

1995

SH 117466

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

JOANNE BURROUGHSFORD,

Appellant

- and -

PETER LYNCH, ESTELLE GRANT and KAREN O'BRIEN,

Respondents

- and -

WILLIAM CAMPBELL,

Respondent

D E C I S I O N

HEARD: at Halifax, Nova Scotia before The Honourable Justice Walter
R. E. Goodfellow on June 18, 1996

DECISION: August 21, 1996

COUNSEL: R.W. (Ray) Kuszelewski
Solicitor for the Applicant

Alexander M. Cameron
Solicitor for William Campbell

GOODFELLOW, J.:

1. BACKGROUND

Joanne Burroughsford is a parent who was in receipt of single-parent family benefits under the **Family Benefits Act**. Her family benefits were terminated by the Department of Community Services pursuant to the "spouse-in-the-house" rule. Ms. Burroughsford appealed the matter to the Social Assistance Appeal Board and her appeal was denied.

Ms. Burroughsford then applied to quash the Board's decision on a number of basis including that the regulations constituting the "spouse-in-the-house" rule violate s. 15 of the **Canadian Charter of Rights and Freedoms**.

The matter came before Justice Haliburton of this Court on a pre-hearing conference after which counsel agreed on this preliminary application to deal with a narrow issue.

2. ISSUE

Is the case of **R. v. Rehberg** (1994) 127 N.S.R. (2d) 331 determinative of the issue between the parties and binding on the Social Assistance Appeal Board?

3. REGULATIONS

3 (1) In the Regulations,

...

(d) "cohabit" means live together with another person as husband and wife and "cohabitation" has a corresponding meaning.

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 co-habits with his wife and she does not provide him with the monetary requirements for regularly recurring needs; or the woman no longer co-habits 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 sanatorium 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.

13 For the purpose of the Act and the Regulations

...

(e) cohabitation may be established by any relevant evidence and shall be deemed to occur where

(i) a man and woman share the same address and under their arrangement or understanding do not have separate living accommodation; or

(ii) a man and woman share the same address and represent themselves to others to be husband and wife.

21 (1) The Director shall not grant benefits pursuant to section 6 or 8 of the regulations where;

...

(ii) the mother is cohabiting with a male person.

21 (3) The Director shall not grant benefits pursuant to section 6 or 8 of the regulations where;

...

(ii) the father is cohabiting with a female person.

21 (9) Subject to subsection (8) of this section, a person is ineligible to apply for, or receive, benefits under section 5 of the regulations if that person is cohabiting with a spouse at the time of the application or cohabits with a spouse after benefits have been granted.

4. ANALYSIS OF R. v. REHBERG (1994), 127 N.S.R. (2d) 331

The Nova Scotia Family Benefits Act and Regulations established a scheme of benefits payable to certain disadvantaged persons. I had occasion to relate the background to the Act and Regulations in dismissing an application under s. 15 of the Charter in **Rhyno v. The Minister of Community Services (1994), 131 N.S.R (2d) 353.**

Family benefits under the **Family Benefits Act** are payable to persons where need is "likely to be of a prolonged nature". Such persons include disabled and single parents. They are provided benefits that are not available to other groups in society.

There are limits placed upon the benefits payable under the **Family Benefits Act**, and one such limiting provision, the so-called "spouse-in-the-house" rule was reviewed in some

depth by the Honourable Justice F.B. William Kelly in the **Rehberg** case. The facts in the **Rehberg** case were that Ms. Rehberg was charged with fraud contrary to s. 381(a) of the **Criminal Code** on the basis that she falsely obtained Social Assistance payments from the Nova Scotia Department of Community Services in the approximate amount of \$17,000 between June, 1989 and June, 1991. Ms. Rehberg denied she received benefits through fraud and specifically challenged the constitutionality of the parts of the legislative scheme giving rise to most of the alleged fraud, namely her failing to report that she was cohabiting with a man and was thus ineligible for benefits. Ms. Rehberg had asked her family benefits case worker if the child tax credit would affect her benefit entitlement and was advised that it would not and that she could spend these funds on actual family needs. Ms. Rehberg saved two years of the child tax credit payments and used her savings for a down payment on a home. A Mr. Hillier, who was then only a platonic friend, held himself out to be her husband in order to permit Ms. Rehberg to secure the necessary mortgage financing. The initial title to the home was held by both of them jointly.

Subsequently Mr. Hillier established a relationship with Ms. Rehberg and resided in her home, but this did not occur until long after the house acquisition. Ms. Rehberg was unaware of an alternate house acquisition program. Justice Kelly was satisfied that if she had been aware of the home ownership policy and had applied, in her circumstances, she would have been approved and probably would have received increased support. Ms. Rehberg went through the subterfuge of Mr. Hillier being represented as her husband, joint ownership, etc. out of ignorance of the policy regarding home ownership, and as Justice

Kelly found to some extent out of fear that she would not be able to provide stable housing for her six children.

