Citation: Stadler v St Boniface/St Vital (Director), 2022 MBCA 56
Date: 20220614
Docket: AI20-30-09516

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

	)	***K. A. Burwash***
	)	*for the Appellant*
	)	
MARTIN STADLER	)	***D. L. Carlson*** *and*
	)	***A. J. Ladyka***
(Appellant) Appellant	)	*for the Respondent*
	)	
	)	***M. A. Smith***
- and -	)	*on a watching brief*
	)	*for the Social Services*
	)	*Appeal Board*
DIRECTOR, ST. BONIFACE/ST. VITAL	)	
	)	*Appeal heard:*
(Respondent) Respondent	)	***January 26, 2022***
	)	
	)	*Judgment delivered:*
	)	***June 14, 2022***

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.

PFUETZNER JA

[1] This is the latest chapter in a dispute between the appellant and the respondent (the Director) as to when a disabled individual receiving income assistance under *The Manitoba Assistance Act*, CCSM c A150 (the *Act*), must apply for a federal retirement or old age benefit.

Background

Prior Proceedings

[2] The first disagreement between the parties arose when the appellant attained the age of 60. The Director invoked section 12.1(2) of the *Assistance Regulation*, Man Reg 404/88R (the *Regulation*), to require him to seek Canada Pension Plan (CPP) benefits early, at age 60. It reads:

> **General obligations**
> . . .
> **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 dependents 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.
>
> [emphasis added]

[3] The appellant appealed the Director's decision to the Social Services Appeal Board (the Board), claiming that being forced by the Director to apply for CPP early breached his "right to the equal protection and equal benefit of the law without discrimination . . . based on . . . physical disability" under section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Board found that it did not have jurisdiction to consider the *Charter* in making decisions under the *Act*.

[4] The appellant was granted leave to appeal the Board's decision to this Court. In *Stadler v Director, St Boniface*, 2017 MBCA 108 (*Stadler #1*), this Court applied *R v Conway*, 2010 SCC 22, and held that the Board had

jurisdiction to determine questions of law and that there was no exclusion in its enabling legislation prohibiting it from exercising constitutional jurisdiction.

[5] The matter was then returned to the Board and, after a new hearing, it dismissed the appellant's *Charter* claim. The appellant again sought and was granted leave to appeal to this Court. In *Stadler v Director, St Boniface/ St Vital*, 2020 MBCA 46 (*Stadler #2*) , leave to appeal to SCC refused, 39269 (26 November 2020), this Court dealt with the following issue: "[D]oes requiring a disabled recipient of income assistance to apply for [CPP] retirement benefits early, at age 60 instead of age 65 pursuant to section 12.1(2) of the [*Regulation*] infringe his equality rights under section 15 of the *Charter*" (at para 1).

[6] Steel JA noted that "[b]eing forced to apply early for CPP benefits rather than at the age of 65, permanently reduces the income of a person with physical disabilities" (at para 110). Ultimately, this Court ruled that the appellant was not required to apply for CPP benefits "until the age of 65" (at para 112) and directed that section 12.1(2) of the *Regulation* be "read down to exclude disabled recipients of income assistance from the requirement to apply for CPP benefits before the age of 65" (*ibid*).

Legislative Amendment

[7] In 2018, the Legislature removed the jurisdiction of the Board to decide constitutional matters by enacting section 8.1 (since repealed) (section 8.1) of *The Social Services Appeal Board Act*, CCSM c S167 (the *SSAB Act*), which, at the relevant time, read as follows:

> **No jurisdiction over constitutional questions**
> **8.1** The [Board] does not have jurisdiction
>
> (a) to inquire into or make a decision concerning the constitutional validity or applicability of an Act of the Parliament of Canada or of the Legislature, or of a regulation made under the authority of such an Act; or
>
> (b) to grant a remedy under subsection 24(1) of the [*Charter*].

Current Proceedings

[8] When the appellant attained the age of 65, the Director took the position that, because of section 12.1(2) of the *Regulation*, the appellant was required to apply for the old age security (OAS) pension and the guaranteed income supplement (GIS) (collectively, OAS/GIS) under the *Old Age Security Act*, RSC 1985, c O-9 (the *OAS Act*). OAS is a taxable monthly pension available to people age 65 and older. GIS is a non-taxable monthly benefit added to the OAS pension of individuals with low income.

[9] The appellant refused to apply at age 65 because doing so would decrease his OAS pension by 36% of what it would be if he delayed applying until age 70. As a result, the Director suspended the appellant's income assistance.

[10] The appellant appealed the Director's decision to the Board.

