

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Clyke v. Nova Scotia (Community Services), 2004 NSSC 89

Date: 20040427
Docket: SH 202556
Registry: Halifax

Between:

Shaunderay Clyke

Applicant

v.

Minister of Community Services

Respondent

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: November 19, 2003 in Halifax, Nova Scotia (*Chambers*)

Written Decision: April 27, 2004

Counsel: Donna D. Franey for the applicant
Terry Potter for the respondent

By the Court:

[1] Shaunderay Clyde is a single parent with three young children who is attending university. She was denied income assistance under the *Employment Support and Income Assistance Act*, S.N.S. 2000, c.27 and her appeal was also denied. She claims that Regulation 67(1) of the *Employment Support and Income Assistance Act* is invalid in that it prevents a university student from receiving social assistance benefits.

[2] The issues are as follows:

- 1) Does the *Employment Support and Income Assistance Act* authorize the delegation of a power to create Regulation 67(1)?
- 2) Does the *Employment Support and Income Assistance Act* authorize a regulation like Regulation 67(1) which is discriminatory?
- 3) Does Regulation 67(1) infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

FACTS

[3] Shaunderay Clyde is a student at St. Francis Xavier University who began her studies in September 2002. She is a single parent with three children. She was denied benefits under the *Employment Support and Income Assistance Act* because Regulation 67(1) does not allow benefits to be paid to those attending post-secondary institutions in a program of more than two years unless they are in the Employability Assistance for Persons with Disabilities Program.

[4] Ms. Clyde had been receiving income assistance as well as the child care subsidy and access to Pharmacare before she was a student. The maximum student loan for which Ms. Clyde is eligible is \$11,705.00 which must pay all her living expenses for herself and three children as well as her tuition and book costs at university. A full year's tuition is \$5,300.00. She receives no child support from the father of the children.

[5] Ms. Clyde appeared before the Social Assistance Appeal Board in December 2002 to appeal the revocation of her benefits. Her appeal was denied. She seeks to quash the decision of the Social Assistance Appeal Board.

[6] The *Employment Support and Income Assistance Act*, in s. 2, sets out its purpose:

2 The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency.

[7] Section 3 (g) defines “person in need” as follows:

3 (g) ‘person in need’ means a person whose requirements for basic needs, special needs and employment services as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations.

[8] “Employment services” is defined in s. 3 (c):

3 (c) ‘employment services’ means services and programs to assist recipients in enhancing their employability and quality of life, including programs provided by other departments, agencies or governments in partnership with the Minister.

[9] Section 7(1) provides:

7 (1) Subject to this Act and regulations, the Minister shall furnish assistance to all persons in need.

[10] The regulation making powers under the *Act* are set out in s. 21(1). These include:

21(1)(e) providing for the modification, suspension and cancellation of assistance;

(i) respecting eligibility for assistance or for any program or service provided pursuant to this Act;

The Regulations provide as follows:

67 (1) A person attending a post-secondary education program of more than 2 years shall not receive assistance unless the person is funded to attend by the Employability Assistance for Persons with Disabilities Program, which is a program for adults with vocational handicaps funded by Human Resources Development Canada in partnership with the Government of Nova Scotia.

[11] A post-secondary education program is defined in Regulation (2)(x):

2(x) ‘post-secondary education program’ means a program designated for student loan purposes;

[12] The parties have agreed that the standard of review is one of correctness.

ISSUES

Issue No. 1

[13] Ms. Clyde says there is no power under the *Act* to create Regulation 67(1). She says it is delegated legislation which is not valid because it is inconsistent with or in conflict with the *Employment Support and Income Assistance Act*.

[14] Ms. Clyde says that the scheme of the *Act* is to provide social assistance to persons in need, that she clearly falls within the definition of a person in need and that the Regulation deprives her of benefits to which she is entitled. She says there is no express authority to create that Regulation.

[15] The appellant, Ms. Clyke, refers to the decision of Justice Flinn in *Way v. Covert*, [1977] N.S.J. No. 204 (CA) as support for her proposition that the Regulation is invalid. In that case, the appellant, Way, had her benefits reduced when regulations under the *Family Benefits Act* were amended to provide that a person in need would not receive a shelter allowance if boarding with a family member whose income exceeded the amount set out in the Regulations.

[16] Flynn, J.A. said at para. 85:

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.

He said in para. 86:

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.

