

**NOVA SCOTIA COURT OF APPEAL**

**Pugsley, Hart and Flinn, J.J.A.**

**Cite as: Way v. Nova Scotia (Social Assistance Appeal Board), 1997 NSCA 99**

**BETWEEN:**

**JEAN WAY**

Appellant

- and -

**ROBERT COVERT, DOROTHY  
HENDERSON, and JOANNE KING, in  
their capacity as a Social Assistance  
Appeal Board, and BILL CAMPBELL,  
in his capacity as Director of Family  
Benefits**

Respondents

Claire McNeil/John Hedley  
for the Appellant

Alexander Cameron  
for the Respondent

Appeal Heard:  
January 24, 1997

Judgment Delivered:  
May 13, 1997

**THE COURT:**

Appeal allowed; reasons of Flinn, J.A.; concurred in by Hart, J.A.;  
separate reasons by Pugsley, J.A.

**Pugsley, J.A.:**

This is an appeal by Jean Way from a decision of Gruchy, J., sitting as a Supreme Court judge in Chambers, dismissing her application for an order in the nature of *certiorari* to quash a decision of the Social Assistance Appeal Board, and dismissing, as well, her application for a declaration that certain regulations enacted pursuant to the **Family Benefits Act** S.N.S., c-158 (1989) (the **Act**) were "*ultra vires* the power of the Governor in Council to enact".

Ms. Way, presently 44 years of age, requires constant care and attention as the result of mental and physical disabilities sustained in an accident when she was a child. She lived with her father until his death in 1987. Since then, she has resided with her brother, Austin Way, his wife, and their 21-year old unemployed son.

Ms. Way qualifies for financial assistance, as a disabled person in need, pursuant to s. 5(1)(b) of the **Act**. Up until the end of October, 1994, Ms. Way received benefits of \$303.00 per month to cover shelter and food costs; of that amount, she paid \$200.00 to her brother, and the balance was kept aside to meet her personal needs.

By letter dated October 12, 1994, on behalf of the Director of Family Benefits, Ms. Way was advised that effective November 1, 1994, she would no longer be entitled to shelter allowance benefits, as the income of her brother exceeded the limit prescribed in a schedule contained in amendments to the Regulations to the **Act** (the **1994 Regulations**). Ms. Way's family benefits were accordingly reduced from \$303.00 to \$74.00 monthly.

Ms. Way appealed the decision of the Director to the Social Assistance Appeal Board. The Board, consisting of the respondents, Robert Covert, Joanne King and Dorothy Henderson, denied her appeal.

Ms. Way subsequently applied to the Supreme Court. The Board members, as well as the Director, were joined as respondents to the application. Notice of the

application was duly served on the Attorney General of Nova Scotia, pursuant to s.10 of the **Constitutional Questions Act**, Chapter 89, S.N.S. (1989). The Attorney General was not represented at the hearing of the application before the Supreme Court or at the hearing of the appeal.

The application was dismissed in a written decision of September 17, 1996, reported at (1997) 154 N.S.R. (2d) 225.

In her appeal to this Court, it is submitted on behalf of Ms. Way, that the Supreme Court Chambers judge erred in law:

- in failing to conclude the **1994 Regulations** were discriminatory and were not authorized by the **Act**;
- in failing to conclude the **1994 Regulations** violated Ms. Way's s.15 **Charter** rights, and that such a violation could not be justified under s. 1 of the **Charter**;
- in failing to grant a declaration that the **1994 Regulations** were inconsistent with the obligations of the Government of Nova Scotia pursuant to the Canada Assistance Plan Agreement made with the Government of Canada.

## **Background**

The affidavit of Austin Way, introduced as an exhibit before the Social Assistance Appeal Board, provides in part:

12. In addition to shelter, we supply Jean with all of her meals. These meals are purchased and prepared by my family and me. We also supply her with laundry services as well as meeting her transportation needs. All of these expenses are paid by my wife and me.

. . .

