

SUPREME COURT OF ONTARIO
(Divisional Court)

IN THE MATTER OF the Canada Act, Schedule B, Constitution Act, Part 1, Canadian Charter of Rights and Freedoms;

AND IN THE MATTER OF the Social Assistance Review Board, pursuant to the Family Benefits Act, R.S.O. 1980, Chapter 151, and the Ministry of Community and Social Services Act, R.S.O. 1980, Chapter 273;

AND IN THE MATTER OF the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484.

B E T W E E N :

SHEILA BEAUDETTE

Appellant

- and -

THE DIRECTOR OF THE INCOME MAINTENANCE BRANCH
OF THE MINISTRY OF COMMUNITY AND SOCIAL SERVICES

Respondent

- and -

THE ATTORNEY-GENERAL OF ONTARIO

Respondent

APPELLANT'S FACTUM

PART I
NATURE OF PROCEEDINGS

1. The Appellant was a recipient of an allowance under the Family Benefits Act, R.S.O. 1980, Chapter 151, whose benefits were cancelled effective July 1, 1984. The Appellant appealed to the Social Assistance Review Board and in a decision dated November 19, 1984, the Social Assistance Review Board affirmed the decision of the Respondent to

cancel the Appellant's allowance. The Appellant subsequently applied for a reconsideration of the decision of the Board. This is an appeal pursuant to Section 15(1) of the Family Benefits Act from the decision of the Social Assistance Review Board on the reconsideration hearing, which decision is dated April 1, 1985, and wherein the Board again affirmed the decision of the Respondent to cancel the Appellant's allowance.

PART II

STATEMENT OF FACTS

2. The Appellant is a single parent who was granted an allowance under the Family Benefits Act effective October 1, 1980 as a single mother with one dependent child.

Transcript, p. 6, lines 5 - 8

3. The Appellant's allowance was cancelled effective July 1, 1984 by letter dated July 25, 1984 for the reason that she was not considered to be living as a single person as required by the Family Benefits regulations. In the report of the Director to the Board, dated August 9, 1984, it is alleged that the Appellant was residing in a spousal relationship with Mr. Raymond Christoff from October of 1980 to June of 1984.

Record of Proceedings, Report to the Board from the Director, p. 4

4. The Appellant had dated Mr. Christoff off and on for seven years. Mr. Christoff is the father of the Appellant's son, Raymond Beaudette, born March 18, 1979.

Transcript, p. 6, line 8

p. 17, lines 24 - 25

5. The Appellant considered Mr. Christoff a friend and their relationship had been a sexual one at times. However, the Appellant testified that she had never lived with Mr. Christoff and did not wish to live with or marry him due to his drinking problem.

Transcript, p. 29, lines 23 - 25

p. 42, lines 13 - 18

6. Mr. Christoff had maintained a close relationship with his son, Raymond, since birth.

a) Mr. Christoff visited Raymond and the Appellant at the home of the Appellant once or twice a month.

Transcript, p. 46, lines 5 - 8

b) Mr. Christoff had taken Raymond fishing.

Transcript, p. 39, lines 21 - 23

c) On one occasion in 1981 Mr. Christoff took Raymond and the Appellant camping for a weekend.

Transcript, p. 39, lines 11 - 13

d) On occasion Mr. Christoff, the Appellant and Raymond went out to dinner together, usually to McDonalds, and more recently the Appellant and Mr. Christoff had not socialized alone.

Transcript, p. 15, lines 17 - 19

p. 38, lines 17 - 25

e) The Appellant sometimes took Raymond to see his paternal grandmother.

Transcript, p. 45, lines 22 - 25

p. 46, lines 1 - 4

7. A witness for the Appellant stated at the hearing that she did not consider the Appellant and Mr. Christoff to be

living together.

Transcript, p. 52, lines 18 - 24

p. 53, lines 1 - 11

8. The Appellant resided in the City of Ottawa at 140 Balsam Street from September 1, 1979 to January 3, 1981, at 557 Laurier Street # 8 from January 3, 1981 to September, 1981, and at 608-1065 Ramsey Crescent from September, 1981 to the date of the hearing.

Record of Proceedings, Notice of Decision, p.67

9. Throughout the period during which the Appellant received an allowance the alleged spouse, Mr. Christoff, resided with his mother at 117-3 Ritchie Street, Ottawa, an Ontario housing project.

a) Documents submitted by the Appellant's agent at the hearing show that Mr. Christoff's mother had declared him to be residing with her and paid additional rent on that basis. Mr. Christoff paid his mother room and board.

Transcript, p. 33, lines 12 - 25

p. 34, lines 1 - 4

p.16, lines 9 - 10

Record of Proceedings, Exhibit 9, p. 70

b) Documents submitted by the Appellant's agent at the hearing show that dating back to his hire in 1980, the home address given by Mr. Christoff to his employer was that of his mother.

