Date: 20221125
Docket: CI 21-01-32406
(Winnipeg Centre)
Indexed as: Hutlet v. Attorney General of Canada et al.
Cited as: 2022 MBKB 223

# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

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|---|---|---|
| PAUL ANDRE NORBERT HUTLET, | ) | David Baker and |
| | ) | Sujit Choudhry |
| | ) | for the applicant |
| applicant, | ) | |
| - and - | ) | |
| | ) | Scott Farlinger and |
| ATTORNEY GENERAL OF CANADA AND | ) | Erica Haughey |
| ATTORNEY GENERAL OF MANITOBA, | ) | for the Attorney General |
| | ) | of Canada |
| respondents. | ) | |
| | ) | |
| | ) | Michael Conner and |
| | ) | Kathryn Hart |
| | ) | for the Attorney General |
| | ) | of Manitoba |
| | ) | |
| | ) | |
| | ) | JUDGMENT DELIVERED: |
| | ) | November 25, 2022 |

## BOCK J.

## Introduction

[1] The applicant, Paul Andre Norbert Hutlet, challenges the constitutionality of s. 8(1)(b) of the ***Assistance Regulation***, Man. Reg. 404/88R enacted under ***The***

***Manitoba Assistance Act***, C.C.S.M. c. A150, and s. 80.1(4) of the ***Canada Pension Plan***, R.S.C., 1985, c. C-8 ("***CPP***").

[2] Mr. Hutlet is severely and very likely permanently disabled. His disability prevents him from doing any type of substantially gainful work. As a result, he receives a monthly disability benefit under the ***CPP*** ("CPP-D").

[3] Mr. Hutlet's CPP-D affects his financial eligibility for monthly income assistance for persons with disabilities ("IAPD") provided under the Employment and Income Assistance program ("EIA") established and administered by ***The Manitoba Assistance Act***. Section 8(1)(b) of the ***Assistance Regulation*** exempts various income from the calculation of an applicant's available financial resources, but CPP-D is not one of them. Mr. Hutlet's CPP-D income is therefore taken into account for the purpose of determining his eligibility for IAPD. In practice, it is offset against the amount of IAPD that would be available to him. (Mr. Hutlet, inaccurately in my view, describes this as a "clawback", not an offset, of his CPP-D. Manitoba does not claw back Mr. Hutlet's CPP-D from him; he receives the full amount of CPP-D to which he is entitled.) Because Mr. Hutlet's CPP-D exceeds the maximum amount of IAPD available to him under the ***Assistance Regulation***, he does not qualify for IAPD.

[4] Mr. Hutlet submits Manitoba's failure to include CPP-D as an exempt source of income in s. 8(1)(b) of the ***Assistance Regulation*** violates his right to life, liberty and security of the person under s. 7 of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***"), because it deprives him of income necessary for his "subsistence

support", a benchmark which he derives from s. 7 of Canada's ***Poverty Reduction Act***, S.C. 2019, c. 29, s. 315.

[5] Mr. Hutlet also submits Manitoba's failure to include CPP-D as an exempt source of income in s. 8(1)(b) violates s. 15(1) of the ***Charter***, because it discriminates against him on the basis of his disability.

[6] Mr. Hutlet's attack on the ***CPP*** is directed at s. 80.1(4), which forms part of a provision authorizing Canada to enter into intergovernmental agreements with provinces. He contends s. 80.1(4) is unconstitutional because it fails to include a mandatory term that intergovernmental agreements coordinate CPP-D and provincial social assistance benefits in a way that ensures recipients are not deprived of income necessary for their subsistence support.

[7] The primary issues raised by Mr. Hutlet's application are: (a) whether the ***Poverty Reduction Act*** sets a legal benchmark for subsistence support; (b) whether the absence of CPP-D in s. 8(1)(b) of the ***Assistance Regulation*** violates s. 7 of the ***Charter***; (c) whether the absence of a mandatory coordination provision in s. 80.1(4) of the ***CPP*** violates s. 7; (d) whether the absence of CPP-D in s. 8(1)(b) of the ***Assistance Regulation*** discriminates against Mr. Hutlet in violation of s. 15(1) of the ***Charter***.

[8] In his notice of application Mr. Hutlet also asserted s. 7 of the ***Charter*** must be interpreted to comply with Canada's obligations under certain provisions in the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9-14 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*] and the *Convention on the Rights of Persons with Disabilities*, 30 March 2007, Vol. 2515

(December): p. 3 (3 May 2008). This argument was not developed in any of the briefs filed by the parties, and was only briefly addressed in the "Applicant's Compendium" and by Mr. Hutlet's counsel in oral argument. Given that the point was not fully argued in either written or oral argument, I have declined to consider it in these reasons.

[9] For the reasons that follow, Mr. Hutlet's application is dismissed.

## The evidence

[10] A substantial amount of evidence was filed on this application.

[11] Mr. Hutlet filed the following evidence:

(a) three affidavits which he swore on September 2, 2021, November 1, 2021 and January 17, 2022, and on which he was cross-examined;

(b) two affidavits sworn by John Stapleton, an acknowledged expert on income support benefit design and social policy, on August 31, 2021 and January 12, 2022. For over 28 years, Mr. Stapleton worked with the Ministry of Community and Social Services for the Province of Ontario in a variety of roles. Between 2016 and 2018, Mr. Stapleton served as a member of the Minister's Advisory Committee on Poverty Reduction for the Government of Canada, appointed by the federal Minister of Families, Children and Social Development, to advise on the development of a federal poverty reduction strategy. That federal initiative is described in detail in a publication produced by Employment and Social Development Canada in 2018 entitled, *"Opportunity for All – Canada's First Poverty Reduction Strategy"* (available for download at Canada.ca/publicentre-EDSC). Mr. Stapleton was cross-examined on his affidavits;

(c) an affidavit sworn by his family physician, Dr. Rizk, affirmed October 28, 2021. Attached as exhibits to that affidavit are reports from some of Mr. Hutlet's other healthcare providers, including: Dr. Onwarah, a psychiatrist; Dr. Hooper, an internal medicine specialist; Dr. Taraska, a dermatologist; and Ms. Meadows, a social worker.