[17] The respondent however says that Regulation 67(1) is not an invalid delegation of power under the *Act*. The respondent points out that the definition of a “person in need” means a person whose requirements for basic needs, special needs and employment services “as prescribed in the Regulations” exceeds income, assets and other resources. The respondent says the *Act* specifically contemplates that employment services will be prescribed in the Regulations.

[18] The respondent also points out that s. 7 (1) of the *Act* does not merely say the Minister shall furnish assistance to all persons in need, but is to do so subject to the *Act* and Regulations. In other words, not all persons in need receive assistance.

[19] Although s. 2, which sets out the purpose of the *Act*, is broad, the *Act* clearly contemplates limits on who gets assistance. The *Act* contemplates that some of those limits would be set in the Regulations. Section 21(1) gives the power to make regulations respecting eligibility for assistance. The definition of “person in need” specifically addresses employment services which includes post-secondary programs which will be prescribed in the Regulations.

[20] Regulation 67(1) does exactly what the *Act* contemplates. It prescribes the employment services, that is, a post-secondary education program of more than two years, which makes a person ineligible for assistance.

[21] This is unlike *Way v. Covert, supra*, where eligibility, which was unrestricted in the *Act*, was taken away by regulation. In this case, eligibility was not unrestricted in the *Act* and the way in which it was contemplated to be restricted is carried out in Regulation 67(1). I therefore conclude the *Act* does validly give the authority to enact Regulation 67(1) and Regulation 67(1) was enacted within the express authority given by the *Act*. It is not invalid as an improper denial of assistance to a person in need.

Issue No. 2

[22] The appellant says that Regulation 67(1) is discriminatory in that it makes a distinction not specifically provided for in the *Act* nor necessarily implied. It is in the sense of partial and unequal operation that the word discriminatory is used in this context.

[23] The appellant says that Regulation 67(1) allows some but not all persons to remain eligible for assistance while enrolled in a post-secondary education program longer than two years. In that sense, she says it is discriminatory or creates a distinction.

[24] The issue is whether the *Act* allows such a distinction to be made.

[25] Regulation 67(1) exempts some persons from ineligibility. They are persons funded by Human Resources Development Canada and the province to attend post-secondary education programs of more than two years under the EAPD Program. The persons who are so funded are those persons who have physical or mental disabilities, that is, those who have “vocational handicaps” and are in the EAPD Program. Section 5 of the *Employment Support and Income Assistance Act* provides for agreements such as the EAPD Program agreement. It says:

The Minister may make and enter into agreements on behalf of the Province with the Government of Canada or the government of another province of Canada or any minister or agency of them with respect to any matter pursuant to this Act.

There is no suggestion that the EAPD agreement is invalid.

[26] In *Forget v. Quebec (Attorney General)*, [1998] 2 S.C.R. 90 (SCC), Lamer, J. (as he then was) said in para. 28:

In theory, the power to regulate does not include the power to discriminate. Accordingly, where a statute contains no authorization, express or implied, a discriminatory regulation may be challenged and set aside. This rule was recognized by this Court in *City of Montreal v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368. Speaking for the Court, Beetz J. said (at p. 404):

The rule that the power to make by-laws does not include that of enacting discriminatory provisions unless the enabling legislation provides the contrary has been observed from time immemorial in British and Canadian public law.

[27] Because of the EAPD agreement, Regulation 67(1) allows some persons to receive assistance while taking a post-secondary program of more than two years and not others. There is nothing specific in the *Act* which contemplates this. The general regulation making powers to which the respondent refers are similar to those which were found lacking in *Way v. Covert, supra*.

[28] I have concluded above that a regulation which limits assistance to those taking post-secondary programs of two years or less is valid. That is contemplated by the *Act*. There is nothing in the *Act* which provides that, by regulation, some can remain eligible and others not if they take programs of more than two years.

[29] To say that the distinction is only between those disabled persons who are in the EAPD Program and those disabled persons who are not is not an answer either in my view. Such a distinction is not contemplated by the *Act*.

[30] If it is not provided for in the Statute, the issue is not its reasonableness. As the court said in *R. v. Sharma*, [1993] S.C.J. No. 18 (SCC) at para. 26:

... Further, 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. ...

[31] However, I conclude that Regulation 67(1) is not invalid. As the respondent says, it does not create the distinction, it only recognizes the existence of a federal/provincial agreement which provides funding for some vocationally

disabled persons. The agreement is set out in Tab 8 of the respondent's materials. It is authorized by the *Department of Human Resources Development Act*, S.C. 1996, c. 11, a piece of federal legislation and by s. 5 of the *Employment Support and Income Assistance Act*.

