February 22, 2019

The Right to Support for Adult Children with Disabilities

By: Jennifer Koshan and Jonnette Watson Hamilton

Case and Bill Commented On: *Ryan v Pitchers*, 2019 ABQB 19 (CanLII); Bill 28, the *Family Statutes Amendment Act 2018*

As Laura Buckingham noted in an ABlawg post in December 2018, Alberta's Bill 28, the *Family Statutes Amendment Act 2018*, made three key amendments:

- creating legislated rules for property division for separating common-law couples;
- closing a gap in child support legislation for adult children with disabilities; and
- repealing the *Married Women's Act*, RSA 2000, c M-6.

The second of these amendments was recently considered in *Ryan v Pitchers*, 2019 ABQB 19 (CanLII). In this case, a mother brought a constitutional challenge to the pre-amendment version of the *Family Law Act*, SA 2003, c F-4.5 (*FLA*), which did not allow disabled children of unmarried parents to obtain child support once they turned 18 and were not attending school full-time. The mother's argument was that the definition of child in the *FLA* violated the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*. The government did not defend the case given the pending legislative amendment in Bill 28, and although the father raised constitutional counter-arguments, the mother's claim was successful.

Although the decision may seem like a foregone conclusion, the section 15 analysis of Madam Justice Carolyn Phillips has some interesting features that we will comment on in this post.

The *Ryan v Pitchers* Decision

Christina Ryan and Christopher Pitchers never married and are the parents of an adult daughter (not named) who has "very serious disabilities resulting from Down syndrome, cerebral palsy, and other issues" (at para 1). Ryan applied for retroactive and ongoing child support from Pitchers because their daughter's monthly expenses exceeded what she was entitled to under the *Assured Income for the Severely Handicapped Act*, RSA 2000, c A-45 (AISH). When the case was heard in November 2018, the father argued that the Court should simply await the pending change to the law. However, Justice Phillips noted that the legislation may not be retrospective and decided to proceed with the mother's constitutional challenge to the *FLA*.

Under the old version of the *FLA*, "child" was defined as follows under s 46(b):

> (b) "child" means a person

> (i) who is under the age of 18 years, or
>
> (ii) who is at least 18 years of age but not older than 22 years of age, and is unable to withdraw from his or her parents' charge because he or she is a full-time student as determined in accordance with the prescribed guidelines… (emphasis added)

The daughter of Ryan and Pitchers turned 18 in April 2017, completed high school that same year, and is no longer a full-time student. She was therefore not entitled to support based on the definition of "child" in the *FLA*.

If Ryan and Pitchers had been married and were divorcing, their daughter would have been entitled to child support under the *Divorce Act*, RSC 1985, c 3 (2nd Supp), which defines "child" as follows in s 2(1):

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
> (a) is under the age of majority and who has not withdrawn from their charge, or
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life… (emphasis added)

Ryan argued that the definition of child in the *FLA* violated section 15 of the *Charter* in that it discriminated against her daughter on the basis of her disability and on the basis of her parents' marital status.

In assessing this claim, Justice Phillips relied heavily on the Supreme Court of Canada's 2011 decision in *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII). *Withler* is often seen as a companion case to *R v Kapp*, 2008 SCC 41 (CanLII), where the Court established the following two-part test for section 15 claims:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp* at para 17 and *Withler* at para 30).

While many lower courts have continued to use the *Kapp* / *Withler* test, the Supreme Court of Canada noted several problems with that test in its subsequent section 15 decisions. One of those problems is the focus on "creating a distinction" in the first step, which seems to overlook adverse effects discrimination: *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII) at paras 323-333 (*Quebec v A*); *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII) at paras 19-20 (*Taypotat*); *Quebec (Attorney general) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII) at para 25 (*APP*). The first step of the current test asks: "does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds" (*APP* at para 25, emphasis added), making it clear that adverse effects discrimination is caught by section 15.