[12] Manitoba and Canada filed the following evidence:

(a) Manitoba filed four affidavits from four provincial civil servants: Darlene March, Manager of Central Intake with Manitoba Housing and Renewal Corporation, affirmed December 9, 2021; Lillibeth Pasa, Senior Economic and Statistical Analyst with the Department of Families, affirmed December 9, 2021; Darren MacDonald, Senior Director, Quality Assurance for EIA, affirmed December 9, 2021; and Dwayne Rewniak, Executive Director of Manitoba Housing and Renewal Corporation, affirmed December 9, 2021. Ms. March, Ms. Pasa and Mr. MacDonald were cross-examined on their affidavits. In addition, Manitoba filed the affidavit of Andrew Heisz, the Director at Statistics Canada responsible for the Centre for Income and Socioeconomic Wellbeing Statistics, affirmed February 25, 2022. Mr. Heisz was also cross-examined on his affidavit; and

(b) Canada filed two affidavits from two federal civil servants: Tricia Humbert, a Senior Programs Officer with Canada Revenue Agency, affirmed December 8, 2021, tasked with that Branch's division responsible for Emergency Benefits Integrity, and Stephane Garnier, a Canada Pension Plan Policy Analyst with the

Department of Employment and Social Development, sworn December 8, 2021. Ms. Humbert and Mr. Garnier were both cross-examined on their affidavits.

## Government programs

[13] Mr. Hutlet's application involves certain provincial and federal legislation, social policies and support programs. At this point it is useful to introduce and describe them, in order to place what follows in context.

### Manitoba

[14] EIA is a social assistance program established and administered by ***The Manitoba Assistance Act*** and the ***Assistance Regulation***. Manitoba describes EIA as a program of last resort intended to provide assistance to people who have no other means to support themselves and their families. To that end, s. 2 of the ***Act*** authorizes Manitoba to "take measures to provide to residents of Manitoba those things and services that are essential to health and well-being, including a basic living allowance, an allowance for shelter, essential health services and a funeral upon death."

[15] EIA applicants must meet categorical and financial eligibility criteria. Categorical eligibility refers to the categories of persons defined in s. 5(1) and s. 5.1 of ***The Manitoba Assistance Act***. Of relevance to Mr. Hutlet is s. 5(1)(a): it establishes IAPD, the specific category of income assistance for a person with disabilities who, by reason of physical or mental disability that is likely to continue for more than 90 days, is unable to earn an income sufficient to meet the basic necessities of themselves and their dependents.

[16] Financial eligibility for EIA is addressed in s. 4(1) of the ***Assistance Regulation***. It provides that an applicant is eligible to receive income assistance if their household's

"financial resources" are less than the sum of the cost of their "basic necessities" and "shelter costs".

[17] "Basic necessities", also referred to by Manitoba as the "basic needs budget", is a monthly amount determined under Schedule A to the ***Assistance Regulation***. It includes a living allowance to help with the cost of basic needs like food, clothing, personal and household items, determined in accordance with Division 2 of Schedule A, and coverage for certain health care expenses, determined in accordance with Division 3 of Schedule A.

[18] The health care expenses payable to a person under Division 3 of Schedule A include, in clauses (a) to (d), essential medical and surgical care, essential optical supplies such as eyeglasses, essential dental care, and essential prescription drugs. Clause (e) provides for payments in respect of "such other remedial care, treatment and attention including physiotherapy as may be prescribed by a duly qualified medical practitioner." Clauses (f) to (h) authorize payments in respect of a broad array of other health care costs, subject to authorization by the director. According to Mr. Macdonald, the coverage provided includes chiropractic treatment, foot care, hearing aids, medical equipment and supplies not covered under any other health plan, ambulance service, addictions treatment, phones for health or safety, prescription food supplements prescribed by a doctor, prosthetic and orthotic devices not covered by Manitoba Health, special diet allowance required for a medical problem, and transportation for medical appointments.

[19] An applicant's "shelter costs" are determined in accordance with Schedule B to the ***Assistance Regulation***.

[20] "Financial resources", defined in s. 1 of ***The Manitoba Assistance Act***, includes "allowances, pensions, insurance benefits, and income from business farming or any other source". Section 8(1)(a) and (b) of the ***Assistance Regulation*** comprises a lengthy list of assets and income excluded from the definition of financial resources. For example, non-recurring cash gifts to persons with a disability to a maximum of $500 per month, tax credit refunds, liquid assets up to $4,000 per person to a maximum of $16,000 per family and contributions to a Registered Disability Savings Plans to a maximum of $200,000 do not count as an applicant's "financial resources".

[21] CPP-D is not included in the list of exempt income in s. 8(1)(b), and is therefore included as one of the financial resources available to an applicant. Manitoba is not unique in this regard. Every other province also considers CPP-D to be an available financial resource in determining eligibility under its social assistance program.

[22] The EIA program provides a monthly income allowance to an applicant whose basic needs budget exceeds their household's monthly financial resources, calculated according to the formula set forth in s. 4.1 of the ***Assistance Regulation***. That formula may be summarized as follows:

> A [total assistance payable] =
>
> (B [Schedule A: Division 2 living allowance for basic necessities + Division 3 health care expenses]
>
> + C [Schedule B shelter assistance])
>
> – D [available financial resources]

[23] In some cases – and Mr. Hutlet's is one of them – an applicant's available financial resources may exceed the living allowance available to them in respect of their basic

necessities, but is not sufficient to meet their health care needs. Such an applicant is nevertheless eligible for assistance to meet those health care needs in accordance with s. 4, s. 4.1, and Division 3 of Schedule A of the ***Assistance Regulation***.

[24] Eligibility under the EIA program is assessed upon an applicant's initial application and is then reassessed on a monthly basis, in recognition of the possibility that an applicant's circumstances may change.