Record of Proceedings, Exhibits 7 and 7(a),
pp. 40 & 41

10. The Appellant pays for her rent and utilities. The Appellant does not have a joint bank account with Mr. Christoff.

Transcript, p. 33, lines 2 - 3

p. 42, line 2

11. Mr. Christoff pays the Appellant support in the amount of \$50.00 each month for the benefit of Raymond pursuant to an out-of-court agreement entered into with the assistance of the Family Benefits administration. Mr. Christoff declares these payments for income tax purposes and does not claim a personal exemption for the Appellant or Raymond.

Transcript, p. 14, line 13

p. 42, lines 5 - 8

p. 45, lines 10 - 16

Record of Proceedings, Exhibit 8, p. 42

12. The Appellant was 15 years of age with a grade 8 education at the time of her son's birth and taking up residence on her own. In these circumstances, the Appellant has over the years required assistance in obtaining credit and certain necessities, and her family was not in a financial position to provide help.

Transcript, p. 40, line 9

p. 47, lines 19 - 22

- a) In 1980 a friend of the Appellant, Earl Steves, co-signed her lease at 557 Laurier Avenue, #8, Ottawa, Ontario.

Transcript, p. 31, lines 3 - 25

p. 32, lines 1 - 3

- b) Mr. Christoff co-signed two conditional sales

contracts for the Appellant (on March 4, 1982 and April 21, 1983) so that she could buy furnishings for her home. The Appellant paid these debts in full upon receipt of her income tax refund.

Transcript, p. 15 lines 8 - 12

p. 40, lines 10 - 15

- c) Mr. Christoff signed a conditional sales contract for the Appellant on April 21, 1983 with the same furniture store so that she could buy additional home furnishings. Both the Appellant and Mr. Christoff made payments on this contract. The debt to the furniture store was paid in full in January of 1984. By oral agreement the Appellant was obliged to reimburse Mr. Christoff for all payments made by him to the furniture store and at the time of the hearing before the Social Assistance Review Board \$800.00 remained owing by the Appellant to Mr. Christoff.

Transcript, p. 41, lines 7 - 24

p. 43, lines 19 - 25

p. 44, lines 1 - 24

13. Mr. Christoff also co-signed a conditional sales contract with the same furniture store for another friend, Phillip Stants, which contract showed Mr. Christoff's address as 608-1065 Ramsey Court, that of the Appellant. The evidence at the hearing was that Mr. Christoff signed the contract without reading it. Mr. Christoff's address on the contract was filled in by a store employee subsequent in time to the execution of the conditional sales contracts

where the Appellant and Mr. Christoff were co-signators.

Transcript, p. 16, lines 10 - 11

Record of Proceedings, Exhibit 4, p. 36.

14. Mr. Christoff provided the Appellant with limited financial assistance over and above his legal obligation to support his son, Raymond, and the assistance given was consistent with a friendship with the Appellant and his role as access parent.

- a) The Appellant, Mr. Christoff and Raymond went out to McDonald's once or twice a month, at which time either Mr. Christoff or the Appellant would pay the bill.

Transcript, p. 38, lines 16 - 25.

p. 39, lines 1 - 9

- b) When Mr. Christoff visited at the Appellant's home he did not bring food.

Transcript, p.38, lines 9 - 21

- c) On occasion, Mr. Christoff lent the Appellant \$10.00 to 20.00 at the end of the month when she ran out of money. The Appellant paid Mr. Christoff back through a deduction in her monthly child support payments.

Transcript, p. 38, lines 6 - 16

p. 49, lines 2 - 25

p. 50, lines 1 - 6

- d) Mr. Christoff provided the Appellant with assistance in purchasing home furnishings by co-signing or signing conditional sales contracts.

15. In its decision the Social Assistance Review Board made no finding that the Appellant and Mr. Christoff cohabited while the Appellant was in receipt of an allowance.

Record of Proceedings, Notice of Decision, pp. 75
- 76.

16. Of the evidence presented to the Social Assistance Review Board the most recent indicator that the Appellant was not living as a single person was August of 1983. The Appellant presented documentary evidence that Mr. Christoff was residing with his mother as recently as November of 1983.

Record of Proceedings, Exhibit 4, p. 36

Exhibit 9, p. 61

PART III

STATEMENT OF ISSUES TO BE ARGUED AND THE LAW

A. THE FAMILY BENEFITS ACT

17. The Family Benefits Act provides for long-term financial assistance to certain categories of individuals in financial need, as defined by the Act and Regulations.

Family Benefits Act, ss.7,20(m)

Regulation 318, s.2

18. All applicants for benefits are required to undergo a means test to determine whether they are a "person in need". A "person in need" is one whose budgetary requirements exceed his or her net income, determined in

accordance with the regulation.