Despite using an out-of-date formulation of the test for discrimination that focused attention on direct discrimination, Justice Phillips did remark on the need to pay attention to the impact of the challenged law. Indeed, she characterized the law as an example of adverse effects discrimination, recognizing its facial neutrality on characteristics other than age or student status, and its disproportionate negative effect on disabled adult children (at para 18).

Justice Phillips also noted that section 15 analysis should be contextual, with the context including "the law's real impact on the claimants and members of the group to which they belong", considering "social, political, economic and historical factors concerning the group" (at paras 9 and 11). Put another way, the court must determine "whether the lines drawn between groups that benefit and groups that do not are appropriate, having regard to those impacted and the objects of the scheme" (at para 10). Although Justice Phillips does not cite *Withler* in this part of her decision, it was *Withler* that emphasized line drawing between the intended beneficiaries and the excluded group (*Withler* at para 67).

Withler also revisited the approach to comparative analysis under the first step of the test for section 15 of the *Charter*, acknowledging some of the critiques that had been made of the so-called "mirror comparator" approach. Under that approach, in assessing whether there is a distinction based on a protected ground, the claimant is compared to the group that ""mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought" except for the personal characteristic on which the claim was based" (*Withler* at para 49, quoting from *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 (CanLII) at para 23). *Withler* advocated a more flexible approach to comparison, stating: "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination" (at para 63).

Justice Phillips did not discuss *Withler*'s treatment of comparator groups in her analysis of the first step of the test from *Kapp* / *Withler*. However, she did use two different comparator groups, one within the *FLA* and one between the *FLA* and the *Divorce Act*, as part of her analysis of a direct discrimination claim.

First, she found that the definition of child in the *FLA* "created a distinction between adult children whose dependency arose from continuing full-time education and adult children whose dependency arose from disability. If an adult child was unable to attend full-time school by reason of disability, that adult child was no longer eligible for support" (at para 18). She also characterized the law as an example of adverse effects discrimination, as noted above – "[w]hile the definition of child may have been neutral on its face, it had a disproportionately negative impact on disabled adult children" (at para 18).

This analysis within the four corners of the challenged provisions is confusing in its melding of direct and adverse effects discrimination. It also points to the difficulties in using mirror comparators. Justice Phillips' first point is that the *FLA* created a distinction between two groups that was indicative of direct discrimination, flowing from a mirror comparator analysis between adult children who are eligible for child support because they are full-time students and adult children who are not eligible because they are persons with disabilities. But the real problem with the *FLA* is the adverse effects discrimination; the *FLA* did not take disability and the possible

resulting dependence on parents into account, regardless of whether adult children attending school full-time received benefits or not.

Second, Justice Phillips also found that the *FLA* "created a further distinction between disabled adult children of never-married parents and disabled adult children of previously-married parents; a distinction based on the analogous ground of marital status of the parents" (at para 19). Disabled adult children of never-married parents were ineligible for child support under the *FLA*, while disabled adult children of married parents were (and still are) eligible for support under the *Divorce Act*.

This is also an interesting aspect of the decision. Justice Phillips acknowledged previous case law where the comparison between statutes at the provincial and federal level was found to be incapable of grounding a section 15 claim based on federalism principles. In *Penner v Danbrook*, 1992 CanLII 8274 (SK CA), [1992] 4 WWR 385, the Saskatchewan Court of Appeal found that the failure of the child support regime in that province to include adult children who were full-time students was not discriminatory, even though those children would be eligible for support under the *Divorce Act*. Justice Phillips distinguished *Penner v Danbrook* on the basis that the child in question in that case was not a member of a historically disadvantaged group, as are adult children with disabilities. However, that is a question going to the second step of the test for discrimination, not the first. Nonetheless, Justice Phillips found support for her analysis in *Coates v Watson*, 2017 ONCJ 454 (CanLII), which held that a legislative scheme in Ontario similar to the *FLA* discriminated against adult children with disabilities based in part on the argument that disabled children of divorced parents have the statutory right to child support. However, the decision in *Coates v Watson* was primarily an adverse effects discrimination decision, with the court holding that the impugned legislation in that case "discriminates because of its effects, in context, on groups already marginalized by systemic inequalities" (at para 187).