It was clear that Ms. Rehberg and Mr. Hillier did cohabit and subsequently separated. Justice Kelly made a factual finding that Mr. Hillier's contributions to the household were perhaps equal to his costs in groceries but were not of a financial benefit to Ms. Rehberg. Justice Kelly found, for the purposes of the criminal charge that, for the period of residency, his contributions were minimal, of an incidental nature and not in the nature of "income" as contemplated by the Provincial Social Assistance legislative scheme. He concluded, at p. 337/338:

There was no 'pooling' of resources, and his contributions to her were essentially repaid or were otherwise an act of charity for a friend with children who was sometimes in a rather desperate situation.

In the end result, Justice Kelly, after considering a considerable volume of extrinsic evidence, was not satisfied beyond a reasonable doubt that her reporting incorrectly or failure to report correctly caused a deprivation to the Department. He held, at p. 348:

In the absence of such a deprivation, a conviction cannot lie for these acts.

With respect to the failure to report cohabitation, Justice Kelly determined, at p. 352:

Because of the man-in-the-house rule, single mothers thus are not receiving equal benefits of the law as compared to the other groups entitled to benefits under the Act.

I therefore find that the rule has a discriminatory effect in the application of the **Family Benefits Act**, insofar as it relates to this criminal

charge of fraud against the accused.

Having found discrimination, Justice Kelly went on to note there was very little evidence to determine if the man-in-the-house rule, although discriminatory, is a reasonable limit which "can be demonstrably justified in a free and democratic society" as permitted by **Charter s. 1** and not being satisfied, he issued a stay of the criminal proceedings.

Justice Kelly made a finding, at p. 355:

The facts are clear that Ms. Rehberg gained no economic advantage for herself or her children from the co-residency of her male friend.

and went on to indicate that the penalties available under the **Family Benefits Act** were quite suitable for relatively minor breaches and that it was inappropriate to use the heavy penal weapon of the criminal law thereby warranting the stay of criminal proceedings against Ms. Rehberg.

5. CONCLUSION

It is the position of Ms. Burroughsford that **Rehberg** is determinative and that I am bound by the determination of Justice Kelly.

Dealing with the latter aspect, I agree with the determination of Richard, J. in **Fairview Industries Ltd. et al; Re No. 1** (1991), 109 N.S.R. (2d) 8. Generally one is bound by the decision of another Justice of the Court when the subject matter is substantially indistinguishable. I am not bound by any statute or provision in the **Judicature Act**;

however, in the interests of predictability and certainty, one should usually follow the decision of another Justice unless one is convinced that the judgment is wrong or there exists strong reason to the contrary. Strong reason to the contrary might be something that indicates the prior decision was given without consideration of a statute or some authority that ought to have been followed, and not simply a strongly held contrary view by the second Justice. One obvious consideration for not being bound by a fellow Justice's decision is subsequent direction, comment or overruling of that decision by appellate courts.

A careful examination of the limited record placed before me in this case indicates different facts and issues so that I am unable to conclude that this case is "substantially indistinguishable" from the **Rehberg** case.

Some of the important contrast to **Rehberg** are first of all the main relief and issue sought in this case is to strike down the regulation. Justice Kelly, at p. 334 noted:

The defendant is not asking the court to strike down the man-in-the-house rule as a violation of s. 7 of the **Charter**, but rather is submitting that it is fundamentally unjust contrary to s. 7, to subject persons to imprisonment for improperly receiving welfare monies on the basis of their failure to disclose cohabitation.

Both parties acknowledge that there has been no change in the regulations as a result of the **Rehberg** decision. While not a similar situation, I nevertheless adopt the reasoning in **Salt Spring Island Water Preservation Society v. Canada** (1993), 4 W.W.R. 601, a decision of the British Columbia Court of Appeal states in the headnote:

The case was clearly one where a subsequent decision had affected the validity of an earlier one and it was open to the chambers judge to decline

to follow a decision of another judge of the same court. The chambers judge was correct in holding that the enactment having been declared unconstitutional, but not altered by subsequent legislation, lost its status of having "no force or effect" once held to be constitutional by a higher court.

The regulation sought to be impugned has remained in full force and effect as it has been neither changed by further legislation nor was it struck by Justice Kelly.

Very clearly Justice Kelly concluded the use of the **Criminal Code** was not constitutionally appropriate, and he effectively agreed with counsel for Ms. Rehberg who advanced, p. 334:

The submission is that it does not accord with justice that a person is liable for a ten-year term of imprisonment for failing to disclose a cohabitation situation which had no bearing on her financial need.

In this application, the Court was initially asked to invoke **mandamus**, and by agreement of counsel, it is to be treated as a **certiorari** application. It is clear also that since the decision of Justice Kelly there have been a number of important decisions dealing with s. 15 of the **Charter**, and while I do not necessarily agree with the analysis of Professor Dianne Pothier in her article **M'Aider, Mayday: Section 15 of the Charter in Distress** 6 N.J.C.L. 295, I accept that the Supreme Court of Canada decisions she reviewed have given further direction on the interpretation of s. 15 of the **Charter** since Rehberg.

With respect to s. 1 of the **Charter**, the defendant wishes to produce evidence in support of a reasonable limitation in the event that stage is reached, and given the fact that Justice Kelly, in **Rehberg** acknowledged there was very little advanced in this regard, it

seems appropriate that if this matter is to be advanced, the Attorney General should have the opportunity to properly place its position before the Court.

In the result, I answer the issue in the negative.



J.