[25] According to the Annual Report of the Department of Families for the year ending March 31, 2021, on average in 2020/21 the EIA program provided monthly benefits to an average of 39,273 households including 67,376 individuals, of whom 25,874 were individuals with a disability. Total expenditures on EIA benefits for that period were $442,213,000, including $223,190,000 for individuals with a disability.

[26] Manitoba provides housing assistance through subsidized public housing programs administered by Manitoba Housing and Renewal Corporation ("Manitoba Housing") under ***The Housing and Renewal Corporation Act***, C.C.S.M. c. H160. The rent for housing provided by Manitoba Housing is based on 30% of household income. Tenants of subsidized housing need not be recipients of assistance under the EIA program.

[27] Individuals who are not in subsidized public housing may qualify for financial support through Manitoba's "Rent Assist" program, a component of the EIA program. Rent Assist supports low-income renters in unsubsidized housing. Benefits are calculated on the difference between 30% of a household's reported net taxable income and a maximum of 80% of the median market rent.

**Canada**

[28] The Canada Pension Plan is a federal social insurance program with defined benefits and terms of entitlement. It is operated and administered pursuant to the ***CPP*** and the ***Canada Pension Plan Regulations***, C.R.C., c. 385. It is funded entirely by employer and employee contributions and the investment income earned on those contributions.

[29] Eligible recipients receive a partial income replacement benefit upon retirement, disability or death. It is not a social assistance scheme, nor is it a publicly funded benefit available to all Canadians.

[30] CPP-D is a monthly benefit payable upon disability. It is available to eligible Canada Pension Plan contributors under the age of 65 who have a mental or physical disability that is long-term, of indefinite duration or is likely to result in death, and whose disability prevents any type of substantially gainful work (s. 44(1)(b) and s. 44(2) of the ***CPP***).

[31] The ***CPP*** does not mandate how provincial social assistance programs ought to treat CPP-D. Each province designs its own program. CPP-D is not subject to any income offsets, including income from provincial social assistance programs or private insurance.

[32] In contrast, many provinces, including Manitoba, treat CPP-D as a first payer under their social assistance programs, offsetting amounts received from CPP-D against any benefits payable under their programs. IAPD is subject to such an offset.

[33] Section 80.1 of the ***CPP*** authorizes Canada to enter into intergovernmental agreements with provinces to coordinate and limit the total amount of benefits that might

be payable to a person who is entitled to both CPP-D and periodic payments under a provincial program. It provides:

> **80.1 (1)** The Minister may, with the approval of the Governor in Council, on behalf of the Government of Canada enter into an agreement with any person or body responsible for the administration of
>
> **(a)** any other Act of Parliament,
>
> **(b)** an Act of the legislature of a province, or
>
> **(c)** a federal or provincial activity established other than under an Act of Parliament or of the legislature of a province,
>
> that provides for periodic payments to persons in respect of accidents, injuries, illnesses and occupational diseases for the purpose of limiting the total amount that is payable to a beneficiary as a disability benefit under this Act and as periodic payments under that other law or activity.

[34] Any agreement made by Canada under s. 80.1 must comply with the limits set by s. 80.1(4), entitled "Limitation":

> **(4)** An agreement may not
>
> **(a)** change a person's eligibility to receive a benefit as a disabled contributor's child or the amount of that benefit;
>
> **(b)** change the determination of months that are excluded from a beneficiary's contributory period by reason of disability;
>
> **(c)** result in a beneficiary receiving, in respect of any month, disability benefits under this Act and payments under the other law or activity that are less than the disability benefits that would be otherwise payable under this Act for the month if there were no such agreement; or
>
> **(d)** result in a beneficiary receiving, in respect of any month, disability benefits under this Act that are greater than the disability benefits that would otherwise be payable under this Act if there were no agreement.

[35] To date Canada has not entered into an agreement with any province under s. 80.1. According to Mr. Garnier, the section is intended to permit Canada to enter into a federal-provincial agreement to limit the combined total of CPP-D benefits and provincial

workers compensation benefits received by a disabled employee, based on the premise that the employer, and not the Canada Pension Plan, should be responsible for the cost of a work injury.

[36] In 2020 and 2021, Canada provided COVID-19 benefits to eligible applicants under the Canada Emergency Response Benefit ("CERB") and Canada Recovery Benefit ("CRB") programs pursuant to the ***Canada Emergency Response Benefit Act***, S.C. 2020, c. 5, s. 8, and the ***Canada Recovery Benefits Act***, S.C. 2020, c. 12, s. 2, respectively.

[37] There were 8.9 million unique applicants for CERB benefits and 2.29 million unique applicants for CRB benefits. Applicants applied online, and were required to confirm they met certain eligibility requirements. The CERB and CRB websites currently state that if a claimant has received payments under either program and is later found to be ineligible, they will be contacted to make arrangements to repay any applicable amounts.

[38] According to Tricia Humbert, the Canada Revenue Agency plans to conduct eligibility reviews following the conclusion of each program to determine whether benefit recipients met eligibility requirements. The nature and scope of this review process has not been finalized, nor has a decision been made with respect to any recourse mechanisms that may be implemented to recover benefits paid to recipients ultimately found by CRA to have been ineligible. Canada expects the review process will include an opportunity for applicants to provide further information to CRA in support of their claim of eligibility; an opportunity for affected applicants to request a second review in the event of an adverse decision by CRA; and a further right to apply for judicial review in the Federal Court.

[39] Ms. Humbert says debts found to be owed by ineligible CERB and CRB recipients to Canada would be referred to CRA's collection branch. In that event, an individual may, based upon their ability to pay, be able to enter into payment arrangements or apply for relief under the CRA's Financial Hardship Provisions.

[40] Canada's ***Poverty Reduction Act*** came into force on July 9, 2019. The ***Act's*** preamble makes reference to Canada's "aspiration to be a world leader in the eradication of poverty", and to poverty reduction as a contribution to "meeting Canada's international human rights obligations", including under the Convention on the Rights of Persons with Disabilities.

