applicant, and
Peter Lynch, Martha Parsons and Irma Brown, in their joint capacity as the Social Assistance Appeal Board in the matter of an appeal by Charles Phillips respecting his eligibility for Family Benefits under the Family Benefits Act, S.N.S. 1977, Chapter 8, Respondents, and
James MacKinnon in his capacity as Director of Family Benefits, Respondent, and
The Attorney General of Nova Scotia representing Her Majesty the Queen in the right of the Province of Nova Scotia, Intervenor

[1986] N.S.J. No. 33

27 D.L.R. (4th) 156

73 N.S.R. (2d) 415

26 C.R.R. 109

38 A.C.W.S. (2d) 381

Action S.H. No. 53608 (1986)

Supreme Court of Nova Scotia - Trial Division
Halifax, Nova Scotia (In Chambers)

Nunn J.

February 27, 1986

Charter of Rights -- Equality and protection of the law -- Denial of rights -- Remedies -- Single father with dependent child born out of wedlock denied benefits under s. 5(4) Family Benefits Act -- Appropriate remedy that declaration legislation offending s. 15(1) of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Family Benefits Act, S.N.S. 1977, c. 8, ss. 3, 5(2), 5(4).

This was an application by a single father with a dependent child born out of wedlock, for certiorari to quash a decision of the Social Assistance Appeal Board wherein the Board upheld a decision of the Director of Family Benefits denying the applicant's application for family benefits under the Family Benefits Act. The applicant also sought a declaration that s. 5(4) of the Act offended s. 15 of the Canadian Charter of Rights and Freedoms. Sections 5(2) and 5(4) of the Act provided benefits to disabled fathers with dependent children and to mothers whose dependent child was born out of wedlock.

HELD: The application was allowed in part. As the applicant was not a disabled father nor a mother, no error had been committed by the Director or the Board in reaching the decision to deny benefits to the applicant, as there was no right created by the Act to provide for the applicant. However a declaration was granted that s. 5(4) of the Act was of no force and effect as it was contrary to s. 15(1) of the Charter which guaranteed equality before the law. Section 5(4) clearly discriminated against single males with dependent children. Prima facie, s. 5(4) created the type of discrimination referred to in s. 15(1) of the Charter in that it deprived single males and their dependent children of the equal benefit of the law, with the difference based upon sex. In view of the Charter, this was an arbitrary distinction and one that could not be supported in view of the purpose of the Family Benefits Act which was to provide assistance to persons in need. Nor was the legislation saved by s. 15(2) or s. 1 of the Charter. The only appropriate remedy was to grant a declaration that s. 5(4) of the Family Benefits Act was of no force and effect as it was contrary to s. 15(1) of the Charter. It was not appropriate to amend the legislation by either reading up the word "mother" in s. 5(4) to mean parent or by removing the words "disabled" from s. 5(2) of the Act.

Joan Dawkins, counsel for Charles Phillips.

Allison Scott and Christine Mosher, counsel for the Department of the Attorney General.

NUNN J. (orally):-- This is an application for certiorari and for a declaration. Certiorari is sought to quash a decision of the Social Assistance Appeal Board, dated July 17th, 1985, wherein the Board upheld a decision of the Director of Family Benefits denying the applicant's application for family benefits under the Family Benefits Act, Statutes of Nova Scotia, 1977, Chapter 8.

The applicant is a single father with a dependant child who was born out of wedlock and he was denied any family benefits under this Act on the basis that the applicant was not entitled to family benefits under the provisions of the Act.

The provisions concerned were Section 5(2) and Section 5(4). Sub-section 5 ... or 5(2) reads:

> Subject to this Act in the regulations, a father who is disabled with a dependant child is eligible to apply for family benefits for a family in need on his own behalf and on behalf of, (a) his spouse and dependant child or, (b) dependant child.

Sub-section (4) reads:

> Subject to this Act and the regulations a mother whose dependant child was born out of wedlock is eligible to apply for benefits on her own behalf and on behalf of her dependant child if the mother, (a) is not married, and, (b) has attained the age of 16 years.

The applicant in the present case was neither a father who was disabled nor was he a mother. There can be no doubt that no error was committed by the Director or the Board in reaching the decision they did, as there was no right created by the Act to provide for the applicant.

As a result it is unnecessary to quash the decision. No grounds have been established to warrant its quashing, and even if it were quashed the Board would have no choice under the existing legislation to decide otherwise and in view of the position I am about to take, the Board would have no jurisdiction to act.