[32] Furthermore, within the context of the *Human Rights Act*, R.S.N.S. 1989, c. 214, this is an Affirmative Action Program. Section 6 of the *Human Rights Act* provides that a program "that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clause (h) to (v) of subsection (1) of section 5" is not prohibited discrimination. Section 5 (1)(o) refers to persons who have a "physical disability or mental disability".

[33] Regulation 67 (1) is therefore not an invalid discrimination.

Issue 3

[34] The appellant further submits that Regulation 67 (1) infringes s. 15 (1) of the *Canadian Charter of Rights and Freedoms*. Section 15 (1) provides as follows:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[35] The appellant says that Regulation 67(1) imposes a particular hardship on women who head single parent families.

[36] The decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497(SCC) is the leading case in this area of the law. It was cited by both parties.

[37] In *Law*, Iacobucci, J. reviewed the previous authorities on s. 15 (1) and at para. 88 gave a summary of what he called "guidelines". Under the heading "General Approach", he said:

General Approach

- (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.
- (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15 (1) focuses upon three central issues:
 - (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
 - (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
 - (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

- (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
 - (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
 - (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?and
 - (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of

recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[38] With respect to the purpose of s. 15(1), he said the following at para. 88:

Purpose

- (4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.
- (5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

He then referred to the “comparative approach” and said:

Comparative Approach

- (6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant’s characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

[39] In applying these guidelines, I must bear in mind the statute and regulations which are impugned. The *Act* is one that has as its stated purpose, as previously quoted, the provision of assistance to persons in need and, in particular, “to facilitate their movement towards independence and self-sufficiency”.

[40] Persons in need may be in need for any number of reasons. The appellant fell within the statutory definition of “person in need” until she began to attend university in a four year program.

[41] The EAPD Program lists as eligibility criteria the following:

Eligibility Criteria

- Be disabled within the meaning of the EAPD Agreement - that is, disabled to the extent that they are unable, at the time of requesting services, to seek any meaningful job because of a physical or mental disability, and there is a realistic possibility of benefiting from Employability Assistance services.
- The disability makes it impossible to do the work that the person has been trained to do or the disability has made it difficult to undertake training which would lead to employment.
- Be as (*sic*) least 16 years of age at the time of requesting services.
- Be a Canadian citizen or landed immigrant who is a resident of Nova Scotia.

[42] The EAPD program is one authorized by the *Department of Human Resources Development Act*, a federal statute. The province is authorized to enter agreements with the federal government pursuant to s. 5 of the *Employment Support and Income Assistance Act*.

[43] I have concluded above that in Regulation 67(1) there is a distinction or discrimination in the broadest sense of that word. There is a distinction between various persons, making some eligible and others ineligible for social assistance. That, however, is not the test under s. 15(1) of the *Charter*. As McIntyre, J. said in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 as quoted in *Law, supra*, at para. 26:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[44] In para. 27, Iacobucci, J. said:

Importantly, McIntyre, J. explained that the determination of whether a distinction in treatment imposes a burden or withholds a benefit so as to constitute ‘discrimination’ within the meaning of s. 15(1) is to be undertaken in a purposive way. As he stated, at pp. 180-81, ‘[t]he words ‘without discrimination’ require more than a mere finding of distinction between the treatment of groups or individuals’.

[45] It is true that Shaunderay Clyke is treated differentially from some others by Regulation 67(1). In determining whether this differential treatment is discriminatory within the meaning of s. 15(1), I must look at the purpose of s. 15(1). Iacobucci, J. again referred to Justice McIntyre’s words in *Andrews, supra*, at para. 42:

42. What is the purpose of the s. 15(1) equality guarantee? There is great continuity in the jurisprudence of this Court on this issue. In *Andrews, supra*, all judges who wrote advanced largely the same view. McIntyre J. stated, at p 171, that the purpose of s. 15 is to promote ‘a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration’. The provision is a guarantee against the evil of oppression, he explained at pp. 180-81, designed to remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping.

[46] After reviewing decisions following *Andrews*, Iacobucci, J. said at para. 51:

51. All of these statements share several key elements. It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.

He continued at paras. 55 through 58 as follows:

55. In order to determine whether the fundamental purpose of s. 15(1) is brought into play in a particular claim, it is essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant ...

C. The Comparative Approach

56. As discussed above, McIntyre J. emphasized in *Andrews*, supra, that the equality guarantee is a comparative concept. Ultimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction ...