[41] The stated purpose of the ***Poverty Reduction Act*** is found in s. 3: "The purpose of the Act is to support continuous efforts in, and continuous monitoring of, poverty reduction in Canada." To that end, it sets these aspirational targets in s. 6:

> **6** The targets for poverty reduction in Canada to which the Government of Canada aspires are the following:
>
> **(a)** 20% below the level of poverty in 2015 by 2020; and
> **(b)** 50% below the level of poverty in 2015 by 2030.

[42] The ***Poverty Reduction Act*** establishes an "Official Poverty Line", defined in s. 2 as the "Market Basket Measure, as published by Statistics Canada under the authority of the *Statistics Act*", and in s. 7(1) as "Canada's official metric to measure the level of poverty in Canada and to assess progress in meeting the targets set out in section 6." The Official Poverty Line is not fixed: s. 7(2) provides that it is to be reviewed "on a regular basis as determined by Statistics Canada, to ensure that it reflects the up-to-date

cost of a basket of goods and services representing a modest, basic standard of living in Canada."

[43] The federal government announced its decision to adopt the Market Basket Measure ("MBM") as Canada's definition of the Official Poverty Line in 2018, in the report mentioned earlier, "*Opportunity for All – Canada's First Poverty Reduction Strategy*." "Addressing poverty", the report explains, "is about more than just providing the bare necessities of life" (p. 35). To that end, the Official Poverty Line determined by MBM is "sensitive to the reality of being able to afford the necessities of life, reflecting the costs of a healthy basket of food, appropriate shelter and home maintenance, clothing and transportation. But it is also sensitive to the reality of being able to afford other things that permit full engagement in the community, such as the extra-curricular activities that round out a child's life" (p. 36). Thus, the "modest, basic standard of living in Canada" reflected in the MBM is intended to include "items such as clothing and footwear, transportation, and nutritious food and shelter (including electricity, heat and clean water), and other necessary goods and services, such as personal care items and household supplies" (p. 65). Roughly 25% of the MBM comprises expenditure on this latter category of "necessary goods and services", including not only personal care items and household supplies but also "basic telephone service, reading, recreation, entertainment and school supplies" (p. 70).

[44] Statistics Canada is responsible for the methodology used to calculate the MBM, and for making the calculations. Broadly speaking, MBM is based on the requirements of a "reference family" of two adults and two children. MBM varies regionally to reflect

regional variations in the cost of goods and services. Canada is divided into 50 regions, one of which is Winnipeg.

## Background

[45] Mr. Hutlet was born in 1973. He is single, and presently resides alone in an apartment in Winnipeg. He has a daughter, born in 2001. He raised his daughter under a joint custody arrangement with her mother until their daughter's graduation from high school in 2019. In January 2020, his daughter moved into her own apartment.

[46] Mr. Hutlet is a survivor of childhood sexual abuse, suffering assaults from the age of 11 to 14. He kept this sad fact hidden well into adulthood. For 35 years he has struggled with, and has periodically been hospitalized for, depression, anxiety and stress attributable to the abuse perpetrated on him. Despite this, from 1992 to 2018, Mr. Hutlet was gainfully employed in the private sector, and contributed to the CPP through statutory payroll deductions.

[47] The damage caused by Mr. Hutlet's childhood abuse manifested itself over time and ultimately affected his ability to hold down any type of employment. From 2012 to 2018 he held and lost eight full-time jobs. He twice attempted to work part-time from home, without success. He was employed by two different companies who provided their employees long-term disability plans, first in 2015 and then again in 2018, but in both cases his employment was terminated, resulting in the loss of disability coverage under those plans.

[48] By 2019, Mr. Hutlet was unemployed and unable to work. Because his inability to work had not yet been confirmed by a conclusive diagnosis of disability, he was ineligible

to claim CPP-D. The steady deterioration of his health, combined with his inability to work and earn an income, was economically catastrophic for Mr. Hutlet. In his efforts to support himself, he lost his home, vehicle, assets of any value, and personal savings.

[49] Mr. Hutlet applied and was approved for regular and sickness benefits under the federal government's Employment Insurance program, but by May 2019, those benefits had all been exhausted. This left him in a precarious financial situation. He turned to his widowed mother, who was then 73 and also disabled, for help. Mr. Hutlet's mother withdrew $10,000 from a tax free savings account and loaned those funds to her son, which he then used to meet his living expenses.

[50] It was not until September 2019, after four years of intensive examination by a number of different specialists, that Mr. Hutlet was conclusively diagnosed with three disabling conditions: complex-post traumatic stress disorder, fibromyalgia, and major depressive disorder.

[51] With a confirmed diagnosis of his disabling conditions now in hand, on September 25, 2019, Mr. Hutlet applied for CPP-D. His application was supported by a medical report from his family physician, Dr. Rizk. Dr. Rizk's report included detailed descriptions of Mr. Hutlet's impairments and functional limitations. Dr. Rizk described these impairments, among others: 34 years of severe and debilitating nightmares, flashbacks, tension headaches, panic attacks, anxiety, insomnia, moderate to severe daily pain, dizziness, memory loss, loss of hope, feelings of worthlessness and suicidal ideation. The related functional limitations identified by Dr. Rizk were equally severe and debilitating: an inability to handle any level of stress, psychological demands, or confrontation; an

inability to work with others or work in loud or crowded spaces; an inability to walk, drive, bend, climb, reach, lift or carry over 10 pounds; an inability to sit at a computer for over one hour, or stand for more than 15 minutes; an inability to think clearly or concentrate. Dr. Rizk expects Mr. Hutlet will remain permanently disabled and unable to work.

[52] Since September 2019, Mr. Hutlet's health has worsened. He has developed an autoimmune disease called plaque psoriasis, for which he seeks treatment from a rheumatologist. He has also developed temporomandibular joint disorder, for which he has had to seek emergency dental treatment. Mr. Hutlet attributes these conditions to his desperate financial situation and the intense stress it has produced. Whether or not that is so, I find these conditions do add to the impairments and functional limitations which prevent him from working, exacerbate his stress and worry, and add to the cost of his medical care.