[11] The Board rejected the appellant's argument that he was obligated by section 12.1(2) of the *Regulation* to delay receipt of OAS/GIS until age 70 so as to maximize those benefits. The Board found that an applicant has a legal duty to make "reasonable efforts" pursuant to section 12.1(2) of the *Regulation* to obtain OAS/GIS benefits and that, at any given time, if a benefit

becomes available, he or she must apply for it. Moreover, it interpreted the words "maximum amount" in section 12.1(2) of the *Regulation* to mean the maximum "amount available at the time of application", rather than as the "'maximum benefit' over time."

[12] The Board found that, because of section 8.1 of the *SSAB Act*, it did not have the jurisdiction to review the constitutionality of its own legislation. As a result, the Board declined to decide whether section 8.1 of the *SSAB Act* is unconstitutional or whether section 12.1(2) of the *Regulation* infringes on the appellant's equality rights under the *Charter*. The Board also disagreed with his submission that *Stadler #2* was determinative of the appeal, finding that this Court's reasoning was very specific to the "requirement to apply for CPP benefits prior to age 65."

Issues and Standard of Review

[13] The appellant was granted leave to appeal the Board's decision on the following questions of law (2021 MBCA 7 at para 25):

> . . .
> 1. Did the Board err in confirming the decision of the [Director] to suspend the [appellant's] income assistance benefits pending confirmation that he had applied for OAS/GIS?
>
> 2. Did the Board err in determining that it does not have the jurisdiction to review the constitutionality of its own legislation?

[14] The parties agree that the first question raises an issue of statutory interpretation and the second question raises a constitutional issue. Both are

to be reviewed for correctness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37).

Analysis

Does the Board Have Jurisdiction to Review the Constitutionality of Its Own Legislation?

[15] I will deal first with the question of whether the Board erred in determining that it does not have the jurisdiction to review the constitutionality of its own legislation in light of section 8.1 of the *SSAB Act*, which purports to remove the Board's jurisdiction to consider constitutional issues.

[16] In his factum, the appellant argues that the Board erred by failing to find that section 8.1 of the *SSAB Act* is unconstitutional. The appellant relies on the comments of Gonthier J in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 44, to argue that section 8.1 of the *SSAB Act* is unconstitutional because the Legislature cannot remove *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims, which was not done here. He also argues that section 8.1 of the *SSAB Act* is unconstitutional because "it requires the Board to ignore the supreme law of Canada being the *Charter* and s. 52 of the *Constitution Act*" (see the *Constitution Act, 1982*).

[17] At the hearing of the appeal, the appellant conceded that the constitutionality of section 8.1 of the *SSAB Act* is not directly before us. The Board did not decide on its constitutionality and, accordingly, leave to appeal

was not granted on that issue. Instead, the appellant argued that the Board interpreted section 8.1 too narrowly—effectively precluding itself from considering the *Charter* in any way. He points to the Board's conclusion that it is "bound by [s]ection 8.1 of [the *SSAB*] *Act* as it is written, and does not have the jurisdiction to consider *Charter* rights arguments." He submits that, as a result, the Board wrongly determined that it could not apply this Court's decision in *Stadler #2*, which otherwise would have been binding in the present case and would have obligated the Board to read down section 12.1(2) of the *Regulation* as to when the appellant had to apply for OAS/GIS benefits.

[18] The Director argues that, through section 8.1 of the *SSAB Act*, the Legislature clearly withdrew constitutional jurisdiction from the Board. The Director submits that, while the Board has the power to decide questions of law, it no longer has "the authority to resolve constitutional questions that are linked to matters properly before" it (*Conway* at para 78). The Director notes that other jurisdictions in Canada have similarly chosen to place restrictions on administrative tribunals' ability to adjudicate constitutional issues.

[19] In my view, the Board was correct when it found that it "does not have jurisdiction to consider the constitutionality of its own legislation". Section 8.1 of the *SSAB Act* is a clear, express statutory provision removing constitutional jurisdiction from the Board, as contemplated in *Conway* (see paras 65, 68, 78). The Board did not err by not attempting to look behind the facial validity of that provision to assess its constitutionality—an act specifically prohibited by the provision itself. As the Board is not an available forum in which to challenge the validity of section 8.1 of the *SSAB Act*, such a challenge would need to be brought in the Court of Queen's Bench.

[20] I agree with the Director's submission that *Stadler #2* is part of the law of Manitoba and, unless it could be distinguished, it had to be applied by the Board regardless of section 8.1 of the *SSAB Act*. I am not persuaded by the appellant's argument that the Board refused to consider *Stadler #2* as a result of it interpreting section 8.1 of the *SSAB Act* too narrowly.

[21] Indeed, the Board did consider *Stadler #2*, concluding:

> . . .
> [T]he current appeal is not so similar to [*Stadler #2*] that the Manitoba Court of Appeal's reasoning in that case should be automatically applied to this appeal. The Board notes that the Court of Appeal applied its reasoning very specifically to the requirement to apply for CPP benefits prior to age 65.
> . . .

