Indexed as:

Reference re Family Benefits Act (N.S.) (N.S.C.A.)

In the Matter of a Reference to the Court of Appeal pursuant to Section 2 of Chapter 51 of the Revised Statutes of Nova Scotia, 1967, the Constitutional Questions Act, by Order in Council N.S. O.I.C. No. 86-409 respecting the Family Benefits Act, S.N.S. 1977, c. 8

[1986] N.S.J. No. 403

75 N.S.R. (2d) 338

26 C.R.R. 336

Action S.C.A. No. 01609

Nova Scotia Supreme Court - Appeal Division
Halifax, Nova Scotia

Hart, Jones, MacKeigan, Macdonald and Pace JJ.A.

Heard: September 12, 1986
Judgment: November 27, 1986

Family benefits -- Discrimination -- Sections of Family Benefits Act providing benefits to disabled fathers and single mothers held to be discriminatory on the basis of sex and thus invalid -- Canadian Charter of Rights and Freedoms, ss. 1,15, 28 -- Family Benefits Act, S.N.S. 1977, C-8, ss. 3, 5.

This was a reference relating to the constitutional validity of s. 5(1), (2), (3), (4), (4a), (4b), and (5) of the Family Benefits Act. The section provided for benefits for the elderly or disabled, for disabled fathers, for single women with dependent children, for mothers of illegitimate children and for foster children. The issue raised was whether these provisions were consistent with the equality guarantee of s. 15 of the Canadian Charter of Rights and Freedoms.

HELD: Subsections 5(2), (3), (4), (4a), and (4b) were found to be inconsistent with ss. 15 and 28 of the Charter in that they discriminated in providing benefits based on the sex of the recipient. They

were not laws for the amelioration of the conditions of disadvantaged groups within the meaning of s. 15(2) of the Charter, and they were not a reasonable limitation on equality under s. 1 of the Charter. It was necessary to establish discrimination before the argument that equality rights were infringed could be raised. Sections 5(2)-(4b) did not treat males and females equally; they discriminated between them in extending benefits. The distinction did not fulfil any meaningful purpose in providing assistance to those in need. There was not sufficient evidence before the court to show that ss. 5(1) and (5), which provided benefits according to age and disability, were discriminatory, and these subsections were found to be invalid.

Reinhold M. Endres and Alison Scott, for the Attorney General.

Joan M. Dawkins, for other interested parties.

Tim Hill, for Halifax Cornwallis, New Democratic Party.

THE COURT: -- By Order in Council dated the 17th day of April, 1986 the Governor in Council, pursuant to Section 2 of Chapter 51 of the Revised Statutes of Nova Scotia, 1967, the Constitutional Questions' Act, referred the following questions relating to the constitutional validity of particular sections of the Family Benefits Act, S.N.S. 1977, c. 8, to the Appeal Division:

1. Are subsections (1), (2), (3), (4), (4A), (4B) and (5) of Section 5 of Chapter 8 of the Statutes of Nova Scotia, 1977, the Family Benefits Act, consistent with the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, and if not, what are the particulars of the inconsistency or inconsistencies?
2. Are subsections (1), (2), (3), (4), (4A), (4B) and (5) of Section 5, or any of them, laws or programs for the amelioration of the conditions of disadvantaged individuals or groups within the meaning of Section 15(2) of the Canadian Charter of Rights and Freedoms?
3. Are subsections (1), (2), (3), (4), (4A), (4B) and (5) of Section 5, or any of them, reasonable limits prescribed by law within the meaning of Section 1 of the Canadian Charter of Rights and Freedoms?

The reference resulted from the decision of Mr. Justice Nunn, dated February 27, 1986, in Phillips v. Lynch (1983), 73 N.S.R. (2d) 415 declaring that s. 5(4) of the Family Benefits Act was of no force or effect as being contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms. That decision is under appeal by the Attorney General.

By order of the Chief Justice notice of the reference was published in various newspapers throughout the Province and interested persons were invited to make submissions on the reference. Joan M. Dawkins, barrister of Dalhousie Legal Aid, was appointed to represent other interested parties. In addition to briefs on behalf of the Attorney General and Dalhousie Legal Aid, submissions were filed on behalf of eight intervenors representing various social and community groups interested in the proceedings.

The following material by way of historical background to the Family Benefits Act is from the factum of the Attorney General:

> At Confederation, relief for the poor in Nova Scotia was provided by local 'poor districts' or 'townships' pursuant to an enactment entitled Of the Poor, R.S.N.S. 1859, c. 89.
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> Townships continued to be charged with the sole financial responsibility for the poor with the enactment of the Poor Relief Act, S.N.S. 1884, c. 35. This Act, although amended and revised through time, remained substantially unchanged in content and assignment of financial responsibility until its repeal by the Social Assistance Act, S.N.S. 1956, c. 7.
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> Under the 1884 Poor Relief Act and its successor the Social Assistance Act of 1956, the Province had no role in the determination of the amount of benefits paid by each municipality to its poor.
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> In 1930, the Province first assumed a direct role in the provision of assistance to the needy with the enactment of the Mothers Allowance Act. S.N.S. 1930, c. 4. Under this legislation, the Province assumed direct financial responsibility for the provisions of support for widows with two or more legitimate children formerly the responsibility of municipalities. This legislation did not change substantially in content, although amended and revised, until repeal in 1960.
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> The Province assumed further responsibility in the provision of assistance to certain needy with the enactment of the Old Age Security Act, S.N.S. 1952, c. 11, the Blind Persons Allowance Act, S.N.S. 1952, c. 12, and the Disabled Persons Allowance Act, S.N.S. 1954, c. 11. Under these statutes, the Province incurred direct financial responsibility for those needy eligible under the Acts and formerly the responsibility of the municipalities.