[53] On October 17, 2019, Mr. Hutlet applied for IAPD. His application was approved on October 18, 2019. His monthly benefit was determined to be $1,051.40. As a condition of his application, Mr. Hutlet was required to sign Service Canada's Form ISP-1613, by which he consented to the retroactive reimbursement to Manitoba of IAPD benefits if his application for CPP-D was later approved.

[54] Canada informed Mr. Hutlet on November 13, 2019, that his application for CPP-D had also been approved, effective February 2019, at a monthly amount of $1,125.72. He received a retroactive payment of $11,257.20, from which the Canada Pension Plan deducted $1,268.40. This amount represented IAPD paid to Mr. Hutlet for the period October 17 to November 30, 2019, and was paid by the Canada Pension Plan to Manitoba

in accordance with the reimbursement form he had executed as a condition of his IAPD application. Mr. Hutlet used the remaining sum of $9,988.80 to repay the loan made to him by his mother.

[55] In this way the practical effect of s. 8(1)(b) of the ***Assistance Regulation*** was brought home to Mr. Hutlet. Had s. 8(1)(b) included CPP-D as exempt income for the purpose of determining his eligibility for IAPD, his monthly income in November 2019 would have been $1,125.72 from CPP-D and $1,051.40 from IAPD, for a total of $2,177.12. Because it did not, his CPP-D was offset against the amount of IAPD available to him, so reducing his IAPD to zero, and leaving him with only CPP-D of $1,125.72.

[56] On December 2, 2019, Manitoba informed Mr. Hutlet that he was no longer eligible for IAPD, including health services benefits. His claim was terminated, and his file was closed.

[57] Mr. Hutlet appealed the decision to terminate his claim for IAPD to the Social Services Appeal Board on January 24, 2019, on the grounds that, among other things, his basic needs budget as determined by the EIA program was insufficient to meet what he had identified as his basic needs. The Board denied his appeal. He re-applied for IAPD on April 1, 2020, but his application was closed on April 20, 2020, when he did not provide all of the supporting documentation required.

[58] Mr. Hutlet had no further contact with the EIA program until he commenced this proceeding on August 30, 2021. His lawsuit prompted the EIA program to suggest that he re-apply for IAPD on the basis of his current financial circumstances, given that more

than a year had passed since his last application, and EIA shelter rates had increased in the interim.

[59] On September 15, 2021, Mr. Hutlet, through his counsel, made a fresh application for IAPD. According to Darren Macdonald, the EIA program's Senior Director for Quality Assurance, Mr. Hutlet's application was assessed on the basis of the information provided, but was again found to be ineligible because his CPP-D benefits exceeded his basic needs budget.

[60] Running out of money and fearing he might soon be evicted from his apartment as a result, on September 15, 2021, Mr. Hutlet applied to Manitoba Housing for subsidized public housing. Mr. Hutlet's application indicated he was only willing to live in the south region of Winnipeg. He was told no rental units were currently available in that region, and that the wait list could be lengthy. He was referred to a list of non-profit housing providers who offer housing options on rental terms similar to those provided by Manitoba Housing.

[61] Manitoba Housing did tell Mr. Hutlet that a subsidized unit would be available in Winnipeg's central area by November 1. As it turned out, by September 28, 2021, Manitoba Housing was in a position to offer him a subsidized rental unit in a downtown Winnipeg location, at 444 Kennedy Street, effective October 1, 2021. Based on his CPP-D, his subsidized rent for that unit would be $356 per month plus a small charge for lights.

[62] Although $356 per month compared favourably to Mr. Hutlet's current rent of $902 per month, Mr. Hutlet declined the offer from Manitoba Housing, primarily for three

reasons. First, his current apartment was within a 10-minute drive of his mother and several members of his extended family, on whom he relies for transport to many of his medical appointments. The Kennedy Street apartment was much farther away, and would therefore reduce their ability to provide that kind of assistance. Second, at 351 square feet, the Kennedy Street studio apartment was considerably smaller than his 695 square foot, one bedroom apartment. There would be no space in the smaller apartment for his in-home massage therapy or physiotherapy treatments. Moreover, in-home massage, physiotherapy and trauma therapy must be provided in a room separate and apart from a bedroom, and that would not be possible in the Kennedy Street apartment. Third, after careful analysis of media reports and other publicly available information, he concluded that the Kennedy Street apartment would not be as sanitary, safe or secure as his current apartment.

[63] Manitoba takes issue with Mr. Hutlet's reasons for declining the Kennedy Street apartment. According to Ms. March, 444 Kennedy Street complies with all of Manitoba Housing's standards, including health and safety. It has daily on-site security from 4:00 p.m. to 5:00 a.m., card access and an extensive network of security cameras throughout the building. Bus stops are located within a one minute walk from the building, giving Mr. Hutlet access to bus routes reasonably comparable to his current routes. Manitoba casts doubt on Mr. Hutlet's need for in-home massage and physiotherapy treatment because it is not supported by a specific medical recommendation.

[64] While I am satisfied on the evidence that Kennedy Street provides appropriate housing for its tenants, I cannot fault Mr. Hutlet for his decision to decline Manitoba

Housing's offer, based as it was on a reasonable, albeit highly subjective, assessment of his personal needs and interests.

[65] Mr. Hutlet, on the other hand, asserts that Manitoba contrived Manitoba Housing's offer of the Kennedy Street apartment to moot his motion for interlocutory injunctive relief. He submits it was only the filing of his motion which prompted Manitoba to advance him to the front of a long queue of individuals ranked ahead of him on Manitoba Housing's waiting list.

[66] I find Mr. Hutlet's complaint to be speculative and without substance. I am satisfied on the basis of Ms. March's explanation of Manitoba Housing's allocation process that Mr. Hutlet's application for subsidized housing was handled by Manitoba Housing in accordance with its usual policy and procedure, with no ulterior motive.