Family Benefit Act, s.7

Regulation 318, s. 1(1)(d)

19. The regulations provide that in calculating income for these purposes, the recipient's income is deemed to include "all payments of any nature or kind whatsoever" including all "casual gifts" and "casual payments" and also including any such payments received by the beneficiary's "spouse" where the two are living together. "Spouse" is defined to include "a person who although not legally married to another person lives with that person as if they were husband and wife." Further, as a condition of eligibility, a recipient must take advantage of all available sources of income, including the right to support under provincial or federal family laws.

Regulation 318, ss. 1(d); 13 1(b); 13(2);8

20. Certain recipients of benefits who have met all the criteria for benefits, including financial need, are made ineligible for benefits solely because they are "not living as a single person", a single person being defined as "an adult person who is a widow, widower, unmarried, deserted, separated or divorced and who is not living with another person as husband or wife".

Regulation 318, ss. 1(c), 5(b)

21. The categories of individuals disqualified solely because they are not living as a single person are the following:

-a woman between the ages of sixty and sixty-four years who is a widow, unmarried, divorced, or whose husband has deserted her, is institutionalised or imprisoned (Act, s.7(1)(b));

-a mother with a dependent child who is unmarried, a widow, divorced, deserted or whose husband is institutionalised or imprisoned. (Act, s.7(1)(d));

-a wife of a recipient of Old Age Security Benefits, who is sixty years old and over and whose husband is institutionalised or imprisoned. (Reg. s.2(1)(iii)(iv));

-the wife of a recipient or former recipient of Family Benefits who is in need, is sixty years old or has dependent children (Reg. s.2(2));

-a mother with a dependent child who is in need and has separated from her husband for 3 months or more. (s. 2(7),Reg);

-a father with a dependent child, who is in need, separated, a widower, divorced, unmarried, or whose wife is institutionalized or imprisoned. (Reg. s.2(8).

22. The question of whether the Appellant is living as a single person within the meaning of the Act and Regulation is a question of law reviewable by this Court.

Re Warwick and Minister of Community and Social Services (1978) 21 O.R. (2d) 528 (C.A.)

23. It is submitted that the facts relied upon by the Director and found by the Board are not capable in law of supporting a finding that the Appellant was not living as a single person. This Court has consistently and repeatedly held in circumstances such as those present in the case at bar that the Board has erred in law in finding that a recipient of benefits is not living as a single person.

Willis v. Ministry of Community and Social Services (1983) 40 O.R. (2d) 287

Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services (1985) 51 O.R. (2d) 303

Re Burton and Minister of Community and Social Services (1985) 52 O.R. (2d) 211

24. It is submitted that the Social Assistance Review Board misapprehended the test they were to apply, constituting an error in law, in failing to make a finding as to whether the Appellant was or was not living with another person. To establish that the Appellant was not living as a single person, two elements must be shown:

- a) that she was living with another person, and
- b) that she was living with that person in a conjugal relationship, that is as husband and wife.

In the absence of a finding that she was in fact living with another person, the inquiry ends and evidence of her relationship with the other person is irrelevant.

Re Burton, supra, at 220

Re Pitts, supra, at 307 - 310

Dowlut v. Com'r of Social Services (March 29, 1985), Unreported Decision, at 3 (summarized 30 A.C.W.S. (2d) 299)

25. It is submitted that in reaffirming the Director's decision to terminate the Appellant's benefits, the Board committed yet again what this Court has described as the Board's "persistent misinterpretation" of the law by seizing upon the sexual, familial and social relationship as the basis of their decision, permitting the Board "to de-emphasize or ignore the essential final question, that is, whether (Mr. Christoff) was living with the Appellant." Evidence that a recipient of benefits is friendly with a man or even that she has a sexual relationship with him is not

sufficient in law to support a finding that she is not living as a single person.

Re Burton, supra, at 222

Re Pitts, supra

26. Even in the absence of a specific finding of cohabitation, it is submitted that the Board erred in law in finding that the Appellant was not living as a single person where the only evidence that she was living with another person was circumstantial and the most recent indicator was almost one year prior to the cancellation of the Appellant's allowance. The determination that a recipient is not living as a single person must be based on evidence of cohabitation and consortium at the time the allowance is cancelled or a reasonable time before the date of cancellation.

Chartier v. The Director of Income Maintenance Branch of the Ministry of Community and Social Services, (December 4, 1984) Unreported Decision, at 2

27. It is submitted that the Board erred in law in asserting without supporting evidence that there was an economic interdependence between the Appellant and Mr. Christoff sufficient to constitute anything approaching a conjugal relationship.

Re Willis, supra

28. It is submitted that the Board erred in law in stating that the Board was not bound by the decision in Willis v. Ministry of Community and Social Services, (which decision provides inter alia that it is necessary to find a recognition of an obligation to provide economic support before it can be found that a conjugal relationship exists), contrary to the principle of stare decisis.

29. It is submitted that in reciting the evidence presented at the hearing the Social Assistance Review Board in its decision made several errors or misconstrued some of the evidence:

- a) The Board recited as evidence that the Appellant and Mr. Christoff, rather than the Appellant and Deborah Stants, met through a program and that they visited each other one or twice per day.

Transcript, p. 51, lines 17 - 24
Record of Proceedings, Notice of Decision,
p.70

- b) The Board recited as evidence that when Mr. Christoff visited the Appellant and Raymond he did so on Fridays, Saturdays and Sundays, rather than Friday, Saturday or Sunday on those weekends he did visit.

Transcript, p. 36, lines 14 - 15

Record of Proceedings, Notice of Decision p.69

- c) The Board recited as evidence that the Appellant's witness, Ms. Stants, testified that her knowledge of Mr. Christoff was very limited. Ms. Stants made no such statement.

Transcript, pp. 51 - 62
Record of Proceedings, Notice of Decision,
p.70

30. It is submitted that Board erred in law in rejecting the sworn testimony and direct evidence of the Appellant and the witness for the Appellant without a proper explanation and finding of credibility.

"The task of determining credibility may be a difficult one but it must be faced. If the Board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its grounds for disbelief....Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided."

Re Pitts, supra

Re Dowlut, supra

31. It is submitted that the Board erred in law in failing to consider the evidence as a whole before it in accordance with well-established principles of law.

- a) The Board is required to make principle findings of fact and to reach conclusions based on those findings.

Re Burton, supra, at 214

- b) In weighing the evidence the Board must do so fairly and impartially and according to principle as judges, and in particular the Board must be wary of the limitations of hearsay evidence.

Re Dowlut, supra, at 6-12

- c) In reaching a decision as to whether a person is or is not eligible for an allowance the Board must act on more than mere suspicion.

Re Warwick, supra, at 537

Re Willis, supra, at 293

Re Pitts, supra, at 310 and 314

B. CHARTER OF RIGHTS AND FREEDOMS

32. It is submitted that by excluding the Appellant from

benefits on the basis that she is "not living as a single person", the Act and Regulations violate the Appellant's right pursuant to s.7 of the Charter not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice and her right to equality pursuant to s.15 of the Charter.

FUNDAMENTAL JUSTICE

(a) "Life, Liberty and Security of the Person"

33. The rights involved in "life, liberty and security of the person" can have their basis in common law, statute law or in deeply rooted traditions that have become fundamental to our way of life.

R. v. Morgentaler, Smoling and Scott
(1985) 52 O.R. (2d) 353 at 377

34. The provision of state benefits for the needy has become a fundamental tenet of modern Canadian Society. The particularly onerous economic burdens faced by single mothers and the necessity of providing for the children of single mothers has been recognized by the legislature of Ontario since 1920.

Mothers' Allowances Act, S.O. 1920, c. 89

Constitution Act, 1982, s. 36

35. It is submitted that the Canadian authorities have already established that the right to life, liberty and security of the person is broader than the freedom from arbitrary arrest and detention, or other purely physical intrusions.

R. v. Morgentaler, Smoling and Scott, supra,
(Ont. C.A.)

R. v. Robson, (1985) 45 C.R. (3d) 68 (B.C.C.A.)

R. v. Videoflicks (1984) 48 O.R. (2d) 395
per Tarnopolsky J.A. at p. 483

"The concert of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these..."

36. It is submitted that "security of the person" includes the basic necessities of life such as a minimum requirement of food, clothing and shelter. This interpretation is in accordance mandated by the Canada's international obligations as a signatory to the Universal Declaration of Human Rights.

Universal Declaration of Human Rights (1948)
Art. 25, para (1), N.N. DOC. A/811

The Declaration of the Rights of the Child
G.A. Res. 1386 14 U.N. GAOR, Supp. (No. 16) 19,
UN. DOC. A/4354 (1954)

37. It is submitted that welfare benefits designed to provide the necessities of life for single mothers are an inextricable part of security of the person. Whether or not the Charter protects economic rights or rights of private property per se, it is submitted that subsistence benefits provided by law, essential to human existence, are a matter of security of the person within the meaning of s.7.

38. For the purpose of the present case, it is unnecessary to decide whether s.7 confers an affirmative right to welfare benefits. Whether or not it does, it is submitted that the grounds and procedures implemented to revoke

benefits designed to meet basic needs must satisfy the requirements of fundamental justice.

39. In applying the principles of fundamental justice found in section 7, the court is not limited to procedural review but may examine the substantive content of legislation.

Reference Re S. 94(2) of the Motor Vehicles Act
(unreported) (S.C.C.)

R. v. Morgentaler, Smoling and Scott, supra

R. v. Young (1984) 46 O.R. (2d) 529 (Ontario Court of Appeal)

40. The "not living as a single person" standard further adversely affects rights protected by s.7 in that a recipient may be prosecuted if found to be in receipt of benefits he or she is not entitled to receive under the Act or Regulations.

Family Benefits Act, s.19

(b) **"Not Living as a Single Person" Arbitrary and Unrelated to Legitimate Legislative Purpose**

41. It is submitted that revoking the Appellant's benefits because she is "not living as a single person" violated her right not to be deprived of security of the person except in accordance with the principles of fundamental justice because the revocation of benefits was based upon an arbitrary standard, unrelated to any legitimate legislative purpose.