From inception, the programs for the aged, disabled and blind were cost-shared with the Federal government, by virtue of agreements entered into pursuant to s. 2 of the respective provincial statutes, and the Old Age Assistance Act, R.S.C. 1952, c. 199, the Blind Persons Act, R.S.C. 1952, c. 17, and the Disabled Persons Act, R.S.C. 1953-54, c. 11. Federal government participation in these programs was constitutionally restricted to a funding role because of provincial jurisdiction over property and civil rights and matters of a local and private nature under s. 92 of the Constitution Act, 1867.

> Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 355 (P.C.)

It was not until 1966 that the Federal government began to cost-share 'mothers allowance' by virtue of agreements entered into pursuant to the Canada Assistance Plan Act, R.S.C. 1966, c. 67.

> Appendix A - Nielson Task Force, Report on the Canada Assistance Plan (Appendix 3 at p. 64).

By 1966, the Mothers Allowance Act had been repealed and re-enacted as part of the Social Assistance Act, S.N.S. 1958, c. 13 by S.N.S. 1960, c. 59. Payments to mothers under the Social Assistance Act, remained the responsibility of the Province (s. 14), while all other recipients received payments from municipal governments (s. 31).

Under the Canada Assistance Plan Agreement of 1967, the Federal government provided cost-sharing of social assistance for any resident of Canada 'whose basic needs' (i.e. food, clothing, shelter, and household supplies) cost more than the person has or can obtain. If a person's income and assets are less than the cost of his basic needs, the persons is said to be 'in need'. Under the agreement, the Province is committed to provide the necessary legislative mechanisms for assistance to persons in need in order to receive Federal cost-sharing.

Under the terms of the agreement, the Province is left to determine the details of needs testing.

To fulfill its Canada Assistance Plan Agreement commitments, this Province amended the Social Assistance Act by S.N.S. 1966, c. 13, affecting both provincial and municipal methods of granting assistance.

Provincial assistance was extended under the Social Assistance Act (1966), to the disabled (s. 7), so that new applicants no longer applied for assistance under the Disabled Persons Allowance Act and the Blind Persons Allowances Act, and also extended benefits in s. 12 to foster parents. By s. 16 of the amended Act, all provincial payment of benefits to recipients were made subject to regulations which prescribed the form, calculation and amount of assistance available for each category. These regulations satisfied the Canada Assistance Plan Agreement.

> N.S. Reg. made pursuant to the Social Assistance Act S.N.S. 1966, c. 13, Aug. 10, 1966 (see sessional volume S.N.S. 1966-67 at pp. 494-502).

For the first time, by virtue of the 1966 amendments, municipal assistance was subject to regulations made pursuant to s. 46(1)(a) of the Act prescribing standards of assistance. These standards of assistance required each municipality to provide for the basic needs of individuals such as shelter and food, etc.

> N.S. Reg. 16/85 - Municipal Assistance Regulations made pursuant to the Social Assistance Act, S.N.S. 1970, c. 16 for 'standards' established pursuant to current legislation. (See Appendix C - Social Assistance Act and Regulations)

For the first time also, the Province was empowered by s. 45 of the Act, subject to regulation, to reimburse municipalities for their welfare expenditure. By regulation the Minister of Social Services could reimburse municipalities for specific budget items such as amounts expended for shelter and food, etc.

> Social Assistance Act Reg. (see sessional volume S.N.S. 1967-68 at p. 434). s. 1. See also N.S. Reg. 15/85, supra.

The rate of reimbursement a municipality is eligible for was established by regulation pursuant to s. 45(2). The Province in turn is eligible under the Canada

Assistance Plan Agreement for reimbursement of a portion of these amounts.

The right of each municipality to establish the rates of assistance paid to beneficiaries within its jurisdiction was unaffected by the 1966 amendments and subsequent amendments to the Act.

The 1966 Social Assistance Act was amended by S.N.S. 1967, c. 100 to extend supplemental provincial benefits to those receiving benefits under the Old Age Assistance Act, Disabled Persons Allowance Act and Blind Persons Allowances Act. The Act was revised by R.S.N.S. 1967, c. 284. No changes of any consequence were made to the Act in that revision. The Social Assistance Act was amended again by S.N.S. 1970, c. 16. Provincial assistance was further extended by this Act to the aged, formerly beneficiaries under the Old Age Assistance Act, to disabled fathers, formerly beneficiaries under the Disabled Persons Act and to the blind, formerly beneficiaries under the Blind Persons Allowances Act.

By S.N.S. 1970, c. 16, the Social Assistance Act was revised by repealing those sections dealing with recipients funded by the Province. The latter provisions formed the basis for the Family Benefits Act, S.N.S. 1977, c. 8. (See Appendix D - Family Benefits Act and Regulations). The purpose of the Family Benefits Act, stated in s. 3, is 'to provide assistance to persons or families in need where the cause of the need has become or is likely to be of a prolonged nature'. Those eligible to apply for family benefits are categorized in s. 5 of the Act and include the aged, the disabled, the disabled father; single, divorced, widowed or separated women with a dependent child, and unmarried mothers. The Act allows for payments on behalf of foster children or illegitimate children in certain circumstances.

It may be noted that under the Family Benefits Act, 'disabled' is defined in regulations as including blind persons (see N.S. Reg. 80-624, s. 3(g)). Although not repealed, no payments are now made pursuant to the Blind Persons Allowances Act, the Disabled Persons Allowances Act or the Old Age Security Act.

The Canada Assistance Plan Agreement between Canada and Nova Scotia remains in effect today. The Province continues to fulfill its Canada Assistance

> Plan commitment by regulating 'standards' of assistance to be paid by municipalities under the Social Assistance Act, and by ensuring grants of provincial assistance under the Family Benefits Act are consistent with the Agreement.