57. To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally: see *Weatherall*, supra, at pp. 877-78.

58. When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see *Symes*, supra, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.

[47] In this case, the appellant says the relevant comparator group is assistance recipients who are not excluded from pursuing post-secondary education of more

than two years. She says the distinction in Regulation 67(1) has an adverse impact and a disproportionate effect on single mothers.

[48] Ms. Clyde claims that the group of which she is a member is single mothers and the group to which she says she should be compared is, to quote from her counsel's brief, "the group of income recipients who are not excluded from pursuing a post-secondary education program of more than two years in length".

[49] However, Regulation 67(1) identifies those who are not excluded from pursuing a post-secondary education program of more than two years much more specifically than that. They are adults with "vocational handicaps" because of physical or mental disability and who are funded to attend post-secondary education programs by the EAPD Program.

[50] Who then are those who are differentially treated from that group? The appellant says those that are treated differentially, that is, based upon personal characteristics, are single mothers. In my view, the group is not so limited. It is all those income recipients who do not have physical or mental disabilities, who are not vocationally disabled and who are not funded by the EAPD to attend post-secondary programs of more than two years. According to the EAPD agreement, not even all those who have physical and mental disabilities and who are vocationally disabled and in the EAPD program will be funded for post-secondary education. The EAPD Program provides a number of programs and services as set out in s. 2.2 of the agreement, of which post-secondary education of more than two years is but one.

[51] Some of those who are not excluded from post-secondary education of more than two years may even be single mothers. Single mothers are not excluded from the EAPD Program; nor are members of other groups which are named specifically in s. 15 or members of analogous groups as long as they meet the criteria for the EAPD Program, that is, having a physical or mental disability. On the other hand, there are many other income recipients who are not single mothers who are likewise not eligible for assistance while attending post-secondary education programs of more than two years. These may include those who are identified in s. 15 or who are members of an analogous group including other persons with disabilities.

[52] The members of the two comparator groups could be very similar, the only difference being that some are in the EAPD Program and some are not.

[53] The distinction in Regulation 67(1) between Ms. Clyde and those who are not excluded from post-secondary education of more than two years is not based on a personal characteristic of Ms. Clyde. The group which is excluded from post-secondary education of more than two years is those who do not have physical or mental disabilities and are not vocationally disabled and are not funded by the EAPD Program. Ms. Clyde is part of that group not because she is a single mother but because she is not part of the EAPD Program which is available only to persons with physical and mental disabilities and who are vocationally disabled. Ms. Clyde does not have a physical or mental disability. Eligibility for the EAPD Program and therefore for funding for post-secondary education programs of more than two years is based on criteria to which I have previously referred.

[54] The purpose of the *Employment Support and Income Assistance Act* is to provide assistance to persons in need and to facilitate their movement towards independence and self-sufficiency. The EAPD Program which is a federal/provincial program has affirmatively selected one group of persons in need and provided a program to facilitate their movement towards independence and self-sufficiency.

[55] In my view, to say that the purpose and effect of a program like EAPD is contrary to s. 15(1) of the *Charter* is to lose sight of the ameliorative purpose of s. 15(1). The EAPD Program is a program designed to give the income recipients who are part of that program opportunities from which they have unfairly been excluded because of their mental or physical disabilities. To paraphrase Justice Iacobucci from para. 51 which I have quoted above: Such differential treatment does not constitute discrimination within s. 15(1) because it assists in ameliorating the position of persons with disabilities within Canadian society.

[56] A person who may be a member of another s.15(1) group or of an analogous group but who is excluded from the benefits of a program designed to assist other s. 15(1) groups may be given differential treatment but, in my view, that does not infringe the equality rights guaranteed by s. 15(1) in this case. It is important to remember that single mothers as a group are not in fact ineligible for the differential treatment afforded by Regulation 67(1) as long as they meet the EAPD criteria of being physically or mentally disabled.

[57] There may be many members of s. 15(1) or analogous groups who could benefit from a post-secondary education program of more than two years. Some may be assistance recipients. It does not violate s. 15(1) equality rights guarantees to offer that education to some but not all of the historically disadvantaged groups. Policy decisions must be made by government and are not to be interfered with by the courts unless they offend s. 15(1). This one does not.

[58] I therefore do not to consider the second and third issues referred to in *Law*.

[59] I conclude that Regulation 67(1) does not discriminate against Shaunderay Clyke so as to infringe her s. 15(1) rights.

[60] The application is dismissed.

Hood, J.