Now the declaration sought is based on the premise that the Family Benefits Act, particularly Section 5(4) offends Section 15 of the Canadian Charter of Rights and Freedoms, being part I of the Constitution Act, 1982. Notice was provided to the Attorney General and a Notice of Intervention was filed. While there may be some procedural difficulties as to the form of this application, the parties addressed themselves to Section 24 of the Charter, and in these circumstances, it is appropriate to consider the application for a declaration under that section.

The Family Benefits Act has for its stated purpose sub-section (3):

> The purpose of family benfits under this Act, is to provide assistance to persons or families in need, whether cause of need has become or is likely to be of a prolonged nature.

This purpose makes no distinction between persons who may apply for and receive the benefits.

Yet the operative section in issue here is Section 5(4) which is directed to a single mother. Clearly the section read in the light of the purpose, discriminates against single males with a dependant child in the circumstances of that section. Prima facie the section creates the very type of discrimination referred to in Section 15(1) of the Charter, depriving single males and their dependants of equal benefit of the law, with the difference based upon sex. The Family Benefits Act

was in effect prior to the coming into effect of the Charter and prior to the coming into effect of Section 15 three years later. No changes were made to the Family Benefits Act during the three year period when Section 15 was inoperative.

Taking into account the representations made and briefs filed, as well as the changes in modern society and lifestyles, which are apparent to the court, I am unable to accept the different treatment as reasonable. The purpose of the Statute is to provide assistance to persons in need and to hold this to be a reasonable distinction would be to deprive some persons and dependant children of necessary assistance based solely upon the sex of the applicant. This is clearly the type of situation Section 15(1) of the Charter was designed to prevent.

In view of the Charter, therefore, this is an arbitrary distinction and one which cannot be supported in view of the purpose of the Family Benefits Act.

It was urged upon me that if it was discrimination under Section 15(1) then it is saved by Section 15(2) because it is a programme "having as its object the amelioration of conditions of disadvantaged individuals," namely, single female parents supporting a child. This I cannot accept. Its object is clear from Section 3 and the Act is directed to a much wider class of people than single female parents. While it may ameliorate their financial situation, it is not at all within what would normally be accepted as an affirmative action type programme. Dependant children, which are necessary to obtain the benefit, are also a significant part of the main thrust of the legislation. Anything in the total programme which might ameliorate the conditions of the group of single female mothers as a specific group is only incidental. As a result, the discrimination here is not saved by Section 15(2).

Nor can this legislation be saved by Section 1 of the Charter as a "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The evidence before me on this is scant but no other province in Canada has similar legislation and the two provinces which did have a system similar to that of Nova Scotia; namely, Ontario and Manitoba, have already amended their legislation to conform to the requirements of the Charter and have changed the very type of legislation here to remove any discrimination based upon sex. That alone is significant evidence to preclude any suggestion of the reasonable limits approach applying in these circumstances. However, taking into account the purpose of the Family Benefits Act, the payment of benefits to persons or families in need, and recognizing that dependant children are an integral part of the intended benefits, I am unable to accept that limiting the benefits to single mothers in the circumstances of Section 5(4) of the Family Benefits Act is a reasonable limit prescribed by law and, even it it were a reasonable limit, there is nothing before me to show that such limit "can be demonstrably justified in a free and democratic society".

Turning now to remedy. The remedy in this case was a rather difficult consideration. The court is reluctant to assume the role of legislator and while I have been asked to amend the legislation by either reading up the word "mother" in Section 5(4) to mean parent, or by removing the words "who

is disabled" from Section 5(2), I can only indicate that I am unwilling to do this. The court ought not to assume the role of legislator except in unique and unusual circumstances, and then only rarely. I feel that the only appropriate remedy to apply is to grant a declaration that Section 5(4) of the Family Benefits Act is of no force and effect as it is contrary to Section 15(1) of the Charter. I have not considered Section 5(4A) or 5(4B) of the Family Benefits Act and this decision is not directed to those sub-sections. I would only add that I am aware that the Legislature is opening tomorrow and I would expect it to deal with this problem and if, in its wisdom, a new section is enacted to provide for the continuation of benefits it may consider retroactive legislation, if necessary, to avoid any harm to people who are receiving benefits or may become entitled to benefits during the period of time from the date of this order to the time when the Legislature deals with it.

As a result, the applicant will be granted a declaration as indicated. I presume an Order will be drafted in the form that I have suggested.

The applicant will be entitled to costs of the day.