Attached to the Attorney General's factum were twelve appendices setting out various statutes and reports dealing with the provision of social assistance in the Province. Miss Dawkins only objected to one of these documents, Appendix E, which is a report prepared by Dr. Ram Seth of Mount Saint Vincent University and Mrs. Elizabeth McNaughton, Senior Researcher of the Department of Social Services. That report was prepared in anticipation of the litigation and professes to show the relatively different position in terms of long-term needs of men and women who are in receipt of social assistance. Miss Dawkins argued that the intervenors dispute the conclusions of the report and accordingly the material should be excluded as interested parties have not had an opportunity to challenge the authors of the report. The Attorney General maintained that the report was submitted by way of background information and should be considered in that light. In Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, Estey, J. in delivering the judgment of the Supreme Court of Canada stated at p. 381:

> "The practice of broadening the scope of the record in constitutional matters before the Court began in earlier appeals: see Anti-Inflation Act, [1976] 2 S.C.R. 373; and more recently in Re Residential Tenancies Act, [1981] 1 S.C.R. 714. The earlier practice in constitutional fields before this Court and before the Privy Council where historical matter was excluded, has been widely disapproved in constitutional writings: see, for example, Hogg, Constitution of Canada, p. 97. The Court on this appeal received this historical material. I have not found it necessary to take recourse to it in construing s. 6, and therefore I do not wish to be taken in this appeal as determining, one way or the other, the propriety in the constitutional interpretative process of the admission of such material to the record."

For a review of the authorities see R. v. Seo 25 C.C.C. (3d) 385. We do not think it is necessary in the present case to deal with the admissibility of the report as we do not find it of assistance in resolving the issues before the Court.

Section 5 of the Family Benefits Act, S.N.S. 1977, c. 8, provides as follows:

> "5(1) Subject to this Act and the regulations, a person is eligible to apply for family benefits as a person in need
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> (a) who has attained the age of sixty-five years and is not eligible to receive a pension under the Old Age Security Act (Canada); or
> (b) who has attained the age of eighteen years, is disabled and is not eligible to receive a pension under the Old Age Security Act (Canada).

(2) Subject to this Act and the regulations, a father, who is disabled, with a dependent 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 dependent child; or

(b) dependent child.

(3) Subject to this Act and the regulations, a woman with a dependent child is eligible to apply for family benefits for a family in need on her own behalf and on behalf of a dependent child if

(a) she is a widow; or

(b) she no longer cohabits with her husband and he does not provide her with monetary requirements for regularly recurring needs; or

(c) her husband is a patient in a sanitorium, hospital or similar institution; or

(d) her husband is imprisoned in a penitentiary to which the Penitentiary Act (Canada) applies; or

(e) she is divorced and has not remarried.

(4) Subject to this Act and the regulations, a mother whose dependent child was born out of wedlock is eligible to apply for benefits on her own behalf and on behalf of her dependent child if the mother

(a) is not married; and

(b) has attained the age of sixteen years.

(4A) Notwithstanding subsection (4) and subject to this Act and the regulations a mother whose dependent child was born out of wedlock and who applies for benefits on or after the first day of September, 1983, is not eligible to receive benefits on her own behalf or on behalf of her dependent child if the mother has not attained the age of majority at the time of her application.

(4B) Where, in the opinion of the Director, extraordinary and compelling circumstances are present and the Director is satisfied that adequate income from other sources is not available to a mother whose dependent child was born out of wedlock and who by virtue of Section 4A, is ineligible to receive benefits, the Director may provide benefits in such amounts and under such terms and conditions as he deems necessary for the well being of the mother and her dependent child.

(5) Subject to this Act and the regulations, a person is eligible to apply for family benefits on behalf of

(a) a foster child in the applicant's care and custody where the child is not being maintained by his parent or parents or whose parents are dead or are

disabled as defined in the regulations; or

(b) a child born out of wedlock where his mother is ineligible for benefits on her own behalf as well as on behalf of the child."

The issue raised on the reference is whether the provisions in s. 5 referred to in the questions are inconsistent with s. 15 of the Canadian Charter of Rights and Freedoms and accordingly of no force and effect. The relevant provisions of the Charter are:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> ...
>
> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
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> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
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> ...
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> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
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> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

In approaching the Charter certain principles have evolved. In Law Society of Upper Canada v. Skapinker, supra, Estey, J. stated at p. 383:

> "The development of the Charter, as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new Charter provisions, none should be undertaken."

In R. v. Big M Drug Mart Ltd. [1985], 1 S.C.R. 295, Chief Justice Dickson, in delivering the judgment of the majority of the Supreme Court of Canada stated at p. 344:

> "This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."

With respect to the history of s. 15, see Hogg, Constitutional Law of Canada 2nd ed. p. 798 and Equality Rights and The Canadian Charter of Rights and Freedoms by Bayefsky and Eberts, p. 11.

We turn now to specific decisions of the Courts dealing with s. 15 of the Charter. In Re MacDonald and The Queen, 21 C.C.C. (3d) 330, the Ontario Court of Appeal had to consider the effect of the provisions of the Charter on the Young Offenders Act, 1980-81-82-83 (Can.), c. 110. Morden J.A. in delivering the judgment of the Court stated at p. 348:

> "At the outset I should deal very briefly with one particular question relating to what amounts to an infringement of rights under s. 15 having regard to its particular wording. On the one hand, the section can be read as providing that there is no infringement unless there is unequal treatment resulting from discrimination, that is discrimination in the sense of invidiousness - unjustifiability, unreasonableness or irrelevance. On this approach, putting it in its simplest terms, there would be no infringement unless the person alleging infringement could show an inequality that was unreasonably imposed: see Gold, 'A Principled Approach to Equality Rights', 4 Supreme Court L.R. 131 (1982), at pp. 151-3, where this approach discussed on the basis that 'equality rights ... in the Charter contain within them a non-absolutist conception' without reference in this part of the article to the words 'without discrimination'. On the other hand, it has been argued that discrimination should be read in a neutral sense, as meaning merely distinction or classification, with the result that 's. 15 should be interpreted as providing for the universal application of every law. Where a law

> draws a distinction between individuals, on any ground that distinction is sufficient to constitute a breach of s. 15, and to move the constitutional issue to s. 1 [to consider whether the law is justified]': Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 799-801. Since, in my view, the result of this appeal would be the same no matter which approach is followed, I need not, beyond noting that this issue exists, express a concluded opinion on it.
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> It should also be noted at this point that it is not in dispute that s. 15, by reason of its particular terms read in the light of the case-law relating to s. 1(b) of the Canadian Bill of Rights provides for equality in the substance of the law and not just administrative equality: see Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms', 61 Can. Bar. Rev. 242 (1983, at pp. 248-55, and Hogg, Constitutional Law of Canada, supra, p. 798."

