

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Janice L. leMaistre
Madam Justice Lori T. Spivak

BETWEEN:

	)	<i>J. B. Williams</i>
	)	<i>for the Appellant</i>
	)	<i>(via videoconference)</i>
<i>NIGEL CANN</i>)	
	)	<i>A. J. Ladyka</i>
	)	<i>for the Respondent</i>
<i>(Appellant) Appellant</i>	)	<i>(via videoconference)</i>
)	
<i>- and -</i>	)	<i>M. A. Smith</i>
	)	<i>on a watching brief</i>
	)	<i>for the Social Services</i>
	)	<i>Appeal Board</i>
<i>DIRECTOR, FORT GARRY/RIVER</i>	)	<i>(via videoconference)</i>
<i>HEIGHTS</i>)	
	)	<i>Appeal heard:</i>
	)	<i>June 7, 2021</i>
<i>(Respondent) Respondent</i>)	
	)	<i>Judgment delivered:</i>
	)	<i>September 13, 2021</i>

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

LEMAISTRE JA

Introduction

[1] The appellant appeals an order of the Social Services Appeal Board (the Board).

[2] The respondent (the Director) clawed back \$378 of the appellant's monthly income assistance benefits after he received a payment under the Canada Emergency Response Benefit (the CERB) program. The appellant appealed the Director's decision to the Board. After the Board dismissed his appeal, the appellant sought, and was granted, leave to appeal the Board's order to this Court in *Cann v Director, Fort Garry/River Heights*, 2020 MBCA 101, on the following questions (at para 64):

...

- (1) Did the Board err by considering [the appellant's] entitlement to the CERB in reviewing the decision of the Director to claw back \$378 of income assistance benefits?
- (2) Did the Board err in its treatment of the CERB for the calculation of [the appellant's] income assistance benefits?

[3] For the reasons that follow, I would allow the appeal and set aside the Board's order confirming the Director's assessment of the overpayment. I would direct the Director to refund to the appellant the \$60 deduction taken from the appellant's income assistance benefits in July 2020.

Background

[4] The appellant is a person with a disability receiving income assistance. He has received income assistance for over 10 years as he has been unable to meet his basic necessities. The appellant is eligible for income assistance under section 5(1)(a)(i) of *The Manitoba Assistance Act*, CCSM c A150 (the *MAA*) and section 4(1) of the *Assistance Regulation*, Man Reg 404/88R (the *Regulation*).

[5] In the spring of 2020, the appellant had expenses associated with his service dog that he was unable to pay for. Believing he was eligible for the CERB, he applied for, and received, one payment in the amount of \$2,000. He kept \$740 of the CERB payment (the \$740), and returned the balance to the federal government. The appellant reported the receipt of this payment to the Director, but only after he had received his income assistance benefits for the month.

[6] The Director treated the appellant's CERB payment as "earned income" and applied the exemption found in sections 8(4) and 8(5) of the *Regulation* (as it then appeared) (the work incentive provisions). Applying the work incentive provisions to the \$740 resulted in an exemption of \$362. The Director considered the remainder of the CERB payment of \$378 to be a financial resource that reduced the amount of income assistance payable to the appellant.

[7] On June 1, 2020, the Director advised the appellant that, because he had received the \$740, his income assistance benefits should have been reduced by \$378 for the month of May and that the overpayment would be recovered through deductions from his future income assistance benefits at the rate of \$60 per month. The appellant's income assistance benefits were reduced by \$60 for the month of July. He filed his notice of appeal to the Board on July 15, 2020. There have been no further deductions pending the outcome of his appeal to this Court.

[8] In addition to appealing the reduction of his monthly income assistance benefits, the appellant raised a number of issues before the Board. The Board upheld the Director's decision to claw back \$378 of the appellant's

income assistance benefits. It determined that the other issues raised by the appellant were not appealable, had been previously appealed or were “out-of-jurisdiction.”

[9] In its reasons, the Board set out the eligibility criteria for the CERB as follows:

1. You did not apply for, nor receive, CERB or EI benefits from Service Canada for the same eligibility period
2. You did not quit your job voluntarily
3. You reside in Canada and are at least 15 years old
4. You earned a minimum of \$5,000 (before taxes) in the last 12 months, or in 2019, from one or more of the following sources:
 - a. employment income
 - b. self-employment income
 - c. provincial benefit payments related to maternity or parental leave
5. One of the following:
 - a. Your work hours have been reduced because of COVID-19
 - b. You have stopped or will stop working because of COVID-19
 - c. You are unable to work because of COVID-19, for example because you are taking care of someone.