14. Since the shelter allowance has been cut off, my wife and I have had a difficult time meeting our expenses and supplying Jean with her basic necessities. Since assistance

was reduced, the entire \$74.00 remaining has to go towards food and shelter expenses, and no money is left for any of Jean's other personal needs.

. . .

18. My family assumed responsibility for the care and guidance of Jean, not because of a legal obligation but because of a family obligation. Before my father died he asked that I take care of Jean. By providing Jean with care and supervision I am simply fulfilling this request and carrying out what I believe is my familial obligation as her brother. I believe the government is simply taking advantage of this family obligation which I feel towards my sister.

It should be noted that Mr. Way is under no legal obligation to provide assistance to the appellant.

In support of the respondents' position, an affidavit deposed by Rupert Fisher, Manager of Operations of the Income Assistance Division of the Nova Scotia Department of Community Services, was introduced. The Department of Community Services administers a number of provincial Social Assistance Acts, including the **Act**.

The Annual Report of the department for the fiscal year ending March 31, 1995, annexed as an exhibit to Mr. Fisher's affidavit, reveals that the number of individuals entitled to family benefits in Nova Scotia increased by about 6,000 over the last six years and that the paid benefits for those entitled to family benefits increased from approximately \$170,000,000 to \$245,000,000.

The authors of the Annual Report noted:

As everyone knows, the financial difficulty faced by Nova Scotia in coming years will require all departments to work with diminished resources.

Since the inception of the **1994 Regulations** in August of 1994, and as a result of the **1994 Regulations**, the Department of Community Services has experienced savings of approximately \$800,000 per annum.

## Relevant Sections of the *Family Benefits Act*

Section 2 of the **Act** provides:

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.

The phrase "person in need" is defined under s. 3(1)(l) to mean:

...a person whose monetary requirements for regularly recurring needs determined under the regulations exceed his income as determined under the regulations;

Section 5(1) of the **Act** provides:

Subject to this Act and the regulations, a person is eligible to apply for family benefits as a person in need

(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).

Section 18(1) provides in part:

18(1) The Governor in Council may make regulations

(a) respecting the manner of making an application for family benefits;

(b) providing for inquiries to be made concerning or on behalf of applicants or recipients in order to determine their eligibility for family benefits;

. . .

(d) providing for the time and manner of granting family benefits;

(e) providing for the suspension, discontinuance, reduction, increase and resumption of family benefits;

(f) prescribing the maximum amount of family benefits that may be granted;

. . .

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

. . .

(j) respecting the property or income or other qualifications to be possessed by applicants and persons receiving family benefits;

(k) prescribing standards of eligibility for family benefits in addition to those mentioned in this Act;

## Opinion

The issue of whether the Chambers judge erred in concluding the Legislature authorized the Governor in Council to create the **1994 Regulations** is a jurisdictional issue. I agree with the joint submission of counsel that the standard of review to be employed by this Court is one of correctness.

It is submitted on behalf of Ms. Way that the **1994 Regulations** are discriminatory because they are based upon a distinction between those family benefit recipients who live with relatives, and those who do not - a distinction not authorized by the **Act**. This challenge is not based upon a distinction relating to "personal characteristics of any individual" and thus directed to a violation of s. 15 of the **Charter**, but rather, based upon a discrimination carried out in the absence of delegated power. The distinction might, as well, be characterized as that between a needy person who lives with a relative, whose gross monthly income is equal to or greater than a stated amount, and a needy person who lives with a relative whose gross monthly income is less than the stated amount.

In the field of municipal law, it is clear that by-laws will be struck down if they are "partial and unequal in their operation as between different classes" (Lord Russell of Killowen, C.J., in **Kruse v. Johnson**, [1898] 2 Q.B. 91 at 99).