In Reference re an Act to Amend the Education Act, 53 O.R. (2d) 513, the question was whether the proposed amendment which was to provide full funding for Roman Catholic high schools was inconsistent with the Charter. Chief Justice Howland and Robins J.A. dissented. In referring to s. 15(1) of the Charter they stated at p. 553:

> "Section 15(1) is a unique guarantee of equality. It covers not only 'equality before the law' and 'equal protection of the law' (clauses which have received interpretation in Canadian, English and American jurisprudence), but it goes further and guarantees the right of every individual to both 'equality under the law' and 'equal benefit of the law'. This variety of formulations of the concept of equality reflects the intent of the framers of the Charter that s. 15(1) govern the application of every law so as to ensure that every individual receives the equal protection and the equal benefit of the law without discrimination. It appears clear that the language of s. 15(1) was calculated to avoid the interpretative difficulties that had been presented by the 'equality before the law' clause in s. 1(b) of the Canadian Bill of Rights and to overcome the restrictions that had attached to that clause: see generally, Gold, 'A Principled Approach to Equality Rights: A Preliminary Inquiry', 4 Supreme Court L.R. 131 (1982); Hogg, Constitutional Law of Canada, 2nd ed. (1985), c. 35; and Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms', 61 Can. Bar Rev. 242 (1983).
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> We think it manifest that s. 15(1) must be given a large and liberal interpretation, one aimed at fulfilling the purpose of its broad guarantee and constraining governmental action inconsistent with its intent."

After referring to the comments of Chief Justice Dickson in R. v. Big M Drug Mart Ltd., supra, they continued at p. 554:

> "In our view, s. 15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of 'equal justice' and 'equal access to the law' the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and equal respect. This is not to suggest that s. 15(1) requires that every person in every instance be treated in precisely the same manner. There is no infringement of the section unless the unequal treatment is discriminatory. Most laws provide for distinctions and prescribe different results based on those distinctions. Indeed, a State could not function without classifying its citizens for various purposes and treating some differently from others. As Mr. Justice Stewart pointed out in his discussion of the equal protection clause of the U.S. Fourteenth Amendment in San Antonio School District v. Rodriguez (1973), 411 U.S. 1 at p. 60: 'There is hardly a law on the books that does not affect some people differently from others.' Similarly, although spoken in a different context, Chief Justice Dickson said at p. 347 S.C.R., p. 362 D.L.R. of Big M Drug Mart Ltd., supra, '...the interests of true equality may require differentiation in treatment'. This Court in Re McDonald and The Queen (1985), 51 O.R. (2d) 745 at p. 765, 21 C.C.C. (3d) 330, speaking through Morden J.A., accepted that '[i]t can reasonably be said, in broad terms that the purpose of s. 15 is to require "that those who are similarly situated be treated similarly".' This analysis is appropriate to the subject-matter of this reference and, so far as the issue arises, can aptly be applied. However, on the view we take of the relationship between s. 15(1) and Bill 30, there is no need to consider either the various tests that have been developed to assess the legitimacy of particular statutory classifications or the various approaches that have been suggested with respect to the application of s. 15(1): see, Gold, 'A Principled Approach to Equality Rights: A Preliminary Inquiry', supra, at pp. 151-3; Hogg, Constitutional Law of Canada, supra, at pp. 800-1; Re McDonald and the Queen, at pp. 763-5 O.R., pp. 415-7 D.L.R.
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> Section 15(1) forbids governments, in respect of all matters within their legislative authority, from denying to individuals, and similarly to groups of individuals, the equal protection and equal benefit of the law on a discriminatory basis. For greater particularity, the section enumerates specific prohibited grounds of discrimination".

As the majority of the Court felt that a determination of the issue depended on other provisions of the Constitution they did not consider it necessary to discuss the full implications of ss. 15 and 2(a) of the Charter.

Subsequently in Re Blainey and O.H.A., 54 O.R. (2d) 513, Dubin, J.A. in delivering the judgment of the majority referred with approval to the decision of Chief Justice Howland and Robins, J.A. in the Education Act case. Dubin, J.A. quoted from the above passages. He concluded at p. 529:

> "Section 15(1) of the Charter in its broadest terms guarantees not only 'equality before and under the law', but also the 'equal protection' and the 'equal benefit' of the law without discrimination. It is fundamental in a free and democratic society that all persons should be treated by the law on a footing of equality, with equal concern and equal respect, to ensure each individual the greatest opportunity for his or her enhancement."

The appellant, a 12 year old girl, had been prevented from playing on a boys hockey team by regulations of the Ontario Hockey Association. It is clear from the decision that Dubin, J.A. found that s. 19(2) of the Human Rights Code was discriminatory in violation of s. 15(1) of the Charter.

In Shewchuk v. Ricard et al. 28 D.L.R. (4th) 429, it was argued that the Child Paternity and Support Act, R.S.B.C. 1979, c. 49, violated s. 15 of the Charter.

The Act permitted proceedings only by the mother. Chief Justice Nemetz in a separate judgment stated:

> "The Supreme Court of Canada has ruled that courts must take a purposive approach to the interpretation of the Charter (Reference re s. 94(2) of the Motor Vehicle Act (1986) 1 W.W.R. 481; and The Queen v. Big M Drug Mart Ltd. (1985) 1 S.C.R. 295 at 344). I have now had the opportunity of reading the entire Act. In my opinion the object is clear. That object is to establish and protect the ability of a single mother to obtain support for her illegitimate child from his father. But the intervenors argue, despite this worthy objective, that 'discrimination' as used in s. 15(1) 'should be read in a neutral sense, connoting 'distinction.' I disagree. The approach of the Charter is not one of neutrality. The Charter enshrines certain fundamental freedoms for every Canadian based upon customs and law which pre-existed the Charter. One category of such laws is the Human Rights Statutes both Federal and Provincial. The new Equality Rights provisions buttress such Human Rights legislation which usually has as its objective the prevention of discrimination against persons within the same categories set out in s. 15(1). In my opinion the term 'discrimination,' when used in Equality Rights, does not water down the pejorative connotation of the word. To the contrary, the word "discrimination' as used in s. 15(1) means actions or

> policies showing partiality or prejudice in treatment directed against individuals or groups such as the ones set out in the section."

