

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

	)	<i>K. A. Burwash</i>
	)	<i>for the Applicant</i>
)	
<i>MARTIN STADLER</i>	)	<i>A. J. Ladyka</i>
	)	<i>for the Respondent</i>
)	
<i>(Appellant) Applicant</i>	)	<i>D. L. Carlson</i>
	)	<i>for the Attorney General</i>
	)	<i>of Manitoba</i>
)	
<i>- and -</i>	)	<i>V. E. Rachlis</i>
	)	<i>on a watching brief</i>
	)	<i>for the Social Services</i>
<i>DIRECTOR, ST. BONIFACE/ST. VITAL</i>	)	<i>Appeal Board</i>
)	
<i>(Respondent) Respondent</i>	)	<i>Chambers motion heard:</i>
	)	<i>September 20, 2018</i>
)	
	)	<i>Decision pronounced:</i>
	)	<i>October 10, 2018</i>

HAMILTON JA

[1] The applicant seeks leave to appeal the decision of the Social Services Appeal Board (the Board) that section 12.1(2) of the *Assistance Regulation*, Man Reg 404/88R (the *Regulation*) under *The Manitoba Assistance Act*, CCSM c A150 (the *Act*) does not violate the applicant's rights under section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[2] Section 12.1(2) of the *Regulation* reads as follows:

12.1(2) An applicant or recipient and the applicant's or recipient's spouse or common-law partner shall make all reasonable efforts on behalf of himself or herself and any dependants to obtain the maximum amount of compensation, benefits or contribution to support and maintenance that may be available under another Act or program, including an Act of Canada or a program provided by the Government of Canada.

[3] The applicant is physically disabled and cannot work. He receives income assistance benefits under the *Act*. When he turned 60, the respondent required him to apply for Canada Pension Plan (CPP) benefits pursuant to section 12.1(2) of the *Regulation*. He chose not to do so on the basis that he would apply at the age of 65 when his CPP benefits would be greater. When he did not apply for the CPP benefits, the respondent, after notice, suspended his income assistance benefits pursuant to section 12.1(4) of the *Regulation*:

12.1(4) Where an obligation described in subsections (1) to (3) is not met, the director may deny, suspend or discontinue income assistance, general assistance or shelter assistance or reduce any assistance to which the recipient later becomes entitled by an amount not exceeding the amount that would not otherwise have been paid.

[4] The applicant's income assistance benefits were reinstated after he applied for his CPP benefits.

[5] The applicant appealed the respondent's decision to suspend his income assistance benefits to the Board.

[6] The Board addressed the applicant's program-based arguments and dismissed his appeal. However, the Board did not address his arguments under the *Charter*, holding that it did not have jurisdiction to do so. On appeal of that decision by the applicant, this Court held that the Board must consider

the principles of the *Charter* when reaching its decision and referred the matter back to the Board to do so (see *Stadler v Director, St Boniface*, 2017 MBCA 108).

[7] The Board reconvened a new hearing to address the applicant's arguments based on discrimination because of his disability, an enumerated ground under section 15 of the *Charter*. In its second decision (the *Charter* decision), the Board dismissed the applicant's appeal, concluding that, "Section 12.1(2) of [the *Regulation*] does not violate the Section 15 equality rights of [the applicant]."

[8] The *Charter* decision is the subject of this leave application.

[9] Because I have concluded that leave to appeal should be granted, my decision is intentionally brief.

The *Charter* Decision

[10] The Board noted that the parties agreed that the issue was "whether Section 12.1(2) of [the *Regulation*] was discriminatory under the *Charter*" and that the applicable analytic approach is set out in *Withler v Canada (Attorney General)*, 2011 SCC 12.

[11] The Board concluded that the applicant's argument would compel the respondent to confer a positive benefit on the applicant, contrary to the case law. It did not accept the applicant's argument that "his situation should be compared to people without his limitations who are not involved in the EIA [Employment and Income Assistance] program" and held that the "correct

comparator [group] is the universe of people without disabilities who are in receipt of income assistance under [the *Act*].”

[12] The Board concluded that the applicant’s appeal failed “the first part of the Section 15 test”:

As the requirement to access any available source of income applies to all people in receipt of assistance, the Board finds that Section 12.1(2) does not create a distinction based on an enumerated or analogous ground set out in Section 15. [The applicant’s] appeal fails the first part of the Section 15 test.

[13] Nonetheless, the Board addressed “the second part of the Section 15 test” and section 1 of the *Charter*. It concluded that the *Regulation* is part of “an overall scheme of benefits designed to address the needs of people with disabilities, and does not create a disadvantage, or perpetuate prejudice and stereotyping” and that it met the proportionality test for the purpose of section 1 of the *Charter*.