The interpretation of these words as used by Lord Russell was considered by Justice Beetz, on behalf of the Court, in **City of Montreal v. Arcade Amusements**, [1985] 1 S.C.R. 368, at p. 406:

It is important to note that the first category of by-laws unreasonable in the legal sense mentioned by Lord Russell of Killowen is that of by-laws which are discriminatory in the non-pejorative but most neutral sense of the word, and which are rendered invalid even though the distinction on which they are based is perfectly rational or reasonable in the narrow or political sense, and was conceived and imposed in good faith, without favouritism or malice.

Justice Iacobucci, on behalf of the Court, in **R. v. Sharma**, [1993] 1 S.C.R. 650 pointed out at 668:

... the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province. (To the same effect are comments of Sopinka, J. on behalf of the majority in **Shell Canada Products v. Vancouver**, [1994] 1 S.C.R. 231 at 282.)

The respondents stress that the majority of the cases cited on behalf of Ms. Way, deal with the validity of municipal by-laws and that the principle respecting discriminatory by-laws should be limited to situations where a municipality attempts to discriminate among its citizens with respect to licenses, taxation, etc.

In the context of social assistance legislation, such as the **Act**, counsel for the respondent argues that there are "strong reasons why the presumption of equal treatment should be more readily displaced".

No authority is cited for this proposition.

It is clear, however, that the Supreme Court of Canada has not limited the principle of discrimination to the field of municipal by-laws.

Justice Beetz stated in the **Arcade Amusements** case at p. 413:

It must be held that, in the absence of express provisions to the contrary or implicit delegation by necessary inference, the sovereign legislator has reserved to itself the important power of limiting the rights and freedoms of individuals in accordance with such fine distinctions. The principle transcends the limits of administrative and municipal law. It is a principle of fundamental freedom. (emphasis added)

I am of the view this principle of fundamental freedom applies to the issues in the present case.

The question on the first issue is whether the **Act** explicitly provided for the Governor in Council to discriminate between family benefit recipients who reside with relatives, and those who do not, or whether it is a necessary incident to the power to pass Regulations as delegated under the **Act**.

The respondents acknowledge that the **Act** does not explicitly authorize the Governor in Council to make "distinctions between classes of recipients based on whether they reside with relatives" but adopts the conclusion of the Chambers Judge that the authority to make the distinction is implicit in the broad authority to pass regulations granted in s.18(1) of the **Act**.

The Chambers judge prefaced his remarks respecting this issue by stating:

I note that s. 18 of the **Act**, and the **Act** itself, set no standards of eligibility or quantum of benefits.

That conclusion, fails to take into account the provisions of s. 5(1) which stipulates standards of eligibility.



The Chambers judge continued:

The Legislature clearly intended that the Governor in Council through regulation, would set the criteria necessary for the proper administration of the benefits granted. Those criteria must necessarily include consideration of the eligibility of applicants and the types and quantum of benefits to be conferred. The Legislature did not write a blank cheque to applicants. The total cost of the program ultimately had to be controlled and, clearly, the Legislature intended that the Governor in Council would do so by the exercise of its regulatory power.

I therefore conclude that the Legislature, by necessary inference and by s. 18(1)(b), (e) (f), (j) and (k) granted the Governor in Council the authority to create the Regulations in question.

While the authority granted to the Governor in Council to make regulations under s. 18 of the **Act** was certainly broad, in my opinion it does not create by necessary implication the right to discriminate. (See comments of Lamer, J., as he then was, on behalf of the majority in **Forget v. Quebec**, [1988] 2 S.C.R. 90 at p. 105.)

A similar expression by a Legislature of granting broad powers to a subordinate body to enact by-laws is found in the **Arcade Amusement** case.

Article 516 of the *Charter of the City of Montreal* provided that the City Council:

...shall have power to enact by-laws to ensure the peace, order and good government of the city, the welfare of its citizens and the proper administration of its affairs, and to pronounce upon any matter calculated to affect or interest the city and its people in any way, provided that such by-laws be not repugnant to the laws of the Province or of Canada, or to any special provision of this charter.