Macfarlane, J.A. delivered the majority judgment of the Court. He stated:

> "But resort to s. 1 is to be had only after it has been established that there has been a breach of s. 15(1), and that the limitation is not saved by s. 15(2).
>
> Section 15(1) guarantees equality before and under the law, and the equal protection and equal benefit of the law, not generally, but 'without discrimination'. The appellant and the intervenors submit that any difference or distinction based upon sex ought to be treated as prima facie discrimination. They also submit that a challenge based upon alleged sex discrimination is more easily established because s. 28 has emphasized the importance of maintaining equality between male and female.
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> I do not think that the presence of s. 28 in the Charter does anything more than emphasize and ensure that all the rights and freedoms in the Charter are guaranteed equally to male and female persons. That was of particular importance prior to April 17th, 1985, when s. 15 came into effect. Section 15(1) provides for equality between male and female. I doubt that those who framed s. 28 of the Charter meant to say that a greater measure of equality was to be afforded on the basis of sex, rather than, for instance, on the basis of race. But nevertheless, the focus of s. 15(1) is upon the enumerated categories where discrimination has most often occurred. Differences in the treatment of male and female persons must be critically examined to ensure that there is no discrimination.
>
> I am not persuaded that every difference or distinction based upon sex is sufficient to give rise to a breach of s. 15(1)."

In Andrews and The Law Society of British Columbia 27 D.L.R. (4th) 600, the British Columbia Court of Appeal had to consider whether the requirement of Canadian citizenship as a prerequisite to the practice of law was a violation of s. 15 of the Charter.

McLachlin, J.A., in delivering the judgment of the Court, stated:

> "Applying this approach to the case at bar, s. 15 must be taken as defining the right to equal treatment without discrimination; s. 1 as providing when and how that right may be limited. The court must first determine if discrimination

> occurred. If a violation of that fundamental right has occurred, it must then consider whether the infringement is nevertheless justifiable under s. 1 of the Charter."

After reviewing the two different views which have been offered on the meaning which should be attached to the word "discrimination" as used in s. 15 she continued:

> "In my opinion, the first of these two approaches to the definition of discrimination in s. 15 cannot prevail. First, as noted at the outset, s. 15, following the general scheme of the Charter as discussed in R. v. Oakes, supra, must be taken to guarantee a right. It cannot have been the intention of Parliament to guarantee a general right against unequal treatment. Almost all statutes draw distinctions between individuals. It cannot be supposed that in all such cases, the individual's constitutional rights are infringed. To call every legislative distinction between people an infringement of s. 15 is to trivialize the fundamental rights guaranteed by the Charter.
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> Second, such an approach deprives the phrase 'without discrimination' of content; provided the treatment is unequal, one passes immediately to s. 1 of the Charter. That would run counter to accepted canons of statutory interpretation. Hogg, supra, p. 800 acknowledges this problem, but says because 'discrimination' is ambiguous and can be read in a 'neutral sense', it should be taken to remit the entire question of justification to s. 1. I cannot accept that view. 'Discrimination' must be taken to have meaning within s. 15 itself.
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> Third, it cannot have been the intention of Parliament that the government be put to the requirement of establishing under s. 1 that all laws which draw distinction between people are 'demonstrably justified in a free and democratic society'. If weighing of the justifiability of unequal treatment is neither required or permitted under s. 15, the result will be that such universally accepted and manifestly desirable legal distinctions as those prohibiting children or drunk persons from driving motor vehicles will be viewed as violations of fundamental rights and be required to run the gauntlet of s. 1.
>
> Finally, it may further be contended that to define discrimination under s. 15 as synonymous with unequal treatment on the basis of personal classification will be to elevate s. 15 to the position of subsuming the other rights and freedoms defined by the Charter. The Charter may be considered to enshrine five kinds of fundamental rights and freedoms or 'civil liberties': the 'political liberties' in ss.

> 2-5 the 'legal rights or liberties' in ss. 7-14; the 'egalitarian rights' (s. 15), the 'linguistic, cultural and aboriginal rights' in ss. 23,25 and 27; and 'mobility rights' (s. 6): Hogg, Constitutional Law of Canada, 1977 at 417.) Each section is important in guaranteeing and advancing one of these kinds of civil liberties. No one section should be regarded as paramount or as encompassing all of the other sections. That, however, may be what will become of s. 15 if it is interpreted as being violated by any distinction or unequal treatment. Section 15, like the 14th Amendment in the U.S. Constitution will dwarf the other provisions of the Charter and be the central issue in virtually all Charter litigation. Laws which do not violate any other fundamental right or freedom, will almost always (if the U.S. experience is any guide) be alleged to violate s. 15 because the Legislature classified or failed to classify. Even though legislation does not violate any other sections, it will always be required to run the gauntlet of s. 15 and s. 1. In my view, this cannot have been the intention of the enactors of the Charter. To interpret s. 15 as other than a section guaranteeing equal protection and benefit without discrimination in the sense of unequal treatment that is unfair or unjustified is, to quote Chief Justice Dickson, 'to overshoot [its] actual purpose...': Big M. Drug Mart, supra at 344.
>
> I turn next to the alternative approach of viewing discrimination as involving a pejorative connotation. On this approach the reasonableness or fairness of the impugned legislative distinction having regard to the purposes and the effect on the complainant is determined initially under s. 15. This approach is consistent with the emphasis in R. v. Oakes, supra, of determining basic rights under the specific sections of the Charter rather than using s. 1 as a tool of interpretation. It also accords full meaning to the word 'discrimination' - a meaning which is generally in accordance with the way that word has been used in many enactments, conventions, and treaties: Quebec Charter of Rights and Freedoms, R.S.Q. 1977, c-C-12; The International Convention of the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195; The International Convention on the Elimination of All Forms of Discrimination Against Women, UNGRA Res. 34/180, GAOR,34th Sess., Supp. 46, p. 193; ILM 33, Article 1; I.L.O. Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), 362 U.N.T.S. 31, Article l(a); UNESCO Convention Against Discrimination in Education (1960), 429 U.N.T.S. 93, Article 1, (not yet ratified by Canada). Finally, it avoids the problem of s. 15 overwhelming the other rights specifically guaranteed by the Charter."