[22] I will now turn to the other issue under appeal.

Was the Appellant Required to Apply for OAS/GIS at Age 65?

[23] This issue involves the interpretation of section 12.1(2) of the *Regulation* and an assessment of the effect of *Stadler #2*.

[24] The appellant maintains that the *Regulation* obligates him to apply for OAS/GIS benefits at whatever time provides him with the maximum benefit over time. I note in passing that this argument does not seem to have been raised with respect to CPP in *Stadler #2*, and that case proceeded on the basis that, in the absence of a successful claim under section 15 of the *Charter*, section 12.1(2) of the *Regulation* required the appellant to apply for CPP at the earliest time it was available.

[25] The appellant submits that the Board erred by reading in a "time component" to the *Regulation* and that disabled recipients may remain reliant on income assistance longer than necessary if they apply for OAS/GIS benefits too early. The appellant also argues that the core principle of *Stadler #2* was binding on the Board in the present case and that the Board erred by not reading down the *Regulation* to allow him to defer his application for OAS/GIS benefits.

[26] The Director asserts that the Board interpreted section 12.1(2) of the *Regulation* correctly based on the plain meaning of the words used and the statutory context. The Director contends that *Stadler #2* is limited to its particular facts in the context of CPP and is not applicable here.

[27] The aim of statutory interpretation is well-known—one must read the words of the enactment "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 Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[28] The overall scheme of the *Act* is to provide financial assistance to those residents of Manitoba whose other financial resources do not allow them to meet their basic needs (see the *Act* at sections 1, "financial resources", 2; and the *Regulation* at section 4(1)). In light of this, I agree with the Director's submission that "[i]ncome assistance can . . . be fairly described as a program of last resort".

[29] Section 12.1(2) of the *Regulation* must also be construed in the context of other related provisions of the *Regulation*. Section 12.1(4) provides that the Director "may deny, suspend or discontinue income assistance" where

an applicant or recipient does not meet their obligation under section 12.1(2). If the appellant's interpretation of section 12.1(2) is correct, the Director could suspend the income assistance of a recipient who applies for a federal benefit at the earliest time it becomes available as that might result in the recipient not receiving the "maximum amount" of that federal benefit over time. This construction makes little sense in the context of an Act that is designed to provide a basic income to Manitoba residents who are still in need after having accessed all other financial resources.

[30] After considering the statutory context and the ordinary sense of the words used, in my view, the Board correctly construed section 12.1(2) of the *Regulation* and, in particular, the phrase "the maximum amount . . . that may be available" when it found that "[t]here is a time component to availability – at any given time, a benefit is available or it is not. The ordinary reading of that sentence, within the context of the Regulation, is that if a benefit is available, the recipient must apply for it."

[31] This leaves the question of whether *Stadler #2* is a binding precedent in the circumstances of the present case.

[32] As I have already explained, section 8.1 of the *SSAB Act* did not prevent the Board from considering whether it was bound by *Stadler #2* and, indeed, the Board did deal with that issue. Was the Board correct in distinguishing *Stadler #2*? In order to answer this question, it is necessary to carefully consider the principle that was established in *Stadler #2*.

[33] The appellant's position is that *Stadler #2* stands for the proposition that a disabled recipient of income assistance should have the same freedom as any other person to apply for federal retirement or old age benefits at the

time of their choosing, including by deferring those benefits. He asserts that this principle applies equally to OAS/GIS benefits as it did to CPP.

[34] The Director argues that the ratio of *Stadler #2* is that the adverse financial consequence to the appellant of having to take CPP at age 60 was a breach of section 15 of the *Charter* that was not justified under section 1 of the *Charter*. The Director maintains that there are significant differences in the present case that make *Stadler #2* inapplicable. For example, here, there is a present benefit to the appellant in applying for OAS/GIS benefits at age 65—he would immediately receive a higher monthly income. In addition, the Director points to the fact that, in *Stadler #2*, the appellant wanted to claim CPP at age 65—the normal age of retirement. He was not asking to defer to age 70, which is available under CPP.

[35] In *Stadler #2*, the Court was concerned with the permanent financial loss that the appellant would incur if he was required to apply early for CPP prior to the normal retirement age of 65. Steel JA noted that "there is a significant financial difference to a person taking [their] CPP benefits early at age 60 as opposed to the normal age of 65" (at para 88). This Court's reasons were focussed on the fact that the appellant was being asked to "apply early" for CPP and references to this fact appear throughout the decision (see paras 1, 20, 23, 29, 88, 95, 97, 105, 110).