[10] The Board concluded that the appellant “[did] not meet the second, fourth and fifth eligibility criteria” for the CERB and that the Director had “correctly assessed the overpayment.” It also concluded that the Director “ha[d] calculated [the appellant’s] overpayment recovery rate according to the legislation, regulation and policy.”

[11] The appellant sought, and was granted, leave to appeal the Board’s decision to this Court.

Issues

[12] As stated at para 2 herein, the appellant was granted leave on the following two questions of law (*Cann* at para 64):

...

- (1) Did the Board err by considering [the appellant's] entitlement to the CERB in reviewing the decision of the Director to claw back \$378 of income assistance benefits?
- (2) Did the Board err in its treatment of the CERB for the calculation of [the appellant's] income assistance benefits?

[13] The appellant argues that the Board erred by focussing on his eligibility for the CERB, rather than considering whether the \$740 was exempted from the calculation of financial resources under the *MAA* and the *Regulation*. He asserts that the \$740 was a liquid asset within the meaning of section 1 of the *MAA* and section 8(1)(a) of the *Regulation*, and should not have affected the calculation of his financial resources for the purpose of his monthly income assistance benefit payment.

[14] The Director argues that, while the Board did not need to consider the appellant's eligibility for the CERB in reviewing the decision to claw back \$378 of his income assistance benefits, its finding that he was not eligible was correct. It also argues that the Board did not err in its treatment of the \$740 for the calculation of the appellant's income assistance benefits.

Standard of Review

[15] Section 23(1) of *The Social Services Appeal Board Act*, CCSM c S167 provides for an appeal of an order of the Board to the Court of Appeal

on a question of law or jurisdiction upon leave being granted. Therefore, this is a statutory appeal with the usual appellate standards of review (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37).

[16] The parties agree that the issues in this case involve statutory interpretation subject to the standard of review of correctness (see *ibid*).

Principles of Statutory Interpretation

[17] The relevant principles of statutory interpretation are not in dispute and can be summarized as follows:

- Section 6 of *The Interpretation Act*, CCSM c I80 mandates that “[e]very Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.”
- The modern approach to statutory interpretation requires that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature]” (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; see also *Manitoba Housing v Amyotte et al*, 2014 MBCA 54 at paras 50-52).
- The entire context of a provision must be considered before determining whether it is reasonably capable of multiple

interpretations. Ambiguity results only “where a statutory provision is subject to differing, but equally plausible, interpretations” (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62; see also para 29).

- When interpreting legislation, values under the *Canadian Charter of Rights and Freedoms* are considered only where there is a “genuine ambiguity” (*Bell ExpressVu* at para 62).
- Any ambiguities in social welfare legislation “should be resolved in favour of the claimant” (*Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080 at 1114, quoting *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2 at 10).

Legislative Scheme

Income Assistance

[18] The *MAA* was “designed to assist the most vulnerable in our society” by providing, among other things, income assistance to eligible Manitobans who are “unable to earn an income sufficient to meet [their] basic necessities” (*Custovic v Manitoba (Director, Employment & Income Assistance)*, 2009 MBCA 86 at para 33; and the *MAA* at section 5(1)(a)(i)).

[19] Under section 4(1) of the *Regulation*, applicants are eligible for income assistance if their “financial resources” are less than the cost of their basic necessities and shelter.

[20] The term “financial resources” in section 4(1) of the *Regulation* is defined in section 1 of the *MAA*:

Definitions

...

“**financial resources**” means, with the exception of the exemptions specified in the regulations, any one or more of the following things:

- (a) all the real and personal property of an applicant, a recipient or a dependant of the applicant or recipient, including the net income from any such property,
- (b) allowances, pensions, insurance benefits, and income from business farming or any other source received by an applicant, recipient or a dependant of the applicant or recipient,
- (c) gifts and gratuities whether in cash or in kind received by an applicant, recipient or a dependent of the applicant or recipient on a one time basis or otherwise, and
- (d) the value attributed by the director to free shelter, free board or free lodging, received by an applicant, recipient or a dependant of the applicant or recipient.

...

[21] The exemptions, which do not form part of the calculation of an applicant’s financial resources, are numerous and can be found in section 8 of the *Regulation*.

[22] The work incentive provisions in sections 8(4) and 8(5) of the *Regulation* (as it then appeared) provide an exemption from the calculation of financial resources for employment earnings as follows:

Calculating financial resources

...

8(4) In calculating the financial resources of an applicant or recipient, the following earnings are not to be included:

- (a) up to \$200 of net monthly earnings, plus 30% of net monthly earnings in excess of \$200 for each employed or self-employed person in a household who has been enrolled for one month or longer;
- (b) up to \$200 of net monthly earnings for each employed or self-employed person in a household who has been enrolled for less than 30 days.