As we read those decisions it is necessary to establish discrimination before one can argue that one's equality rights have been infringed. While it is true that in the Ontario Education Act reference case and Re Blainey and O.H.A., supra, the Ontario Court of Appeal emphasized the equality

provisions of s. 15, in both cases the Court found discrimination in the statutes under review. Indeed we quote from the decision of Howland, C.J. and Robins, J.A. at p. 554 of the O.R. Report, supra, in the Education Act case:

> "There is no infringement of the section unless the unequal treatment is discriminatory."

That interpretation is in accord with the wording of s. 15(1) of the Charter.

It will be necessary under s. 15(1) of the Charter to establish that a challenged law not only treats a class unequally but also in a discriminatory manner. The burden of proof in the first instance of establishing that a law prima facie violates s. 15(1) will be on the person challenging the statute. We see no reason to distinguish in this regard between laws which fall within the listed classifications and those which discriminate on other grounds. No doubt it will be easier to establish a case under the listed classifications as laws classifying on some of those grounds will be inherently suspect. On the other hand it may not be apparent that a law is discriminatory until the purpose and effect of the law is carefully examined.

In our view s. 1 of the Charter does not come into play until a prima facie violation of a right under s. 15(1) has been established. As there is a general test under s. 1 for justifying limitations on charter rights we do not think it is appropriate to create standards for justifying departures under s. 15(1). We see nothing in the wording of s. 15(1) which would warrant such an interpretion and, indeed, to attempt the formulation of a test under s. 15(1) could only conflict with or duplicate the "reasonable classification" test in s. 1. That does not mean that the purpose and effect of the impugned legislation may not have to be examined under s. 15(1) to determine whether a classification is discriminatory. In our view the decisions of the Ontario Court of Appeal in the Education Act Reference case and Re Blainey, supra, are in accord with this interpretation. With the greatest respect we are unable to agree with the view expressed by the British Columbia Court of Appeal in Andrews v. The Law Society of British Columbia that a test of reasonableness is necessary under s. 15(1). Insofar as the argument of the Attorney General supports that position we reject it.

This brings us to a consideration of the provisions of s. 5(1) of the Family Benefits Act. The section provides for classes of persons eligible for benefits based on sex, disability and age. All three grounds are specifically included in s. 15(1) of the Charter. Referring to these classifications in the text Canadian Charter of Rights and Freedoms by Tarnopolsky and Beaudoin, Professor Tarnopolsky, now a Justice of the Ontario Court of Appeal, stated at p. 422:

> "6. Moreover, since subs. 15(1) now lists a number of grounds upon which these clauses are to be interpreted and applied, without discrimination, and since s. 28 guarantees the rights and freedoms in it 'equally to male and female persons' notwithstanding anything in the Charter, the listed grounds must now be considered 'inherently suspect', particularly with respect to

> the rights and freedoms set out in the Charter. Perhaps, in the light of s. 1 of the Charter and in light of the fact that some of the listed grounds, such as age and mental or physical disability, are clearly subject to bona fide qualifications or requirements, a less stringent test may come to be applied to these, such as the American one of 'intermediate scrutiny'."

Referring to s. 28 of the Charter he stated at p. 436:

> "Section 28 of the Charter has to be viewed in the light of the earlier discussion with respect to the diminution, by majority decisions of the Supreme Court of Canada, of the 'equality before the law' clause in subs. 1(b) of the Canadian Bill of Rights, particularly with respect to women in the Lavell and Bliss cases. It was pointed out earlier that in order to overcome these decisions subs. 15(1) of the new Charter was expanded to include the 'equality under the law' and 'equal benefit of the law' clauses. In addition, and probably also because of the American experience whereunder 'sex' was not included in the 'inherently suspect' category of judicial scrutiny, various lobbies, particularly those of women, pressed for the inclusion of s. 28.
>
> Section 28 has also to be viewed in the light of the 'limitations' clause in s. 1 of the Charter and the 'non abstante' clause in s. 33. Based upon past experience, there was fear either that the legislatures through s. 33 might, on the one hand, exempt a law discriminating against women from the ambit of the Charter, or, on the other hand, that the courts might, through the 'limitations' clause in s. 1, so construe a law which discriminates against women as to consider it such a reasonable limit 'as can be demonstrably justified in a free and democratic society'. Therefore, the purpose of s. 28 is clear.
>
> One possible question that may arise, however, is what the relationship would be between s. 28 and subs. 15(2). In other words, if s. 28 provides that 'notwithstanding anything in this Charter' the rights and freedoms 'are guaranteed equally to male and female persons', what would be the constitutional validity of an affirmative action program favouring women? The answer unquestionably must be that such programs must be valid. In the first place, it would be impossible to ignore the clear historical fact that s. 28 was enacted in order to escape the possibility of applying s. 2 so as to 'justify' discrimination against women, or s. 33 so as to totally exempt discriminatory statutes. Second, subs. 15(2) is evidently only an explanation of the substantive provision, which is subs. 15(1). It is subs. 15(1) which provides for the right of equality and which is reaffirmed in s. 28 as having always to be applied equally to men and women.