[67] Having declined Manitoba Housing's offer, Mr. Hutlet then applied to Rent Assist, the support program offered under the EIA program for individuals who are not in subsidized housing. His application was approved. In the result, he received a rent support payment of $121.45 effective November 1, 2021 based on reported taxable income of $23,200. (As discussed below, his taxable income in 2020 and 2021 was skewed upward by his receipt of CERB and CRB in those years.) His Rent Assist support will be adjusted annually on November 1, and is likely to increase considerably, to over $360 per month, on the assumption that his only income in 2022 will be from CPP-D.

[68] Mr. Hutlet swore a supplemental affidavit in these proceedings on November 1, 2021, which contained new information concerning his health care expenses. Manitoba reconsidered Mr. Hutlet's EIA application in light of this new information, and determined

that while his CPP-D benefits still exceeded his basic needs budget, he did not have sufficient income left to cover his eligible essential health care expenses. As a result, Manitoba advised Mr. Hutlet that he was eligible for supplemental health care benefits under the EIA program by letter dated December 3, 2021.

[69] After careful consideration, Mr. Hutlet declined those benefits. Although Manitoba contends he acted unreasonably in doing so, he claims he was justified by his concerns that he could not both receive those benefits and temporary financial support from his mother, who was then providing him a monthly loan of $1,000 from the money he had repaid her in November 2019. Mr. Hutlet feared, not unreasonably, that this arrangement might be assessed by the EIA program as a gift, not a loan, in excess of the $500 monthly limit for gifts set under s. 8(1)(a)(viii.1) of the ***Assistance Regulation***. (On cross-examination, Mr. Macdonald stated that Manitoba has no template for documenting whether monies are in fact loans and not gifts, that permitted loans are generally limited to those which predate applications for EIA, and that decisions are made on a case-by-case basis.) Faced with the choice, he decided he would be in a better financial position if he continued to receive his mother's assistance than accept supplemental health benefits.

[70] Mr. Hutlet is also suspicious that Manitoba's decision to extend supplemental health care benefits to him by its letter of December 3, 2019 was not *bona fide*, but instead a strategic response made with a view to mooting his application. Manitoba denies this. It explains the decision on the basis of Mr. Macdonald's uncontradicted evidence. Mr. Macdonald attests that while Mr. Hutlet's unsuccessful application for

health care benefits in September 2021 contained only one invoice from his massage therapist and a few prescription receipts, his November affidavit contained much more pertinent information about his health expenses, so leading to the approval of his claim for supplemental health care benefits under the ***Assistance Regulation***.

[71] I accept Mr. Macdonald's explanation. The evidence gives me no reason to believe Manitoba acted improperly in its review of Mr. Hutlet's various applications to the EIA program for benefits.

[72] That said, Mr. Hutlet's experience with his applications to the EIA program and to Manitoba Housing do reflect how profoundly difficult it must be to live in poverty. Mr. Hutlet is a vulnerable, disabled person. He regularly has to expend considerable time, effort and energy to obtain, assemble, complete and submit documents and information to support his ongoing eligibility for IAPD benefits, including supplemental health benefits and Rent Assist. The rules and procedures surrounding these programs are complicated and can be confusing. The evidence indicates there is a very high demand for social assistance and subsidized housing in Manitoba. Staff responsible for meeting this demand appear to be burdened with a heavy workload, which no doubt hinders their ability to assist applicants navigating their way through the complexities of the relevant programs. While I do not ascribe any ill motive to Manitoba's handling of Mr. Hutlet's case, I am also very sympathetic to his sense of anxiety, weariness and frustration with the process.

[73] Mr. Hutlet's income in 2020 and 2021 was augmented considerably by Canada's CERB and CRB programs. In May 2020 he applied for CERB. His application was approved, and he received a total of $10,900 under that program for the year 2020 – this

in addition to his CPP-D. In January 2021 he applied for CRB. His application was approved, and as of July 1, 2021, he had received a total of $8,100 under that program.

[74] At this point it is unclear whether Canada will seek to recover CERB or CRB payments from Mr. Hutlet or other recipients like him. Mr. Hutlet became concerned about this in November 2020, when a Canada Revenue Agency representative told him that on her interpretation of the rules governing CERB he was ineligible and would eventually have to repay the CERB benefits he had received.

[75] Where does this leave Mr. Hutlet? He remains disabled and unemployed. He receives CPP-D. He continues to reside in his apartment in Winnipeg's south region at a monthly rent of $902, supported by a Rent Assist benefit of $121. He has kept his private health insurance policy in force, because even after payment of the monthly premium of $91.10 and applicable deductibles, he is in a better financial position with the policy than without it. He follows his doctors' advice with respect to treatment of his medical conditions. He depends on an array of therapy and medication to treat these various conditions, all of which have been prescribed by his family physician, psychiatrist or dentist. These include (with Mr. Hutlet's estimated average monthly cost noted after each) registered massage therapy ($115), trauma therapy ($125), physiotherapy ($110), six different prescription medications ($341), dental care ($41) and vision care ($28).

[76] Mr. Hutlet does not qualify for the IAPD living allowance because of the amount of his CPP-D. He has declined supplemental health care benefits from the EIA program in favour of ongoing financial assistance from his mother. His mother's ability to provide such assistance is very limited, however, and her monthly loans ended shortly after the

parties made their submissions in court. He waits anxiously to see whether Canada will take steps to recover the payments he received under the CERB and CRB programs.

[77] Mr. Hutlet filed a forecasted summary of his 2022 finances as Exhibit 10 to his affidavit sworn January 17, 2022. In it he provides a comparative analysis of the average value of his "unmet needs per month" in five different scenarios. In every scenario he bases the cost of his needs on MBM for 2019, adjusted to account for inflation and for the cost of his disability needs, because MBM does not include any disability-related costs. Every scenario is also adjusted for total income.