Test for Leave to Appeal

[14] Granting leave to appeal is a discretionary decision. The test is well known and is based on the following criteria:

1. Leave may only be granted for a question of law or jurisdiction (see section 23(1) of *The Social Services Appeal Board Act*, CCSM c S167).
2. The applicant must have an arguable case that has a reasonable prospect of success.

3. The question of jurisdiction or law must raise an issue that warrants the attention of the Court. In other words, the decision of the Court will assist in determining similar disputes.

[15] Furthermore, the Court may also consider whether the denial of leave could result in an injustice.

See *Pelchat v Manitoba Public Insurance Corp and Automobile Injury Compensation Appeal Commission*, 2006 MBCA 90; *Winnipeg Airports Authority Inc v EllisDon Corp*, 2011 MBCA 51; *Stadler v Director, St Boniface*, 2016 MBCA 37; and *Harder v Director Fort Garry/River Heights*, 2017 MBCA 11.

The Applicant's Position

[16] The applicant asserts that section 12.1(2) of the *Regulation* and its application to the applicant contravenes section 15 of the *Charter*. He argues that his physical disability requires him to receive income assistance and that if he was not receiving assistance, he would not be required to apply for CPP at the age of 60. He says that this results in a disadvantage in that his choice as to how to use his personal assets has been taken away. He argues that his disability carries a burden that others do not have who are able bodied and are working.

[17] The applicant seeks leave to appeal on the following asserted questions of law:

1. Did the Board err when it held that section 12.1(2) of the *Regulation* does not contravene section 15 of the *Charter*?

2. Did the Board err in law when it held that the respondent did not breach the applicant's section 15 rights by requiring him to apply for CPP at the age of 60?

[18] He submits that the issue raised by these questions is worthy of the attention of the Court because it affects other vulnerable persons with disabilities and that the issue raised by him has a reasonable prospect of success.

The Respondent's Position

[19] The respondent concedes that either of the applicant's asserted questions raise a question of law. However, the respondent expressed concern about the exact nature of the questions, noting that the Board did not address the respondent's exercise of discretion to suspend the applicant's income assistance benefits in the *Charter* decision.

[20] The respondent's principal argument is that leave should be denied because the applicant has not raised an arguable case of substance. The respondent argues that the applicant's comparator group to able-bodied persons is illogical in that it has no relationship with the *Act* or how it operates and that section 12.1(2) of the *Regulation* does not target any particular group or persons who receive income assistance benefits.

[21] Furthermore, the respondent argues that the applicant cannot demonstrate that section 12.1(2) of the *Regulation* creates a disadvantage by perpetuating prejudice or stereotyping, especially when it is considered in the context of the social assistance program under the *Act*.

[22] The respondent relies on *Withler* and *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, arguing that the Supreme Court of Canada has rejected arguments similar to those argued by the applicant.

Decision

[23] As explained, there is no issue as to whether the applicant seeks leave on a question of law.

[24] The debate on this leave application concerns whether the applicant has raised an arguable case that has a reasonable prospect of success.

[25] The *Charter* decision will have to be reviewed in the context of the applicable jurisprudence. Briefly stated, the application of section 15 of the *Charter* calls for a consideration of the full context of a claimant's situation, the actual impact of the law on that situation and whether the impugned law perpetuates disadvantage to or negative stereotypes about that group. Section 15 is concerned with substantive equality, not formal equality between a claimant and a similarly situated group. In *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, Abella J (for the Court) recently articulated the analytic approach required for a section 15 analysis (at paras 16-21):

The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*”: para. 331 (emphasis added).

This Court has repeatedly confirmed that s. 15 protects substantive equality: . . . It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities

available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.

The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.

The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. . . .

The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:

. . .

To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but “evidence that goes to establishing a claimant’s historical position of disadvantage” will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

[26] Given the foregoing, I am of the view that the issue raised by the applicant “cannot be dismissed through a preliminary examination of the

question of law” (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74). The more thorough examination is appropriately conducted by a panel of the Court. Therefore, I am satisfied that the applicant has raised an arguable case that is not frivolous. As such, it has a reasonable prospect of success for the purposes of determining leave.

[27] In my view, the issue raised by the applicant should be addressed by a question of law that reflects the specific conclusion of the Board in the *Charter* decision. Accordingly, the question of law should read as follows:

Did the Board err in concluding that section 12.1(2) of the *Regulation* does not violate the equality rights of the applicant under section 15 of the *Charter*?

[28] I am satisfied that this question warrants the attention of the Court as it has broader implications than just for the applicant.

Conclusion

[29] Leave to appeal is granted to the applicant on the following question of law:

Did the Board err in concluding that section 12.1(2) of the *Regulation* does not violate the equality rights of the applicant under section 15 of the *Charter*?

[30] Costs of the application were not argued before me. For that reason, I defer the question of costs to the panel assigned to hear the appeal.