> Subsection (2) merely defines that 'affirmative action programs' do not constitute infringement of subs. (1). Subsection (2) does not in itself provide for a right, but is merely an amplification of what the right includes. If one were to refer to the discussion earlier herein, based upon the Bakke and Weber cases, it will be evident that affirmative action programs have not been found to contravene either the Equal Protection Clause of the Fourteenth Amendment nor the American anti-discrimination laws: rather, only strict quotas have been found in contravention of the latter, although not of the former. Therefore, since it is subs. (1) that is the amplified Canadian version of the American Equal Protection clause, s. 28 applies to it and not to subs. (2)."

A review of the history of s. 28 by Professor de Jong in Equality Rights and The Canadian Charter of Rights and Freedoms by Bayefsky and Eberts, strongly supports that position. She states at p. 527:

> "In addition, to guarantee a right to sexual equality equally to both sexes must mean that the same standard of equality is to be applied regardless of which sex alleges that it has been denied equality on the basis of sex. Whatever the right is, section 28 guarantees it equally to male and female persons. Both groups have the rights, and both groups have the equal right to claim the benefits of section 28.
>
> Section 28, when applied to section 15(1), does not determine which standard of equality (or review) is appropriate to the alleged violation of section 15(1) rights. As a matter of interpretation, however, the adoption of a 'strict scrutiny' standard would be most consistent with the general priority given in the Charter to the principle of sexual equality, through section 28. The same is true with respect to the interpretation of the words 'demonstrably justifiable' in section 1 as applied to section 15(1). Given section 28, it will almost never be demonstrably justifiable to deny sexual equality as provided by section 15(1).
>
> It must be noted that section 28 operates on section 15(1) only to ensure that the quality of protection of section 15 rights is equal for male and female persons. Whatever standard of review is found to be appropriate must be applied equally to male and female persons.
>
> This means that section 28 cannot be successfully used to challenge the validity of the affirmative action programs provided for in section 15(2). Section 28 simply ensures that defining a legitimate affirmative action program and the

> standard of review on which it is based, are interpreted and applied equally to male and female persons. This means that a court could not apply a standard of review to a program designed to benefit females which was different from the standard of review applied to programs designed to benefit males.
>
> It is not necessary, therefore, to attempt to prevent section 28 from undermining the validity of affirmative action programs designed to benefit women by developing elaborate theories about the relationship between section 1 and section 15." (See also p. 215 of that same text.)

The United States Supreme Court has not subjected classifications based on sex to the "strict scrutiny" test. However, the American Constitution does not contain the equivalent of s. 28 in the Charter. That provision is similar to the equal rights amendment proposed in the United States.

The American courts have examined legislation based on sexual classifications under the equal protection clause. In Stanton v. Stanton, 95 S.Ct. 1373, the issue was whether a State statute specifying for males a greater age of majority than for females denied, in the context of a parent's obligation for support payments for children, the equal protection of the laws guaranteed by s. 1 of the Fourteenth Amendment. Mr. Justice Blackmun in delivering the opinion of the United States Supreme Court stated at p. 1377:

> "Reed, we feel, is controlling here. That case presented an equal protection challenge to a provision of the Idaho probate code which gave preference to males over females when persons otherwise of the same entitlement applied for appointment as administrator of a decedent's estate. No regard was paid under the statute to the applicants' respective individual qualifications. In upholding the challenge, the Court reasoned that the Idaho statute accorded different treatment on the basis of sex and that it 'thus establishes a classification subject to scrutiny under the Equal Protection Clause.' Id., at 75, 92 S.Ct., at 253. The Clause, it was said, denies to States 'the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute.' Id., at 75-76, 92 S.Ct., at 254. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920).' Id., 404 U.S., at 76, 92 S.Ct., at 254. It was not enough to save the statute that among its objectives were the elimination both of an area of possible family controversy and of a hearing on the comparative merits of petitioning relatives."

In Califano v Westcott 99 S.Ct. 2655, s. 407 of the Social Security Act 75 Stat 75, 42 U.S.C. 607,

part of the Aid to Families with Dependent Children program, provided benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but did not provide such benefits when the mother was unemployed. Mr. Justice Blackmun in speaking for the majority of the United States Supreme Court concluded at p. 2663:

> "We conclude that the gender classification of s. 407 is not substantially related to the attainment of any important and valid statutory goals. It is, rather, part of the 'baggage of sexual stereotypes,' Orr v. Orr, 440 U.S., at 283, 99 S. Ct., at 1113, that presumes the father has the 'primary responsibility to provide a home and its essentials,' Stanton v. Stanton, 421 U.S. 7, 10, 95 S.Ct. 1373, 1376, 43 L.Ed. 2d 688 (1975), while the mother is the 'center of home and family life.' Taylor v. Louisiana, 419 U.S. 522, 534 n. 15, 95 S.Ct. 692, 699, n. 15, 42 L.Ed. 2d 690 (1975). Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment."

The framers of the Charter were certainly aware of the American experience when drafting s. 28 of the Charter. In our view Parliament must have intended that legislative classifications based on sex would be prima facie discriminatory. That conclusion is not in accord with the view expressed by MacFarlane, J.A. in Shewchuk v. Ricard et al., supra.

The purpose of the Family Benefits Act is clearly stated in s. 3 of the Act as follows:

> "The purpose of family benefits under this Act is to provide assistance to persons or families in need where the cause of the need has become or is likely to be of a prolonged nature."

No matter what tests one applies to the sexually oriented requirements of s. 5 of the Family Benefits Act the provisions fail to meet the standards of s. 15(1) of the Charter. They do not treat males and females equally, they discriminate between males and females in extending benefits and, finally, the distinction does not fulfill any meaningful purpose in providing assistance to those in need. The argument that there are more females than males in need of long-term assistance does not justify the classification so long as there are some males who are similarly situated. This has particular reference to s-ss. (2), (3), (4), (4A) and (4B) of s. 5 of the Family Benefits Act. The Attorney General concedes that s. 5(2) of the Act is discriminatory.