[36] While recipients of CPP can defer benefits as late as age 70, this was not the issue before this Court in *Stadler #2*. As a result, the principle established in *Stadler #2* does not extend to allow a disabled recipient of income assistance to defer receipt of other benefits as long as may be allowed under those other plans. Rather, the decision is linked to the concept of the

normal or "standard" age for the particular plan. As this Court noted in *Stadler #2*, "[t]he [CPP] pension will continue to increase up to the age of 70, however [the appellant] and the intervener adopted the age of 65 as being the standard age" (at para 88).

[37] The concept of a normal retirement age for pension plans is not novel. For example, *The Pension Benefits Act*, CCSM c P32, states that "[e]very pension plan must specify a normal retirement age" (at section 21(7)). Similar provisions appear in the pension legislation of other provinces and in federal statutes (see the *Pension Benefits Standards Act*, SBC 2012, c 30 at section 64; the *Pension Benefits Act*, SNB 1987, c P-5.1 at sections 1(1), "normal retirement date", 10(4)(d), 39(3); the *Pension Benefits Act, 1997*, SNL 1996, c P-4.01 at sections 22(e), 28; the *Pension Benefits Act*, RSO 1990, c P.8 at section 35(1); and the *Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2nd Supp) at section 2(1), "pensionable age").

[38] In my view, *Stadler #2*, read as a whole, stands for the principle that it is a breach of section 15 of the *Charter* for a disabled recipient of income assistance to be forced to apply early for CPP prior to attaining the normal retirement age of 65 if to do so will result in a financial disadvantage.

[39] Does the principle from *Stadler #2* apply to the circumstances of the present case?

[40] First, I will consider whether there is a normal or standard age for receipt of OAS/GIS benefits. The *OAS Act* provides guidance.

[41] Under section 3(1)(b)(ii) of the *OAS Act*, "a full monthly pension may be paid to every person who . . . has attained sixty-five years of age"

(emphasis added). The plain wording of this provision is that age 65 is the normal age to receive a full OAS pension. This is reinforced by section 7.1(1) of the *OAS Act* which provides that, "[i]f a person applies for their pension after they become qualified to receive a full monthly pension, the amount of that pension . . . is increased by 0.6% for each month" that they defer the application, but not later than to age 70 (see section 7.1(4)).

[42] The plain and ordinary meaning of these provisions is that 65 is the normal age for receipt of OAS/GIS benefits. A person can apply later; however, this results in an increase to what is considered the full amount of OAS available at the normal age of 65.

[43] Next, I will consider whether the record before the Board indicated that there is a financial disadvantage to applying for OAS/GIS benefits at age 65.

[44] The record shows that there are important factual distinctions between a person in receipt of income assistance, such as the appellant, applying for CPP at the earliest available age of 60 and applying for OAS/GIS benefits at the earliest available age of 65.

[45] While OAS payments do increase if the application is delayed beyond age 65, the prevailing view is that there is no advantage to a person who will qualify for GIS in delaying their application. This is because GIS cannot be received in the absence of OAS and, unlike OAS, the amount of the GIS payments do not increase if the application is deferred.

[46] In the case of the appellant, the information before the Board was that his plan to defer his OAS application would mean that he would forego a

monthly income of $1,258.91 (being OAS of $613.53 and GIS of $645.38) that he would otherwise be entitled to at age 65. Instead, he would continue to be reliant on income assistance in the amount of $1,089.02 per month, resulting in a monthly reduction in his income of $169.89 between the ages of 65 and 70. The appellant's assertion that his monthly OAS pension will be higher if he defers his application is not a certainty and is dependent on him reaching age 70. Moreover, it is only after attaining the age of 70 that he would begin to recoup the funds lost through the reduction of his monthly income between the ages of 65 and 70.

[47] Unlike the situation dealt with in *Stadler #2*, where it was found that the appellant would suffer a financial disadvantage if forced by the Director to apply for CPP early, here, there is an immediate financial advantage to the appellant if forced by the Director to apply for OAS at the normal retirement age. There is no guarantee that a longer-term advantage in deferring his OAS application would ever materialize.

[48] In conclusion, I am not persuaded that the Board erred in law when it confirmed the Director's decision to suspend the appellant's income assistance benefits pending confirmation that he had applied for OAS/GIS. The plain meaning of section 12.1(2) of the *Regulation* is that a recipient of income assistance must apply for a benefit if and when it is available. Further, the principle established in *Stadler #2* is not applicable in the circumstances of the present case. In *Stadler #2*, the appellant was asked to apply early for a benefit prior to the normal retirement age where this would have resulted in a permanent financial disadvantage to him. Here, the appellant was told to apply for a benefit at the normal retirement age and doing so will not result in

a permanent financial disadvantage to him; rather, he will receive a higher monthly income between the age of 65 and 70.

[49] For these reasons, I would dismiss the appeal without costs.

Pfuetzner JA

I agree: Chartier CJM

I agree: Mainella JA