Section 517 of the *Charter* provided:

For greater certainty as to the powers conferred on the council by article 516, but without restricting the scope thereof and subject to the reservations which it contains, and without restricting the scope of the powers otherwise conferred in the council by this charter, the authority and jurisdiction of the council extend to all the following matters:

...

g. the public order, peace and safety;

...

s. generally all matter concerning the proper administration of the affairs of the city, public interest and the welfare of its population.

Justice Beetz commented on the issue at p. 414:

Counsel for the City emphasized the amplitude of the City's general powers as compared with those of other municipalities: they lay particular stress on its policing powers, especially Art. 517g. and s. of the *Charter*. However, as can be seen on the face of these provisions, none of them expressly empowers the City to make distinctions based on age. It may well be that an authorization to make distinctions based on the age of children and adolescents would be useful to the City in exercising its general powers, and especially in exercising its power to adopt policing by-laws; but however useful or convenient such an authorization might be, I am not persuaded that it is so absolutely necessary to the exercise of those powers that it would have to be found in the enabling provisions, by necessary inference or implicit delegation. (emphasis added)

The same comments, in my opinion, are directly applicable to the broad powers granted to the Governor in Council pursuant to s.18(1) of the **Act**.

In addition, a review of the **Act** as a whole reveals that the scheme of the **Act** is to focus on persons in need, and on their income and their property, as distinct from the property or income of others who might gratuitously provide assistance to those in need.

For example:

- Section 3(1)(l) defines a person in need as "a person whose monetary requirements for regularly occurring needs determined under the Regulations exceeds his income as determined under the Regulations"; (emphasis added)

- Section 18(1)(k) authorizes the Governor in Council "to make regulations respecting the property or income or other qualifications to be possessed by applicants and persons receiving family benefits." (emphasis added)

There are a few exceptions to this generalization but they are all contained in s. 5 of the **Act**.

A woman with a dependant child is eligible to apply for family benefits pursuant to s.5(3)(b) of the **Act** if she no longer co-habits with her husband and he does not provide her with the monetary requirements for regularly recurring needs. (I note that this Court has concluded that s.5(3), among others, is inconsistent with the **Canadian Charter of Rights and Freedoms** - reference Re **Family Benefits Act** (1987), 75 N.S.R. (2d) 338 at 357).

Section 5(6) of the **Act** permits the Director to provide benefits to an unwed mother, who has not attained the age of majority, in circumstances where "adequate income from other sources is not available" to the mother.

Apart from these provisions, no power is expressed in the **Act** to permit the Director to take into account income from sources other than possessed by the person in need. A cogent argument can be made that the Legislature in prescribing that in these limited cases the income of a husband or parent is relevant, "effectively closed the door to inclusion by Regulation" the income of a relative with whom a recipient resides. (See comments of Dickson, J.A. (as he then was) on behalf of the Manitoba Court of Appeal in **Gach v. Director of Welfare (Brandon)**, [1973] 3 W.W.R. 558 at 561.)

In **Gach**, a 22-year old was enrolled in a Community College in Brandon. She lived apart from, and was independent of, her parents. She applied to the Director of Welfare for social allowance. The Regulations under the **Social Allowance Act**

provided that until an applicant married, or reached the age of 25, the financial resources of her parents should be deemed to be a financial resource available to an applicant.

Justice Dickson summarized the argument advanced by the respondent at p. 560:

The argument in support of the validity of Reg. 12(a) is direct and uncomplicated, viz., the Lieutenant-Governor in Council may prescribe rules for determining the financial resources of an applicant, the Lieutenant-Governor in Council has prescribed that the financial resources of a parent shall be deemed to be the financial resources available to an applicant, and that is the end of the matter.

Justice Dickson focused in on the issue before the Court and stated at p. 559:

We are not here concerned with the wisdom of the Regulation. One may or may not favour parental support, rather than state support for an adult child, but that is not the question before us. What we must decide is whether the Regulation has been made and promulgated in accordance with statutory authority.