[78] Mr. Hutlet's analysis includes the best-case scenario for which he advocates, namely, one in which he receives CPP-D ($1,190 in 2022), the IAPD living allowance under Division 2 of Schedule A ($1,138 in 2022) and health care expenses coverage under Division 3 of Schedule A. But even in that scenario, which assumes a total monthly income of $2,328 plus $556 from EIA for health care benefits, Mr. Hutlet calculates a $188 monthly shortfall in meeting his subsistence needs.

[79] By comparison, he calculates that if he lived off CPP-D and Rent Assist alone, the value of his monthly unmet needs in 2022 would be $1,506. He calculates if he received only CPP-D and EIA supplemental health care benefits (still using his monthly estimate of $556), the value of his monthly unmet needs would fall slightly, to $1,326.

[80] In none of the five hypothetical scenarios presented by Mr. Hutlet does he achieve the MBM benchmark which he says is required to meet his subsistence needs.

[81] Manitoba disputes Mr. Hutlet's analysis. It argues Mr. Hutlet's budgets do not reflect his subsistence needs, because he uses MBM, which reflects a materially higher

standard of living than mere subsistence, to calculate them. It also argues the cost of his "basic needs" – by which it means the cost of the living allowance for basic necessities, health care expenses and shelter assistance to which he may be entitled under ***The Manitoba Assistance Act*** and the ***Assistance Regulation*** – can be met through a combination of CPP-D, subsidized housing (which he has declined), EIA supplemental health benefits (which he has declined), and other benefits, such as home care assistance to clean his apartment, which he has not yet investigated.

[82] Mr. Hutlet's situation leaves him despondent. He has contemplated, but has not pursued, medically assisted death. He notes with irony that while the basic, modest standard of living reflected in the MBM is beyond his financial reach, a medically assisted death, fully funded by Manitoba health insurance, would be well within his means.

[83] It is clear to me that Mr. Hutlet's economic circumstances subject him to much greater than ordinary stress or anxiety. He makes his way precariously from one month to the next like an acrobat crossing a high wire, carefully balancing the allocation of every dollar against very simple and fundamental needs. He cannot afford to put a foot wrong; even a tiny stumble may bring a severe, even catastrophic, result.

## The issues

[84] The issues presented by this application, and my conclusions with respect to each, are:

(a) the ***Poverty Reduction Act*** does not set a legal benchmark for subsistence support in Canada;

(b) the absence of CPP-D in s. 8(1)(b) of the ***Assistance Regulation*** does not violate s. 7 of the ***Charter***;

(c) the absence of a mandatory coordination provision in s. 80.1(4) of the ***CPP*** does not violate s. 7;

(d) the absence of CPP-D in s. 8(1)(b) of the ***Assistance Regulation*** does not discriminate against Mr. Hutlet in violation of s. 15(1) of the ***Charter***;

(e) absent a violation of the ***Charter***, there is no need to address whether s. 8(1)(b) is a reasonable limit under s. 1; and

(f) Mr. Hutlet's application for relief in respect of CERB and CRB is premature.

## Discussion and disposition

### (a) The *Poverty Reduction Act* does not set a legal benchmark for subsistence support in Canada.

[85] The ***Poverty Reduction Act***, Mr. Hutlet argues, sets a benchmark, the MBM, by which to measure "the Official Poverty Line" in Canada. As such, an individual or family whose income is less than the MBM determined for their region by Statistics Canada lives in poverty, not just as a matter of economic and social policy, but also as a legal matter. Mr. Hutlet's s. 7 right to life, liberty and security of the person must therefore be interpreted in light of Parliament's intent on the issue of poverty as expressed in that ***Act***.

[86] I disagree. Nothing in the ***Poverty Reduction Act*** suggests that Parliament intended its metrics generally, or MBM in particular, to be used in the manner for which Mr. Hutlet contends – to establish a minimum level of income or social support for Canadians, or as a constitutional yardstick by which to measure provincial social assistance programs' compliance with s. 7 of the ***Charter***. Rather, MBM's explicit purpose

is to "measure the level of poverty in Canada and to assess progress in meeting the targets set out in s. 6": s. 7(1).

[87] Moreover, I find no support in the ***Poverty Reduction Act*** for Mr. Hutlet's contention that MBM is intended to represent a standard of living where subsistence needs are met, and nothing more. Again, the plain language of the ***Act*** suggests otherwise. The "Official Poverty Line", for instance, defined as the "Market Basket Measure", is to be reviewed on a regular basis by Statistics Canada "to ensure that it reflects the up-to-date cost of a basket of goods and services representing a modest, basic standard of living in Canada", not a "subsistence standard of living" (s. 7(2); underlining added).

[88] The difference between subsistence needs and a modest, basic standard of living is readily apparent when one considers how "subsistence" is commonly defined and understood: "the minimum (as of food and shelter) necessary to support life" (Merriam-Webster Online Dictionary); "the state of having what you need in order to stay alive, but no more" (Cambridge Online Dictionary); "the state of having just enough money or food to stay alive" (Online Oxford Advanced Learner's Dictionary). Had Parliament intended to use subsistence needs as the standard by which to measure progress in meeting the poverty reduction targets in the ***Act***, instead of a modest, basic standard of living, it could have easily expressed itself in those terms. Given that it did not, I am left to conclude this was not Parliament's intention.

[89] While it is not necessary to refer to extrinsic evidence to discern the meaning of MBM in the ***Poverty Reduction Act***, Mr. Hutlet does so by reference to "*Opportunity*

*for All – Canada's First Poverty Reduction Strategy*." But I find that report is actually unhelpful to his position. As I have already noted, the report elaborates that the "modest, basic standard of living in Canada" reflected in MBM includes "items such as clothing and footwear, transportation, and nutritious food and shelter (including electricity, heat and clean water), and other necessary goods and services, such as personal care items and household supplies" (p. 65), as well as "basic telephone service, reading, recreation, entertainment and school supplies" (p. 70). While none of these items should be seen as extravagant or luxurious, they clearly represent something more than a mere subsistence standard of living.