8(5) In subsection (4), “**net monthly earnings**” means

- (a) monthly employment earnings less compulsory payroll deductions; or
- (b) monthly self-employment earnings less self-employment expenses approved by the director.

[23] Section 8(1)(a)(iv) provides an exemption for liquid assets (a term not defined in the *MAA* or the *Regulation*) from the determination of financial resources of up to \$4,000 per person.

[24] Section 20 of the *MAA* provides authority to the Director to recover an income assistance payment made in error or based on a false statement or misrepresentation by the applicant.

[25] The *Assistance Regulation, amendment*, Man Reg 92/2020 (the amending *Regulation*) was passed in October 2020. It prescribes rules for the treatment of “pandemic-related monthly benefits” (at section 2(2)). These rules do not stipulate that the CERB is included in “net monthly earnings”

(*ibid*), but are consistent with the prior policy of the Director to exempt a portion of the CERB from the calculation of financial resources. Specifically, section 2(2) of the amending *Regulation* exempts the first \$200 and 30% of amounts in excess of \$200 of pandemic-related monthly benefits from the financial resources of income assistance recipients for the purpose of calculating the amount of their income assistance benefits. Section 3 of the amending *Regulation* deems it to have come into force on March 15, 2020.

The CERB

[26] The CERB was created by the *Canada Emergency Response Benefit Act*, SC 2020, c 5, section 8 (the *CERB Act*). The purpose of the CERB was “to provide financial assistance to eligible workers to help offset the effects of the pandemic” (*Cann* at para 5). It provides for weekly income support payments of \$500 for up to a maximum of 28 weeks.

[27] Under section 4 of the *CERB Act*, the Minister of Employment and Social Development (the Federal Minister) determines whether an applicant meets the statutory definition of a worker in section 2 of the *CERB Act*, as well as the eligibility criteria in section 6. Section 12(1) provides that the Federal Minister may determine whether an applicant “has received an income support payment to which the person is not entitled, or an amount in excess of the amount of such a payment to which the person is entitled”.

Discussion

Retroactivity of the Amending Regulation

[28] In addition to appealing the Board’s decision, the appellant filed a

notice of constitutional question challenging the validity of the retroactive application of section 2(2) of the amending *Regulation*.

[29] The Director conceded that, if the \$740 was found to be a liquid asset that is fully exempted from the calculation of financial resources, then the amending *Regulation* cannot turn that payment into a benefit that is only partially exempted from the calculation of financial resources, “as that would be contrary to s. 19(2) of the [MAA]”. In light of the position taken by the Director, the parties agreed that the retroactivity of the amending *Regulation* was not relevant to the issues on the appeal. Therefore, by agreement of the parties, the notice of constitutional question was withdrawn at the commencement of the hearing.

Did the Board Err by Considering the Appellant’s Entitlement to the CERB in Reviewing the Decision of the Director to Claw Back \$378 of Income Assistance Benefits?

[30] When the CERB program was implemented, there were no prescribed rules for the treatment of the CERB received by recipients of income assistance benefits. Provincial and territorial governments took differing approaches as to how the CERB would affect social assistance programs (see *Cann* at paras 8-14). After British Columbia and Newfoundland and Labrador announced their approaches, the Federal Minister’s office “announced to the media that [the Federal Minister] had asked her provincial counterparts to not penalize individuals collecting the CERB by a claw back of social assistance” (*ibid* at para 11; see also paras 9-10).

[31] The Manitoba approach had been to treat the CERB as analogous to “net monthly earnings” and apply the work incentive provisions which exempt a portion of the CERB received from inclusion in applicants’ financial resources for the purpose of calculating their monthly income assistance benefits.

[32] The appellant argues that the Board erred by considering his entitlement to the CERB in reviewing the Director’s decision to claw back \$378 of his income assistance benefits. I agree.

[33] It is the Federal Minister’s responsibility to determine eligibility. As Mainella JA points out in *Cann*, “No other decision maker in relation to matters involving the CERB is identified in the *CERB Act*” (at para 32).

[34] The question for the Board was not whether the appellant was eligible for the CERB, but rather whether the \$740 was a financial resource as defined by the *MAA* and the *Regulation*. If the \$740 was not a financial resource, then the appellant did not receive more income assistance than he was entitled to and there was no overpayment.

[35] In my view, the Board erred in law by mischaracterizing the proper legal test and considering an irrelevant factor in determining whether the \$740 was a financial resource (see *Ginter v Director, Employment and Income Assistance*, 2003 MBCA 36 at paras 15-17).

[36] Whether the appellant was eligible for the CERB was irrelevant to the analysis. That said, I acknowledge that it may have been difficult for the Board to render a correct decision in the circumstances of this case. The appellant, who was self-represented at the time, appealed on the basis that the

reduction in his income assistance benefits to recover the overpayment was causing hardship. At the hearing, he seemed to be focussed on the hardship created by the claw back and his materials were unhelpful.