In concluding that the Regulation exceeded the powers accorded to the Lieutenant-Governor in Council under the enabling legislation, Justice Dickson stated at 561:

In seeking, by Regulation, to make the resources of a *parent* part of the resources of an applicant, the Lieutenant-Governor in Council was not "carrying out the provisions of the Act"; it was enlarging those provisions in a material way.

The same analogy is applicable to the Regulations at issue in this case. The Chambers judge has found, indeed there was no argument, that under the **Act** Ms. Way was eligible to receive family benefits pursuant to the provisions of s. 5(1) as a person in need. The Governor in Council has, by Regulation, attempted to eliminate her right to receive shelter allowance by passing a Regulation deeming her brother's income to be a relevant criterion of eligibility. The **1994 Regulations** affected the provisions of

eligibility set out under the **Act** in a material way and, in my opinion, in a discriminatory way that is not authorized by necessary inference or implicit delegation in the **Act**.

## **Conclusion**

The **1994 Regulations** discriminate amongst applicants who reside with relatives whose income exceeds a certain level, and between those who either reside with relatives whose income is below that level, or alternatively, do not reside with relatives at all. The **1994 Regulations** sought to effect a substantial addition to the powers granted to the Governor in Council.

I conclude that the Chambers judge was incorrect in his conclusion that "the Legislature, by necessary inference ... granted the Governor in Council the authority to create the **Regulations** in question". The **1994 Regulations**, in my opinion, are not authorized by the express, or implied, powers given to the Governor in Council under the **Act**.

In view of my conclusion it is not necessary to consider the additional grounds of appeal raised on behalf of Ms. Way.

I would allow the appeal without costs, set aside both the decision of the Chambers judge, and the **1994 Regulations**, and order that the shelter portion of Ms. Way's family benefit payment of \$229.00 per month be reinstated retroactive to November 1, 1994.

Pugsley, J.A.

FLINN, J.A.:

I agree with Justice Pugsley that this appeal should be allowed. I have come to that conclusion, however, for slightly different reasons. In my view, and with respect, it is not necessary to consider whether the **Regulations**, which are the subject of this appeal, are discriminatory. I have concluded that the **Regulations** in question impose a standard of eligibility for benefits which is inconsistent with the basic standard of eligibility set out in the **Statute**. Those **Regulations** are, therefore, invalid.

The **Family Benefits Act**, R.S.N.S. 1989, c. 158 was enacted to set up a system to provide assistance, to single parents and the disabled, to meet the cost of the basic necessities of life. Single parents and the disabled are eligible for this assistance in cases where their income is insufficient to meet the cost of those basic necessities. While the **Statute** gives broad regulatory power to the Governor-in-Council, that regulatory power does not extend to denying benefits simply because a person, otherwise eligible, is living with a relative who has a certain level of income. Such a denial of benefits is a fundamental departure from, and inconsistent with, the basic standard of eligibility set out in the **Statute**. To accommodate such a fundamental change requires that the **Statute** be changed. The basic standard of eligibility cannot be altered by **Regulation**.

I will now set out in more detail the basis for coming to this conclusion.

### The Relevant Legislation

Counsel for the respondents, in his factum, provides the following as background information with respect to the **Family Benefits Act**:

"3. Since its inception, the *Family Benefits Act* and regulations have continued to single out disabled persons and single parents to receive the benefits it confers:

The social assistance system in this Province is such that long term assistance is provided by the Province through its program of Family Benefits under the **Family Benefits Act**, R.S.N.S. 1989, c. 158, which is directed primarily to disabled persons and single parents with children. Assistance in other categories of individuals is normally provided by the municipalities, pursuant to Part 1 of the **Social Assistance Act**, R.S.N.S. 1899, c. 432. (*Skinner v. Social Assistance Appeal Board* (1992), 112 N.S.R. (2d) 197).

4. There are, of course, many other groups and individuals in this province who, arguably, should also be entitled to social welfare benefits; the working poor, the able-bodied unemployed, etc. While these persons may qualify for benefits under other provincial or federal legislation, they do not qualify for benefits under the *Family Benefits Act*.

5. That is because the single parents and disabled persons who are the focus of the *Family Benefits Act* and Regulations are considered by the legislature to be in particular and unique need of state assistance. The legislature has fashioned a legislative benefits scheme especially for them."

The genesis for this social welfare legislation is an agreement entered into between the Government of Canada and the Government of the Province of Nova Scotia on the 22nd day of March, 1967.

Under that agreement the Government of Canada agrees to cost share the Province's financial commitment necessary to implement a program of providing for assistance in respect of persons in need.

Clause 2(a) of that agreement provides as follows:

"2. The Province agrees

(a) to provide financial aid or other assistance to or in respect of any person in the province of Nova Scotia who is a person in need described in subparagraph (i) of paragraph (g) of Section 2 of the Act in an amount or manner that takes into account his basic requirements;"

The Act referred in Clause 2(a) is the **Canada Assistance Plan** and s. 2(g)(i) of the **Canada Assistance Plan**, at the time, provided as follows:



"(g) "person in need" means

- (i) a person who, by reason of inability to obtain employment, loss of the principal family provider, illness, disability, age or other cause of any kind acceptable to the provincial authority, is found to be unable (on the basis of a test established by the provincial authority that takes into account that person's budgetary requirements and the income and resources available to him to meet such requirements) to provide adequately for himself, or for himself and his dependants or any of them, or

This background provides an explanation for the purpose of the **Family Benefits Act** which is explicitly stated in s. 2 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."

It is a "person in need" (or a "family in need") who is eligible for family benefits under s. 5(1) of the **Family Benefits Act**. The **Family Benefits Act** provides its own definition of "person in need", which is similar, in substance, to the definition of "person in need" in the **Canada Assistance Plan**. Section 3(1)(l) of the **Family Benefits Act** provides as follows:

"3 (1) In this Act,

. . . .

(l)"person in need" means a person whose monetary requirements for regularly recurring needs determined under the regulations exceed his income as determined under the regulations;" (emphasis added)

Obviously, the **Statute** empowers the Governor-in-Council to enact Regulations to more particularly define what is taken into account to determine the applicant's income, and that has been done.

Section 23(1) of the **Regulations** refers to "total income from all sources as calculated pursuant to s. 44":

"23(1) No person shall be entitled to receive benefits under Section 5(1) of the Act or Sections 4, 5, 6, 7 and 8 of the regulations, if at the time the person applies for benefits his or her total income from all sources as calculated pursuant to Section 44 is equal to or greater than the expenses and allowances contained in Sections 32 to 42."

Section 44(1) of the **Regulations** provides that income of a spouse or cohabitant is deemed to be the income of the person applying for benefits:

44(1) For the purpose of computing the amount of benefits payable pursuant to the Act and the regulations, the income of an applicant or recipient shall be deemed to include the income of the spouse or person cohabitating with the recipient and the income received by the recipient on behalf of a dependent child."

Section 44(2)-(13) inclusive set out, in detail, matters which are taken into account in determining the applicant's total income (none of which take into account the income of other persons).

I also note here s. 14(1) and (2) of the **Regulations** provide as follows:

"14(1) An applicant or a recipient of benefits shall provide such information relative to his or her living conditions, health and financial circumstances as the Director may require.

(2) The applicant or recipient shall satisfy the Director that no other feasible source of income is available or sufficient to provide that person in need with food, clothing and shelter."

Section 45 of the **Regulations** provides that the Director shall not grant benefits under s. 5(1) of the **Act** to an applicant who has cash or liquid assets in excess of a fixed amount.

From a review of the provisions of the **Act** and **Regulations**, it is clear that the income of others (with the exception of the applicant's spouse or cohabitant) has no bearing on the determination of the applicant's income as the word "income" is used in the definition of a person in need; and, hence, no bearing on whether the applicant is a "person in need".

### **The Circumstances of the Appellant**

The appellant is presently 44 years of age. She has had a mental disability, since childhood, as a result of an automobile accident. She was cared for by her father until he died in 1987. Since 1987, she has been living with, and cared for, by her brother and sister-in-law. She has no spouse, nor cohabitant. Jean Way is not able to live independently. She requires daily care and supervision as a result of her mental disability. Because of her learning disability she does not have the capacity to make the most basic decisions such as when to change clothes, when to bathe or how to feed herself. She also suffers from a significant impairment of her memory. If she did not reside with her family she would need to be placed in some form of institutional care facility. Instead, her family have provided her with care and supervision and met many of her other expenses such as laundry and transportation not covered by the family benefits program.

Because of her disability, the appellant qualifies in her own right for financial assistance as a disabled person under s. 5(1)(b) of the **Family Benefits Act**. It is not in dispute that the appellant is a "person in need" within the meaning of s. 3(1)(l) of the **Family Benefits Act**.

Because the appellant was "boarding" with members of her family, as opposed to renting accommodation or owning accommodation, the family benefit allowances to which she was entitled (for the basic necessities of food, clothing and shelter) are set

out in **Regulation 32(1)** of the **Regulations** made pursuant to the **Family Benefits Act**.

Section 32(1) of the **Regulations** provides as follows:

32 (1) An applicant or recipient who is boarding shall be allowed the following allowances in the amount and in the manner prescribed in Appendix "A" as expenses in the calculation of the budget deficit:

- (a) a shelter allowance; and
- (b) a food, clothing and miscellaneous essentials allowance."

In 1994, the maximum allowable monthly expenses for a single adult such as the appellant, residing in a boarding situation, was \$403 to cover shelter, food, clothing and miscellaneous essentials. This includes the maximum amount available to cover shelter costs of \$229. Because the appellant participated in a school lunch program and was paid \$100 per month, her benefits were reduced to \$303 per month. Of that sum, she paid \$200 to her brother to meet the costs of her shelter and food, and \$103 was kept aside to meet her personal needs.

### **Amendments to the Regulations**

Effective August 1, 1994, the Governor-in-Council amended s. 32 of the Regulations. Following the amendment, the appellant was advised that she would no longer be entitled to her monthly shelter allowance (\$229) because she was residing with a relative (her brother) whose income exceeded a certain level.

The amended Regulations are **Regulations 32(1A)-32(1F)** inclusive which I will set out here in full:

"32(1A) Despite subsection (1), a person who is boarding with a relative is not entitled to have a shelter allowance included in the calculation of the budget deficit.

32(1B) For the purpose of this Section

- (a) "relative" means the father, mother, son, daughter, grandfather, grandmother, brother and sister of the applicant or recipient;
  - (b) "income of the relative" means the earned and unearned income of the relative and the spouse of the relative.
- 32(1C) Despite subsection (1A), the Director shall include a shelter allowance in the calculation of a budget deficit of a boarder who is living with a relative where the gross monthly income of the relative is equal to or less than the income for the family size of the relative prescribed in Appendix "A".
- 32(1D) In determining family size of the relative for the purpose of subsection (1C), the Director shall include
- (a) the applicant or the recipient and the dependents of the applicant or the recipient;
  - (b) the relative and spouse of the relative; and
  - (c) the dependent children of the relative.
- 32(1E) Despite subsection (1A), a persons (sic) who is a recipient on August 1, 1994 and is a boarder living with a relative, is entitled to have a shelter allowance included in the calculation of the budget deficit until such time as a Director reviews the circumstances of the recipient to determine if the recipient is entitled to continue to receive a shelter allowance pursuant to the provisions of this Section.
- 32(1F) Subsection (1A) to (1E) inclusive, apply to persons who apply for or are in receipt of benefits on or after August 1, 1994."

Prior to these amendments, the appellant received \$229 per month as a shelter allowance because her income (including what was deemed to be her income under the **Regulations**) was insufficient to enable her to provide the basic necessities of life for herself. The effect of the amendments is that the income of the appellant's brother

(with whom the appellant resides) is now taken into account to deny the appellant this shelter benefit.