Turning to the provisions of s. 5 which refer to classifications based on age and disability, no material apart from the argument has been placed before the Court to show in what manner these provisions allegedly discriminate on the basis of age or disability. The main argument on the hearing was centred on the qualifications based on sex. We have concluded that the burden of proof in the first instance is on the party challenging the legislation to establish that it does so under s. 15(1). In the present case the Attorney General is not in the position of challenging the provisions of s. 5 of the Family Benefits Act. It must be noted that Question 1. of the Reference does not refer to any particular section of the Charter. We do not think the Court should speculate or try to find some

basis on which these provisions impact on any class because of age or disability. We have no evidence to establish why the distinctions were made on those grounds or of their effect. There may be cases where it can be established that the provisions are discriminatory on the basis of age or disability. The mere fact that the provisions classify on the grounds of age and disability does not, in our view, establish that they are discriminatory. One cannot say with any degree of certainty that the provisions are or are not discriminatory based on age or disability. The most one can say is that it has not been established that the provisions based on age or disability are discriminatory.

Classifications in welfare legislation have not been strictly reviewed in the United States. The following passage is from Constitutional Law, 2nd Ed., by Nowak, Rotunda and Young, p. 823:

> "There is no opinion of the Supreme Court in which a majority of justices have held that there is any right to receive subsistence payments or welfare benefits of any kind. Instead the justices have considered such programs as general economic and social welfare measures which are to be reviewed under the basic rationality standard of the due process and equal protection guarantees."

In our view s-ss. (2), (3), (4), (4A) and (4B) of s. 5 of the Family Benefits Act insofar as they are based on sexual qualifications are in conflict with s. 15(1) of the Charter.

This brings us to a consideration of s. 15(2) of the Charter. The following passage is from Vol, 2, Laskin's Canadian Constitutional Law, 5th ed., at p. 1268:

> "It would appear that this provision was added to the Charter out of excessive caution. In line with the argument suggested earlier, that equal laws can result in inequality if applied to persons in unequal circumstances, it is suggested that 'any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups' cannot be a contravention of subsection (1) of section 15, even without subsection (2) saying so. It would appear that subsection (2) was included partly because of the fear that courts which gave such a limited definition to the 'equality before the law' clause, under section 1(b) of the Canadian Bill of Rights, might also be inclined to find affirmative action to be discriminatory."

The following is from the text Canadian Charter of Rights and Freedoms by Tarnopolsky and Beaudoin at p. 423:

> "The various positive or affirmative steps which have been taken to prevent or overcome discriminatory practices or to ameliorate the disadvantage of certain groups, which have either been ordered following a finding of past discrimination or required by governments as a condition of doing business, or which have even been voluntarily adopted, have come to be known as 'affirmative action' programs."

There is no evidence that benefits payable under the Family Benefits Act can be classified as an affirmative action program. The object of the program is clearly the relief of poverty. There is nothing new in the purpose of the legislation. The history of the legislation clearly shows that it was not designed to overcome past discriminatory practices. We do not think the provisions in conflict with s. 15(1) can be exempted under s. 15(2) of the Charter.

We must now consider s. 1 of the Charter. In R. v. Oakes, 24 C.C.C. (3d) 321, Chief Justice Dickson in delivering the judgment for the majority in the Supreme Court of Canada stated at p. 346:

> "The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.
>
> The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word 'demonstrably' which clearly indicates that the onus of justification is on the party seeking to limit: Hunter v. Southam Inc., supra."

After stating that the standard of proof is by a preponderance of probability he continued at p. 348:

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom': R. v. Big M Drug Mart Ltd., supra, at p. 430 C.C.C., p. 366 D.L.R., p. 352 S.C.R. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing

> and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': R. v. Big M Drug Mart Ltd., supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right of freedom in question: R. v. Big M Drug Mart Ltd., supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

The onus is upon the Attorney General to justify the provisions under s. 1 of the Charter. In the first instance he attempted to justify the provisions as reasonable under s. 15(1) of the Charter. Essentially the same arguments are raised under s. 1. With deference it has not been shown that they are reasonable limits which can be demonstrably justified. As we have already noted, it has not been

shown that the distinction between males and females under the Family Benefits Act bears any true relationship to the relief of poverty. The distinction was pre-Charter and can no longer be justified in the light of s. 15(1) and s. 28 of the Charter. Having failed on the objective test it is unnecessary to consider the proportionality test and the Attorney General has not attempted to justify the distinctions on that ground.

We would answer the questions posed by the Reference as follows:

> Question 1.
>
> Are subsections (1), (2), (3), (4), (4A), (4B) and (5) of Section 5 of Chapter 8 of the Statutes of Nova Scotia, 1977, the Family Benefits Act, consistent with the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, and if not, what are the particulars of the inconsistency or inconsistencies?
>
> Answer:

Subsections (2), (3), (4), (4A) and (4B) of Section 5 of the Family Benefits Act are inconsistent with the Canadian Charter of Rights and Freedoms. The subsections are inconsistent with the provisions of s. 15(1) and s. 28 of the Charter in that they discriminate in providing benefits based on sex. It has not been established that subsections (1) and (5) of Section 5 of the Family Benefits Act are inconsistent with the Canadian Charter of Rights and Freedoms.

> Question 2.
>
> Are subsections (1), (2), (3), (4), (4A), (4B) and (5) of Section 5, or any of them, laws or programs for the amelioration of the conditions of disadvantaged individuals or groups within the meaning of Section 15(2) of the Canadian Charter of Rights and Freedoms?
>
> Answer:

Subsections (2), (3), (4), (4A) and (4B) of Section 5 are not laws or programs falling within s. 15(2) of the Charter.

> Question 3.
>
> Are subsections (1), (2), (3), (4), (4A), (4B) and (5) of Section 5, or any of them, reasonable limits prescribed by law within the meaning of Section 1 of the

Canadian Charter of Rights and Freedoms?

Answer:

Subsections (2), (3), (4), (4A) and (4B) of Section 5 cannot be justified as reasonable limits prescribed by law within the meaning of s. 1 of the Charter.

HART J.A.

JONES J.A.

MacKEIGAN J.A.

MACDONALD J.A.

PACE J.A.