These cases present a challenge. Any distinction in eligibility for child support based on marital status flows from the fact that the *Divorce Act* only applies to previously married couples – the *FLA* applies to both married and unmarried couples as far as child support is concerned. And one cannot challenge the *Divorce Act*'s exclusion of unmarried couples without coming up against the *Constitution Act, 1867*, which gives exclusive jurisdiction over "Marriage and Divorce" to the federal government under section 91(26). *Penner v Danbrook* determined that federalism principles must prevail in this situation, while *Coates v. Watson* relied on the argument that "the Courts have repeatedly held that legislative distinctions which treat children of married and unmarried spouses differently violated the equality guarantee" (*Coates* at para 88).

Penner v Danbrook also reinforces the difficulty with Justice Phillips' mirror comparator analysis of the distinction based on disability. That argument would not work in Saskatchewan. Adult children who are full-time students are not eligible for child support in that province, so adult children with disabilities cannot be compared to anyone who receives the benefit past age 18. To return to our point above, the better approach under the first step of the test for discrimination would be to find that the *FLA* created a differential and adverse impact in its effects by not taking disability and the resulting dependence on one's parents into account in the eligibility criteria for child support.

At the second step of the test for discrimination, Justice Phillips found that the effect of the *FLA* was to deny adult children with disabilities "the benefit of financial support", which had the impact of "exacerbat[ing] the economic difficulties faced by these disabled adult children who were unable to withdraw from their parents' charge" (at para 22). This was particularly so because AISH benefits were insufficient to meet the financial needs of the child at the centre of the dispute. As noted by Justice Phillips, "[w]hen state conduct widens the gap between a historically disadvantaged group and the rest of society, it discriminates" (at para 25). Although she does not cite it here, that definition of discrimination comes from the judgment of Justice Rosalie Abella in *Quebec v A* (at para 332). The "widen the gap" metaphor has also been used in more recent section 15 *Charter* cases that are not referred to by Justice Phillips (see e.g. *APP* at para 106; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 (CanLII)).

In the case at bar, Justice Phillips found that "the effect of the Act was to widen the gap between the historically disadvantaged group of disabled adult children and able adult children who could pursue full-time education. It also widened the gap between disabled adult children who were born within marriages and those who were born outside of marriage, a formerly marginalized group" (at para 24). In light of our comments about these comparator groups and the better characterization of this case as an adverse effects discrimination case, we would have preferred to see an analysis at step 2 that focused on how the *FLA* widened the gap between adult children with disabilities and adults not requiring the ongoing financial support of their parents.

There was no section 1 analysis in the case as the government did not try to defend the legislation.

Conclusion

Although we agree with the conclusion reached by Justice Phillips, we believe it is important to note the errors and oversights in her analysis so that similar mistakes are not made in future cases where it might make more of a difference to the outcome. Lower courts' difficulties with the analysis of adverse effects discrimination is exacerbated by using discarded formulations of the test for discrimination under section 15. The current test, put forward in *Quebec v A*, *Taypotat* and *APP*, explicitly acknowledges that disproportionate negative effects, and not only line drawing, can create discrimination.

The legislature has now corrected the discrimination in the *FLA*, but we cannot leave this issue without commenting on the public/private distinction inherent in this case. An application for child support in the private family law system is only necessary for adults with disabilities when government funded benefits are inadequate or cumbersome to obtain. In our view, responsibility for the financial security of adults with disabilities is a public duty rather than a private family matter, although this is a larger issue that goes beyond the scope of this post.

This post may be cited as: Jennifer Koshan and Jonnette Watson Hamilton, "The Right to Support for Adult Children with Disabilities" (February 22, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/02/Blog_JK_JWH_Ryan_Pitchers_Feb2019.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg