C.A. No. 129404

NOVA SCOTIA COURT OF APPEAL
Cite as: Carrigan v. Nova Scotia (Community Services), 1997 NSCA 19

Hallett, Chipman and Flinn, JJ.A.

BETWEEN:

GILLIS CARRIGAN and the NOVA SCOTIA HUMAN RIGHTS COMMISSION Gillis Carrigan	)	Vincent Calderhead for
Appellants	)	Valerie A. MacKenzie and B. Lynn Reierson for Nova Scotia Human Rights Commission
- and -	)	
NOVA SCOTIA DEPARTMENT OF COMMUNITY SERVICES	)	David J. Bright, Q.C. and Kathryn A. Raymond for the respondent
Respondent	)	Appeal Heard: February 14, 1997
	)	Judgment Delivered: February 26th, 1997

THE COURT: Appeal allowed and matter remitted back to Board of Inquiry per reasons for judgment of Flinn, J.A.; Hallett and Chipman, JJ.A. concurring.

FLINN, J.A.:

The determinative issue in this appeal is whether Section 20 of the Regulations, enacted pursuant to the **Family Benefits Act**, R.S.N.S. 1989, c. 158, makes a distinction, based on marital status, so as to give rise to a complaint of discrimination under s. 5(1)(a)(s) of the **Human Rights Act**, R.S.N.S. 1989, c. 214.

The appellant, Mr. Carrigan, filed a complaint with the Human Rights Commission as follows:

> "I am a single father with one child, Matthias Carrigan. I was married in April of 1993. I separated from my wife on February 22, 1994. We were living in Ontario at the time. I returned to Nova Scotia with Matthias on March 31, 1994.
>
> On or about April 12, 1994, I contacted the Department of Community Services to make application for Family Benefits as a single parent. They informed me that I could not apply until I had been separated from my wife for six months.
>
> I learned that I was ineligible to apply for benefits because of Regulation 20 made pursuant to the Family Benefits Act, which imposes a six month waiting period on married single parents prior to being able to apply for benefits. No other people eligible for Family Benefits face a comparable waiting period.
>
> I allege that I have been discriminated against in the provision of a service because of my marital status, contrary to Section 5(1)(a)(s) of the Human Rights Act and Section 15(1) of the Canadian Charter of Rights and Freedoms. I believe that Regulation 20 made pursuant to the Family Benefits Act should be void and of no legal effect, pursuant to Section 10 of the Human Rights Act."

The Commission established a Board of Inquiry , under s. 32A of the **Human Rights Act**, to conduct a hearing into the complaint. The respondent made a preliminary motion to the Board of Inquiry that the complaint be dismissed. The basis of the motion was that the Board of

Inquiry was bound by the decision of Goodfellow J. in **Rhyno v. Minister of Community Services** (1994), 131 N.S.R. (2d) 353 which held that Section 20 of the Regulations was not discriminatory. The Board of Inquiry agreed.

In its decision, on the preliminary motion, the Board of Inquiry said the following:

> "As I read the Decision of Goodfellow J. in *Rhyno*, he found as a matter of law that s. 20 of the Regulation does not amount to discrimination - indeed, he found that the applicant had "not met the first test, namely that of establishing a legal distinction, and in any event the differentiation created by s. 20 does not amount to discrimination ....."

Mr. Carrigan, and the Commission, appeal to this Court claiming, inter alia, that the Board of Inquiry applied law that was wrong in coming to its conclusion on the preliminary motion of the respondent. It is argued that the methodology, for determining whether a statutory enactment is discriminatory, as established in **Law Society of British Columbia et al. v. Andrews** (1989), 56 D.L.R. (4th) 1 (S.C.C.) was not properly applied in **Rhyno**. The Commission submits that the recent decision of the Supreme Court of Canada in **Miron v. Trudel et al** [1995] 2 S.C.R. 418 (S.C.C.), rendered since **Rhyno**, confirms that the proper methodology was not used in **Rhyno**.

Rhyno was a **Charter** challenge, as opposed to a claim of discrimination under the **Human Rights Act**. It was alleged that s. 20 of the Regulations was contrary to the equality rights provisions of the **Charter**. There is, however, a relationship between s. 15 of the **Charter** and the discrimination provisions of the **Human Rights Act**. In fact, **Andrews**, one of the seminal decisions of the Supreme Court of Canada on s. 15 of the **Charter**, is the source of the definition of discrimination in s. 4 of the Nova Scotia **Human Rights Act**.

Further, it is clear that the jurisprudence pertaining to the interpretation of s. 15 of the **Charter** can be relied on in interpreting guarantees in provincial human rights legislation (See **Dickason v. University of Alberta**, [1992] 2 S.C.R. 1103 (S.C.C.); and **Ontario Human Rights Commission v. Ontario** (1994), 19 O.R. (3d) 387 (Ont. C.A.)).

In **Rhyno**, Justice Goodfellow correctly enunciated the methodology set out in **Andrews**. He said at p. 361 (N.S.R.):

> "In **Andrews** above, the final comments of MacIntyre, J., fashioned a two step analysis. First, it must be determined whether or not a distinction has been made - whether the complainant has been denied equality before or under the law or the equal protection or benefit thereof. If so, the second step is to determine whether or not the denial or distinction constitutes discrimination."

Under the **Charter**, if such a distinction has been made, and if that distinction is found to be discriminatory, then there is a third step of determining if the discrimination can be justified under s. 1.

In **Miron** the nine judges of the Supreme Court of Canada were in general agreement with respect to the first step, as that is expressed in **Andrews**. There was, however, division among the judges as to what should be considered under the second and third steps. Those different opinions are not relevant for the purpose of considering the narrow issue in this appeal.

Counsel for the appellants submit that in **Rhyno** the first step was not properly applied.

I will now examine the legislation which is the subject of this complaint.

The Family Benefits Act is social welfare legislation. Its purpose is stated in s. 2 of the **Act** as follows:

"2 The purpose of family benefits under this Act is to

> provide assistance to persons or families in need where the cause of need has become or is likely to be of a prolonged nature."

Under Section 18(1) of the **Family Benefits Act** the Governor in Council has wide regulatory power, including prescribing the amount of family benefits, standards of eligibility, etc. Included in the regulatory power is the power to make regulations:

> "(h) respecting the duration of circumstances of need, as a standard of eligibility for family benefits;"

Section 20 of the Regulations, which is the subject of this appeal, provides as follows:

> "In order to be eligible to receive benefits pursuant to section 5(b) of the regulations, an applicant or recipient shall be deserted for not less than six months prior to the making of an application for benefits."

It is also necessary to set out ss. 5 and 6 of the Regulations:

> "5. Subject to the regulations, a man or a woman with a dependent child is eligible to apply for benefits for a family in need on his or her own behalf and on behalf of a dependent child if
>
> > (a) the man is a widower or the woman is a widow;
> >
> > (b) the man no longer cohabits with his wife and she does not provide him with the monetary requirements for regularly recurring needs; or the woman no longer cohabits with her husband and he does not provide her with the monetary requirements for regularly recurring needs; or
> >
> > (c) his wife is a patient in a sanitorium, hospital, or similar institution; or her husband is a patient in a sanatorium, hospital, or similar institution; or

> (d) his wife is imprisoned in a penitentiary to which the Penitentiary Act (Canada) applies or her husband is imprisoned in a penitentiary to which the Penitentiary Act (Canada) applies; or
>
> (e) he is divorced and has not remarried or she is divorced and has not remarried.
>
> 6. Subject to the regulations, a father or mother whose dependent child was born out of wedlock is eligible to apply for benefits on his or her own behalf and on behalf of his or her dependent child, if the father or mother
>
> (a) is not married; and
>
> (b) has attained the age of sixteen years."

As Ms. MacKenzie, for the Commission, argues, Section 20 of the Regulations imposes a six month waiting period on a select group of people (applicants who are still legally married) without any inquiry into their circumstances. If you are separated, and still legally married, regardless of your financial circumstances, you have to wait six months before you are entitled to make an application for benefits. That waiting period does not apply to any other applicant or group of applicants.

I agree with counsel for the appellants that, under Section 20 of the Regulations, "a distinction has been made," and the complainant has been "denied the equal protection and benefit of the law," as those words are used by MacIntyre J. in **Andrews**. The Regulation clearly treats married and unmarried applicants differently. Whether that distinction is discriminatory is an entirely separate question. However, it is clear that the Regulation creates a distinction.

In his conclusion, in **Rhyno**, Justice Goodfellow said the following at p. 363 (N.S.R.):

> "I conclude that Mrs. Rhyno fails in that she has not met the first test, namely that of establishing a legal distinction, and

> in any event the differentiation created by s. 20 does not amount to discrimination because it treats her the same as all other married separated persons with child. She falls in the same boat as all those in that classification." (emphasis added)

It is apparent that Justice Goodfellow came to this conclusion, that a legal distinction had not been established, after he carried out an assessment of the rationale behind Section 20 of the Regulations. He said at p. 362 (N.S.R.):

> "However, if the law sought to be impugned is social legislation which attempts to identify and address various differences in applications to try and provide relief relating to needs and capacity and does so, does it amount to creation of a legal distinction?"

To get beyond the first step, it is only necessary to determine that the Regulation, on its face, creates a distinction. Whether the distinction, which is created by the legislation is reasonable, is an issue that is dealt with upon examining whether the legislation, if discriminatory, can be justified (See **Miron** per Gonthier J. at pp. 444-445 S.C.R. and per McLachlin J. at pp. 502-503).

Since I have concluded that a distinction is created by Section 20 of the Regulations, it is necessary that this matter be referred back to the Board of Inquiry for further determination; as to whether the distinction is discriminatory; and, if so, whether it can be justified, as coming within the exception set out in s. 6(f) of the **Human Rights Act**.

Further, since I am proposing that this matter be remitted back to the Board of Inquiry, I will comment on the alternative conclusion which Justice Goodfellow reached in **Rhyno**. After concluding that Mrs. Rhyno had not met the first test of establishing a legal distinction, Justice Goodfellow went on and said:

> "....and in any event the differentiation created by s. 20 <u>does not amount to discrimination because it treats her the same</u>

as all other married separated persons with child. She falls in the same boat as all those in that classification." (emphasis added)

In determining that s. 20 of the Regulations was not discriminatory in any event, it appears, although Justice Goodfellow does not actually say so, that he applied the "similarly situated" test. He compared the complainant to other persons in her group, (married persons) rather than comparing her to others.

The "similarly situated" test was clearly rejected by the Supreme Court of Canada in **Andrews**. MacIntyre J. said at p. 12 (56 D.L.R. (4th)):

> "Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions."

In **McKinney v. University of Guelph**, [1990] 3 S.C.R. 229 LaForest J. said at p. 279:

> "The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe that it survived *Andrews v. Law Society of British Columbia*."

I would allow this appeal. I would remit this matter back to the Board of Inquiry which the Commission has already established. The Board of Inquiry will conduct a hearing, and;

1. determine if the distinction which is created by Section 20 of the Regulations, enacted pursuant to the **Family Benefits Act**, is discriminatory, as being contrary to s. 5(1)(s) of the **Human Rights Act**; and, if so;
2. determine if the discrimination can be justified as coming within

the exception set out in s. 6(f) of the **Human Rights Act**, or such other exception as may be advanced by the respondent.

I would make no order as to costs.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.

C.A. No. 129404

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Appellant

- and -

NOVA SCOTIA DEPARTMENT OF COMMUNITY SERVICES

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.