As I have indicated earlier in these reasons, the income of the appellant's brother has no bearing on whether the appellant is "a person in need" as that is defined in the **Statute**.

The issue, simply put, is whether the Governor-in-Council has the regulatory power to enact these amendments to the **Regulations**.

### **Disposition**

In defence of the amended **Regulations**, counsel for the respondents says the following:

"10. Section 18 of the Act confers broad powers to make regulations upon the Governor-in-Council. Those powers include, among others:

18(1) (e) providing for the supervision, discontinuance, reduction, increase and resumption of family benefits;

(f) prescribing the maximum amount of family benefits that may be granted;

(g) respecting the form or forms of family benefits that may be granted and providing for the granting of family benefits in the form of money, goods, shelter, health care services, social services, training or any combination of them, or in some other form;

(k) prescribing standards of eligibility for family benefits in addition to those mentioned in this Act;

(l) prescribing methods by which the amount and forms of assistance to be granted under any provision or provisions of this Act are to be calculated or determined;

(x) generally for the better carrying out of the provisions of the Act.

11. In short, while the legislature has provided that "persons in need" as defined by the Statute shall receive family benefits, the entire scheme of family benefits in relation to how much is paid, and to whom, is left to the Governor-in-Council.

.....

28. While the Appellant does not receive a shelter allowance, due to her brother's family income, there is no suggestion that the Appellant is not adequately "sheltered". There is no evidence and no suggestion that in living with her brother, she has somehow been deprived of a basic standard of housing. The only question is whether the State is wrong to refuse to subsidize the Appellant's house."

With respect to the last sentence of counsel's submission, whether the State, by statute, can refuse to "subsidize" the appellant's shelter is not the issue here. Likewise, the issue is not whether the State can, or should, require a family member, with a certain level of income, to provide shelter to another family member in need. Those are matters of legislative policy to be decided upon by the Legislature. The issue, here, is whether, by way of **Regulation**, the appellant's shelter benefit can be denied, as it has been done in the amended **Regulations**, on the basis of the income of her brother.

While it is true, as counsel states, that the detail, as to how the scheme of family benefits will work, is left to **Regulation**, it is trite law that a regulation cannot stand if it is inconsistent with its parent statute (**Booth v. R.** [1915] 21 D.L.R. 558 (S.C.C.) and **The Grand Truck Pacific Railway Co. v. The City of Fort William** (1910), 43 S.C.R. 412.

The parent **Statute** here, the **Family Benefits Act**, establishes a basic standard of eligibility for benefits. It is a "person in need" (or a "family in need") who is eligible for benefits. The **Regulations** cannot be inconsistent with this basic standard of eligibility.

Since the appellant, a disabled person, is eligible for benefits under the **Statute** (because her income, and what is deemed to be her income, is not sufficient to meet the costs of the basic necessities of life) the Governor-in-Council cannot pass a

regulation which takes away that eligibility because of the level of income of her brother. Such a regulation is inconsistent with the parent **Statute**; and is therefore invalid.

A similar conclusion was reached by the Dickson J.A. (as he then was), writing for a unanimous Court in the case of **Gach v. Director of Welfare (Brandon)**, [1973] 3 W.W.R. 558 (Man. C.A.), to which Justice Pugsley made reference in his reasons for judgment.

The appeal should, therefore, be allowed. I agree with the terms of Justice Pugsley's proposed order.

Flinn, J.A.

I concur with the reasons of Flinn, J.A.

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Hart, J.A.

C.A. No. 132095

**NOVA SCOTIA COURT OF APPEAL**

**BETWEEN:**

**JEAN WAY**

Appellant

- and -

JUDGMENT BY:

**ROBERT COVERT, DOROTHY**

**HENDERSON, JOANNE KING**  
and **BILL CAMPBELL**

Respondents

REASONS FOR

Pugsley, J.A.