[37] While it is clear that the appellant had an obligation to “immediately report to the [D]irector any material change in circumstances that may affect the entitlement to, or the amount of, income assistance” (the *Regulation* at section 12.1(1)), his failure to report the \$740 until after his income assistance benefits had been paid does not mean he received income assistance to which he was not entitled. Despite the appellant’s failure to report in a timely fashion, the appropriate question remains whether the \$740 was a financial resource.

Did the Board Err in Its Treatment of the CERB for the Calculation of the Appellant’s Income Assistance Benefits?

[38] The appellant argues that the CERB payment he received was a liquid asset and was, therefore, exempted from the determination of his financial resources under section 8(1)(a)(iv) of the *Regulation* and from the calculation of his monthly income assistance benefits.

New Issue on Appeal

[39] The Director argues that this is a new issue on appeal. The test for raising a new issue on appeal is summarized in *Samborski Garden Supplies Ltd v MacDonald (Rural Municipality)*, 2015 MBCA 26 at para 27; and *Davis et al v Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78 at paras 16-18. Generally, appellate courts will not consider issues raised for the first time on appeal absent exceptional circumstances.

[40] I agree that the appellant did not raise this argument before the Board. However, in my view, it is in the interests of justice to deal with this issue on the appeal.

[41] The appellant is a person with a disability who was self-represented before both the Board and the chambers judge. The chambers judge granted leave to appeal on the question of whether the Board erred in its treatment of the CERB for the calculation of the appellant's income assistance benefits. Had the Board applied the relevant considerations to its analysis, it may well have considered whether the CERB payments ought to have been exempted under the *Regulation*. Moreover, this issue was fully argued by the parties at the appeal hearing.

[42] While I agree with counsel for the Director that the record before the Board may have been different if this issue had been squarely before it, I am not persuaded that the record is inadequate. The issue raised involves the interpretation of legislation, so the sufficiency of the record is of less importance (see *Murray v Director of Employment and Income Assistance (Man)*, 2015 MBCA 66 at para 17). I am also not convinced that consideration of the issue will create procedural prejudice to the parties in the circumstances here.

Was the \$740 a Liquid Asset?

[43] The appellant argues that the \$740 was a liquid asset and should have been exempted from the calculation of his financial resources for the purpose of his monthly income assistance benefits.

[44] Support for this assertion can be found in two prior decisions of this Court. In *Miller v Manitoba (Director of Social Services, Winnipeg West)*, 1997 CarswellMan 377 (CA), Huband JA concluded that unpaid wages that were recovered in a single lump sum payment ought to be treated as a liquid asset.

[45] In *Re Wuziuk and Director of Social Services* (1980), 109 DLR (3d) 343 (Man CA), O’Sullivan JA concluded that a one-time gift of \$400 given for the purpose of purchasing an airplane ticket for a holiday was not income to be included in the calculation of financial resources. He found that the \$400 was a liquid asset. In doing so, he explained that “[i]ncome has the character of regularity” (at p 349).

[46] In the unique circumstances of this case, I agree with the appellant that the \$740 is a liquid asset for the purpose of determining his income assistance benefits.

[47] As explained by Mainella JA in *Cann*, the CERB was intended to be a temporary income support program. It provided income support payments at a rate of \$500 per week for up to a maximum of 28 weeks (see para 5).

[48] The appellant applied for, and received, only one CERB payment of \$2,000 representing four weeks of income support. He kept only part of this payment to pay for the needs of his service dog. Despite the fact that the appellant was not employed or earning income at the time he applied for, and received, the CERB payment, the \$740 represents approximately one and one-half weeks of income support payments under the CERB.

[49] In my view, the \$740 was similar in character to the payments in *Wuziuk* and *Miller* that were found to be liquid assets. It was a one-time payment and did not have “the character of regularity” (*Wuziuk* at p 349).

[50] Because the \$740 was a liquid asset and there was no evidence that the appellant had other liquid assets totalling more than \$4,000, it should have been exempted from the calculation of the appellant’s financial resources for the purpose of his monthly income assistance benefit payment. Accordingly, there was no overpayment of the appellant’s income assistance benefits.

Conclusion

[51] In the result, I would allow the appeal and set aside the Board’s order confirming the Director’s assessment of the overpayment. I would direct the Director to refund to the appellant the \$60 deduction taken from the appellant’s income assistance benefits in July 2020. The appellant shall have his costs on the appeal in accordance with the applicable tariff.

leMaistre JA

I agree: Monnin JA

I agree: Spivak JA