42. The Appellant had to satisfy the test of need to qualify for benefits initially. There is a legitimate concern to ensure that only those truly in need receive

benefits and therefore to assess the economic position of each applicant. However, the "not living as a single person" exclusion is a criteria that is entirely unrelated to an applicant's financial resources or needs. To revoke her benefits solely because she chooses to have a sexual relationship or even cohabit with a man where the man makes no financial contribution to her or to her children is to invoke a standard unrelated to any legitimate legislative purpose, and one that is therefore arbitrary and contrary to fundamental justice.

(c) "Not Living as a Single Person" Invasion of Privacy

43. It is submitted that the right to life, liberty and security of the person should be given a broad construction to encompass a right to privacy for the individual to act free from state interference within a sphere of action that is purely personal and does not infringe on the rights of others. Among the personal decisions so protected are the right to choose ones' family arrangements and ones' marital or sexual partners and control basic decisions about ones' lifestyle.

R. v. Morgentaler, Smoling and Scott

Board of Regents of State Colleges v. Roth 408 U.S. 564 at 572 (1972)

Loving v. Virginia 388 U.S. 1 at 12 (1967)

Skinner v. Oklahoma ex rel Williamson
316 U.S. 479 (1967)

44. Regulation 318, ss. 1(1)(c) and 5(b) interferes with an individual's freedom to choose to begin a relationship with a member of the opposite sex, or to choose what form

that relationship will take, as it cuts off all benefits to those deemed to be "not living as a single person". In its result, it imposes an unjustifiable financial burden upon legitimate social and familial relationships. It is therefore an interference with the right to privacy, and constitutes a deprivation of the rights granted by s.7.

45. It is further submitted that the eligibility criterion of "not living as a single person" necessitates a scope of inquiry and investigative techniques which violate the personal privacy of the applicant for no legitimate purpose.

(d) "Not Living as a Single Person" Vague and Uncertain

46. It is an essential attribute of fundamental justice that legal rules be framed and applied consistently and even-handedly. It is respectfully submitted that "not living as a single person" is a standard so vague and uncertain that it apparently cannot be applied in a consistent, even handed way.

47. The principles of fundamental justice require that a person of reasonable intelligence be given fair warning of prohibited or proscribed conduct in order that he or she may avoid acting accordingly; that is, legislation can be void for vagueness if no sensible meaning can be given to the words of the section.

R. v. Morgentaler, Smoling and Scott, supra

Re City of Montreal and Arcade Amusements Inc. et al
(1985), 18 D.L.R. (rth) 161 (S.C.C.)

Re Hamilton Independent Variety & Confectionary Stores
Inc. and City of Hamilton (1983) 143 D.L.R. (3d) 498
(Ont. C.A.)

Saumur v. Quebec [1953] 4 D.L.R. 641

48. The Social Assistance Review Board decisions demonstrate no predictable interpretation of "living with another person as husband and wife" in section 1(1)(c) of the regulation.

49. The interpretations offered by the Courts of the phrase "not living as a single person" have in practice not established guidelines to which the Director or the Board have been able to adhere. The Board is inconsistent and often contradictory in weighing the importance of each of the various criteria.

50. The Board has consistently refused to be bound by an interpretation of the regulations which would place preeminent importance on the matter of actual economic support in determining when a relationship would be found to be one of "husband and wife".

Warwick v. Min. of Consumer and Social Services
(1978) 5 R.F.L. (2d) 326 (Ontario Court of Appeal)

Re Willis (1983) 40 O.R. (2d) 285 (Ontario Divisional Court)

Re Burton, supra

Re Pitts, supra

51. Even if substantive review is limited to exceptional cases where there has been a marked departure from the basic tenets of our legal system, it is submitted that the deprivation of benefits to single mothers and their children on the basis of criteria other than need constitutes such a departure, and that the Charter provides a remedy.

(e) Procedural Deprivation

52. It is submitted that the term "principles of

fundamental justice" have been established to constitutionally enshrine ^{princ} principles of natural justice and procedural fairness.

Reference Re s. 94(2) of the Motor Vehicles Act
R.C. (1985) 63 N.R. 266 (S.C.C.)

R. v. Morgentaler, supra

R. v. Langevin (1984) 45 O.R. (2d) 705

53. Natural justice demands that when there is a statutory right to a hearing which affects the rights of the citizen, there is a prima facie right to cross-examine the opposing evidence in order to correct or controvert any relevant statement brought forward to his or her prejudice.

Township of Innisfil v. Township of Vespra
(1981), 2 S.C.R. 145

Re Toronto Newspaper Guild and Globe Printing
/1951/ 3 D.L.R. 162 (Ont. H.C.); aff'd /1952/ 2
D.L.R. 302 (Ont. C.A.); aff'd /1953/ 2 S.C.R. 18

Law Reform Commission of Canada, Independent
Administrative Agencies, Working Paper 25, 1980

54. Natural justice in a welfare hearing requires that the applicant facing revocation of her family benefits be afforded the opportunity to cross-examine adverse witnesses whose testimony is relied on in the Director's submission.

Goldberg v. Kelly (1970) 397 U.S. 254

55. The Act implicitly denies the applicant the ability to cross-examine in allowing the Director to make his submission in writing only to the Board in section 14(5) of the Act. The Appellant was in fact unable to cross-examine much of the evidence upon which the Board made its decision

as a result of this provision.

Family Benefits Act R.S.O. 1980 c. 151 s. 14(5)

56. The consequences of an inability to cross-examine the Director's submissions are made more severe by reverse onus of proof which falls upon the applicant to disprove the Director's prima facie against her.

Re Ellis (1980), 28 O.R. (2d) 385

57. Similarly, the ability of the Board to consider hearsay evidence, allows it to receive information that is second and third hand, and is therefore inherently less trustworthy than witness testimony. This evidence then becomes more difficult to challenge without the safeguard of cross-examination.

T.A. Miller v. Minister of Housing and Local Government, [1968] 1 W.L.R. 992 (C.A.)

PART III

EQUALITY

(a) Discrimination and Denial of Equal Benefit to Single Mothers

58. It is submitted that Regulation 318, section 1(1)(c) and 5(b) as amended, of the Family Benefits Act, discriminate on the basis of sex and are contrary to section 15 and section 28 of the Canadian Charter of Rights & Freedoms.

59. Although the Regulation was recently amended to include single fathers with dependent children, and is thus on its face gender neutral, it is submitted that the requirement that a single parent with dependent children be 'living as a single person', in its operation, discriminates

against women.

Regulation 318, s.2(8) R.R.O. 1980, as amended to
O.Reg 784/83

60. The 'spouse-in-the-house' test as a condition of eligibility for social assistance is rooted in stereotypes of the 'deserving' sole support mother. Regulatory precursors required sole support mothers to be widowed or deserted and 'suitable', which was undefined, in order to be eligible for benefits.

Mothers' Allowances Act S.O. 1920 c. 89

Submission to Ontario Human Rights Commission, Women
for Justice, April, 1984

61. Despite the non-gender specific eligibility requirements, women constitute the overwhelming majority of the recipients in the category of single parents with dependent children. In 1984, sole support mothers constituted 99% of this category.

Submission to the Ontario Human Rights Commission,
Women for Justice, April, 1984

62. It is submitted that discrimination includes practices and attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to opportunities generally available because of attributed rather than actual characteristics.

Report of the Royal Commission on Equality in
Employment, Rosalie Silberman Abella, Commissioner
Ottawa, The Commission, 1984

63. It is submitted that the Charter reaches legislation which has the effect of interfering with protected rights as

well as legislation which offends Charter guarantees in purpose.

64. The requirements of "living as a single person" has a disparate impact on women seeking Family Benefits, and is therefore discrimination on the basis of sex, and deprives women of equal benefit of the law.

Ontario Human Rights Commission and Theresa O'Malley v. Simpson Sears, Dec. 17, 1985, Supreme Court of Canada (unreported)

K.S. Bhinder & The Canadian Human Rights Commission v. The Canadian National Railway Co., Dec. 17, 1985, Supreme Court of Canada, (unreported)

R. v. Videoflicks, *supra*

Griggs v. Duke Power 401 U.S. 424

65. The stereotype of women's economic dependence on men has historically played a fundamental role in women's equality, and that equality between men and women requires individual economic independence. Women's economic dependence has been created and reinforced by such factors as women's traditional role as homemaker, the lack of employment opportunities for women, and the substantial wage differentials between men and women in the labour force.

Report of the Royal Commission in Equality in Employment, *supra*

66. It is these various factors which have historically forced single mothers onto social assistance and which account for the fact that one half of single parent families headed by women in Canada in 1983 were below the poverty line.

National Council on Welfare, Poverty Profile, 1985, at p. 21

Dennis Guest, The Emergence of Social Security in Canada (1981), pp. 15-16

67. It is the same sexual stereotype of women's economic dependence on men that is being invoked to deprive sole support mothers systematically of their Family Benefits when they are found not to be "living as a single person". In circumstances where the alleged spouse provides no actual support, and is under no legal obligation to do so, the Regulation assumes that by virtue of entering into a relationship with a man, a woman is no longer eligible to receive an income in her own right.

68. A simplistic discrimination analysis examining only comparable classes is inappropriate in dealing with the inequalities perpetuated by sexual stereotypes. It is precisely the fundamentally unequal position of women that gives them a unique social position of being in need of social assistance as sole support parents, and explains why the class of sole support fathers who are subject to the same regulation is nominal in size.

69. It is submitted that Regulation 318, ss. 1(1)(c) and 5(b) exists and operates on the basis of this sexually discriminatory stereotype which denies sole support mothers the equal protection and benefit of the law.

(b) Discrimination and Denial of Equal Benefit to Children of Single Mothers

70. It is further submitted that the requirement that sole support parents be 'living as a single person' discriminates against the intended beneficiaries of these family benefits, that is, the children, and thus violates their rights to

equal protection of the law, and equal benefit of the law guaranteed by section 15 of the Charter.

King v. Smith 277 F. Sup. 31 (1967)

71. Once deemed to be living other than as a single person, a parent is denied family benefits without regard to whether the 'spouse' provides the financial support required by the children or has a legal obligation to do so. It is submitted that the result of this regulation is that some children for whom the legislation was passed are denied the benefits of the legislation because of the lifestyle of their parents.

72. Other relevant legislation governing the welfare of children focuses on what is in the best interests of a child, rather than the rights or conduct of the parent. The children of parents receiving family benefits thus do not receive equal treatment regarding their source of income when compared to children of other single parents.

Child and Family Services Act R.S.O. 1984, c.55

Children's Law Reform Act, R.S.O. 1980, c.68 as amended

Family Law Act, S.O. 1986 c. 4

PART IV

NO JUSTIFICATION AS A REASONABLE LIMIT PURSUANT TO S.1

73. Once a prima facie violation of a Charter right has been established, the onus shifts to the government to justify the limitation of the protected right.

74. Any infringement of a Charter right gives rise to a heavy onus that the limitation imposed be necessary to the achievement of some significant government interest, and

that the means chosen to achieve this objective be proportional, and impair as little as possible the protected right.

Regina v. Big M. Drug Mart Ltd. (1985) 18 CCC (3d) 385 at pp. 429-31 per Dickson J. (S.C.C.)

Re Southam Inc. and the Queen (No. 1) (1983) 41 O.R. (2d) 113 at pp. 124-5 (Ont. C.A.)

R. v. Oakes

75. It is submitted that the "not living as a single person" test of eligibility for Family Benefits is not rationally nor proportionately related to the legitimate government objective of distributing allowances and benefits on the basis of need.

Family Benefits Act, R.S.O. 1980, c.151, ss. 1(a)(d)

76. The "spouse in the house test" cuts off benefits absolutely, where there is no or only a limited economic contribution by the spouse and no legal obligation on him to provide an adequate level of support, despite a continued economic need. The regulation catches more individuals than its purpose requires, and is thus overly broad.

77. Additionally, if the benefits are primarily aimed at providing children with an adequate level of support, the parental criteria of "not living as a single person" is in the same way neither rationally nor proportionally related to their actual economic needs.

Lewis v. Martin 90 S. Ct. 1282 (1970)

78. It is submitted that a rational criterion of eligibility would be to consider the actual economic benefit, existing or available, flowing from the cohabitation when calculating the economic need of the

individual applicant. As this is the procedure that the Regulation employs in determining the level of benefits for those classes of recipients not required to be single, it is submitted that this is a more appropriate and equally workable method of calculating benefit levels that does not unduly infringe on Charter rights.

Regulation 318, RRO 1980, as amended O. Reg 784/83 ss.8; 13(2), 23, 24

79. It is submitted that administrative expediency is insufficient justification for the infringement of a right protected in the Charter.

Singh et al. v. Minister of Employment and Immigration (1985) 17 D.L.R. (4th) 422 at p. 469 per Wilson J. (S.C.C.)

80. A law cannot be vague, undefined or totally discretionary, but must be ascertainable and understandable. A limitation simply left to administrative discretion cannot therefore be one considered to be prescribed by law.

Ontario Film and Video Appreciation Society (1983), 147 D.L.R. (3d) 58 (Ont. H.C.); aff'd (1984), 5 D.L.R. (4th) 766 (Ont. C.A.)

81. It is submitted that the lack of clear criteria for establishing whether a woman is living as a single person and the resulting arbitrary manner in which the regulation is administered, results in the deprivation of benefits according to administrative discretion. The "spouse in the house" regulation therefore is not prescribed by law and cannot fall within the saving provision of section 1.

PART IV

ORDER SOUGHT

82. A declaration that Regulation 318, section 1(1)(c) and section 5(b) as amended, by the Family Benefits Act are in violation of sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms and are of no force or effect.

83. An order that the Appellant be restored to benefits under the Family Benefits Act as of July 1, 1984 with compensation payable to the Appellant from that date.

84. The Appellant's costs of this appeal.

85. Such further and other relief as this Honourable Court deems just.

SCHEDULE A

LIST OF AUTHORITIES

1. Re Warwick and Minister of Community and Social Services (1978) 21 O.R. (2d) 528 (C.A.)
2. Willis v. Ministry of Community and Social Services (1983) 40 O.R. (2d) 287
3. Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services (1985) 51 O.R. (2d) 303
4. Re Burton and Minister of Community and Social Services (1985) 52 O.R. (2d) 211
5. Dowlut v. Com'r of Social Services (March 29, 1985), Unreported Decision, at 3 (summarized 30 A.C.W.S. (2d)299)
6. Chartier v. The Director of Income Maintenance Branch of the Ministry of Community and Social Services, (December 4, 1984) Unreported Decision, at 2
7. R. v. Morgentaler, Smoling and Scott (1985) 52 O.R. (2d) 353 at 377
8. Mothers' Allowances Act, S.O. 1920, c. 89 Constitution Act, 1982, s. 36
9. R. v. Robson, (1985) 45 C.R. (3d) 68 (B.C.C.A.)
10. R. v. Videoflicks (1984) 48 O.R. (2d) 395 per Tarnopolsky J.A. at p. 483
11. Universal Declaration of Human Rights (1984) Art. 25, para (1), N.N. DOC. A/811
12. The Declaration of the Rights of the Child G.A. Res. 1386 14 U.N. GAOR, Supp. (No. 16) 19, UN. DOC. A/4354 (1954)
13. Reference Re S. 94 (2) of the Motor Vehicles Act (unreported) (S.C.C.)
14. R. v. Young (1984) 46 O.R. (2d) 529 (Ontario Court of Appeal)
15. Board of Regents of State Colleges v. Roth 408 U.S. 564 at 572 (1972)
16. Loving v. Virginia 388 U.S. 1 at 12 (1967)

17. Skinner v. Oklahoma ex rel Williamson 316 U.S. 479 (1967)
18. Re City of Montreal and Arcade Amusements Inc. et al (1985), 18 D.L.R. (rth) 161 (S.C.C.)
19. Re Hamilton Independent Variety & Confectionary Stores Inc. and City of Hamilton (1983) 143 D.L.R. (3d) 498 (Ont. C.A.)
20. Saumur v. Quebec 1953 4 D.L.R. 641
21. Reference Re s. 94(2) of the Motor Vehicles Act R.C. (1985) 63 N.R. 266 (S.C.C.)
22. R. v. Langevin (1984) 45 O.R. (2d) 705
23. Township of Innisfil v. Township of Vespra (1981), 2 S.C.R. 145
24. Re Toronto Newspaper Guild and Globe Printing 1951 3 D.L.R. 162 (Ont. H.C.); aff'd 1952 2 D.L.R. 302 (Ont. C.A.); aff'd 1953 2 S.C.R. 18
25. Goldberg v. Kelly (1970) 397 U.S. 254
26. Re Ellis (1980), 28 O.R. (2d) 385
27. T.A. Miller v. Minister of Housing and Local Government, 1968 1 W.L.R. 992 (C.A.)
28. Submission to Ontario Human Rights Commission, Women for Justice, April, 1985
29. Report of the Royal Commission on Equality in Employment, Rosalie Silberman Abella, Commissioner Ottawa, The Commission, 1984
30. Ontario Human Rights Commission and Theresa O'Malley v. Simpson Sears, Dec. 17, 1985, Supreme Court of Canada (unreported)
31. K.S. Bhinder & The Canadian Human Rights Commission v. The Canadian National Railway Co., Dec. 17, 1985, Supreme Court of Canada, (unreported)
32. Griggs v. Duke Power 401 U.S. 424
33. National Council on Welfare, Proverty Profile, 1985, at p. 21
34. Dennis Guest, The Emergence of Social Security in Canada (1981), pp. 15-16

35. King v. Smith 277 F. Sup. 31 (1967)
36. Child and Family Services Act R.S.O. 1984, c.55
37. Children's Law Reform Act, R.S.O. 1980, c.68 as amended
38. Family Law Act, S.O. 1986 c. 4
39. Regina v. Big M. Drug Mart Ltd. (1985) 18 CCC (3d) 385 at pp. 429-31 per Dickson J. (S.C.C.)
40. Re Southam Inc. and the Queen (No. 1) (1983) 41 O.R. (2d) 113 at pp. 124-5 (Ont. C.A.)
41. R. v. Oakes
42. Lewis v. Martin 90 S. Ct. 1282 (1970)
43. Singh et al. v. Ministry of Employment and Immigration (1985) 17 D.L.R. (4th) 422 at p. 469 per Wilson J. (S.C.C.)
44. Ontario Film and Video Appreciation Society (1983), 147 D.L.R. (3d) 58 (Ont. H.C.); aff'd (1984), 5 D.L.R. (4th) 766 (Ont.C.A.)

SCHEDULE B

STATUTES AND REGULATIONS

1. Family Benefits Act R.S.O. 1980, c.151, as amended.
Sections 7, 14, 19 and 29
2. Regulation 318, R.R.O. 1980, as amended.
Sections 1, 2, 5, 8, 13
3. Canada Act, Schedule B, Constitution Act, Part I,
Canadian Charter of Rights and Freedoms, 1982
Sections 1, 7, 15, 28 and 36