[90] Finally, it is worth noting that Mr. Stapleton, the expert on income support benefit design and social policy on whom Mr. Hutlet relies, acknowledged in cross-examination that the MBM is not a subsistence line.

[91] In summary, Mr. Hutlet's assertion that the ***Poverty Reduction Act*** sets a legal benchmark for subsistence support in Canada is not supported by the ***Act's*** stated purpose, its plain meaning, or relevant extrinsic evidence. His argument puts the ***Poverty Reduction Act*** to a purpose for which it was not intended, and misconstrues the term "MBM" by equating it with subsistence support.

### (b) The absence of CPP-D in s. 8(1)(b) of the *Assistance Regulation* does not violate s. 7 of the *Charter*.

[92] Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[93] As a matter of law, s. 7 is only engaged if the claimant can demonstrate that (a) the state has deprived them of their life, liberty or security of the person, and (b) the deprivation is not in accordance with the principles of fundamental justice (***Carter v. Canada (Attorney General)***, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 55).

[94] Turning to the first branch of this test, Mr. Hutlet submits the omission of CPP-D as an exempt financial resource under s. 8(1)(b) of the ***Assistance Regulation*** – what I have described as the offset of CPP-D income – is unconstitutional, because it deprives him of access to IAPD. Put another way, he asserts a right to receive IAPD in addition to his CPP-D to the extent necessary to keep his income above the level of support determined by MBM.

[95] Mr. Hutlet argues that while Manitoba is under no obligation to establish an income assistance program, once it chooses to do so, its program must comply with the ***Charter***. In this case, it does not, because the effect of the CPP-D offset is to deprive him of financial resources (i.e., IAPD) necessary for his subsistence support, in violation of s. 7.

[96] Mr. Hutlet relies on two Supreme Court decisions in support of his argument, ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 (S.C.C.), and ***Chaoulli v. Quebec (Attorney General)***, 2005 SCC 35, [2005] 1 S.C.R. 791 (QL).

[97] In ***Morgentaler***, the court struck down a provision in the ***Criminal Code***, R.S.C. 1970, c. C-34, which criminalized abortion except where the woman seeking the abortion, and those providing it, had complied with certain procedural requirements set forth in s. 251. Meeting those requirements, however, caused serious delay. That delay prevented women from gaining access to abortion in timely fashion, so threatening their

physical and psychological health. By preventing timely access to therapeutic abortion facilities by threat of criminal prosecution, the law was depriving women of the constitutional right to security of the person guaranteed by s. 7.

[98] In ***Chaoulli***, the court struck down certain legislation enacted in Quebec prohibiting private health insurance. The applicants had attacked the prohibition on the grounds that it deprived them of access to timely health care services. Long delays in the publicly funded system, they contended, gave rise to the same kind of risks to physical and psychological health identified in ***Morgentaler***. Their argument found favour with the majority, who wrote at para. 119:

> In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. …

[99] Mr. Hutlet urges me to follow suit, by finding that the legislative scheme of the ***Assistance Regulation*** deprives him of the right to fully realize his rights under s. 7.

[100] I do not accept his argument. I find the comparison to ***Morgentaler*** and ***Chaoulli*** inapt. The applicants in those cases were challenging laws which, by virtue of their design, impeded their access to timely health care. In this way the applicants in both cases were hindered by the state in exercising their right to security of the person. In neither case did the court find that the applicants' right to security of the person imposed an obligation on government to provide a service.

[101] Mr. Hutlet's circumstances are different. The ***Assistance Regulation*** does not hinder him in exercising his rights under s. 7. Rather, it operates to augment his income

where his available financial resources are insufficient to meet his basic needs budget as determined by reference to the Schedules to the ***Assistance Regulation***. In other words, it is a legislative scheme designed to confer a benefit, however modest, on eligible applicants. In this respect it is quite distinct from the legislation at issue in ***Morgentaler*** and ***Chaoulli***.

[102] Mr. Hutlet's situation might be otherwise if his eligibility for IAPD were conditional on registration in an organ donor or blood donation program. Legislation designed to limit access to social assistance benefits based on prior consent to such intimate physical intrusion by the state might well run afoul of s. 7. But the ***Assistance Regulation's*** treatment of CPP-D does not involve any act of state intrusion, physical or otherwise, on Mr. Hutlet.

[103] Although Mr. Hutlet suggests he is not asserting a self-standing s. 7 right to social assistance – that is, a positive economic right – I find his argument amounts to just that. The gist of his complaint is that the support he receives from Manitoba is less than is necessary for his subsistence support, which he equates to the MBM. Mr. Hutlet's reluctance to cast his argument in such terms is no doubt influenced by a powerful line of authority to the effect that s. 7 does not guarantee economic rights, provide a positive right to any particular level of social assistance, or impose an obligation on the state to implement social benefit programs. The majority opinion in ***Gosselin v. Quebec (Attorney General)***, 2002 SCC 84, [2002] 4 S.C.R. 429 is the leading decision on this point, and the following brief survey illustrates the uniformity of opinion across Canada at all levels of court:

(a) ***Gosselin***, which upheld legislation limiting the amount payable in Quebec to welfare recipients under the age of 30 not enrolled in certain education or work experience programs to approximately 30% of the amount paid to those over the age of 30. The case is notable for the following oft-quoted passage at para. 81:

> Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar."

(b) ***Tanudjaja v. The Attorney General of Canada et al.***, 2013 ONSC 5410, 116 O.R. (3d) 574, aff'd 2014 ONCA 852, leave to the Supreme Court of Canada dismissed, in which the applicants unsuccessfully asserted a right to affordable housing. Lederer J. held that there is no positive constitutional obligation on the federal or provincial government to implement programs to alleviate homelessness;

(c) ***Yashcheshen v. Saskatchewan (Ministry of Health)***, 2020 SKQB 4, [2020] S.J. No. 14, in which the applicant failed to persuade the court that s. 7 imposed a positive obligation to provide coverage for a particular drug on which she relied to maintain her health (para. 73);

(d) ***A.C. v. Alberta***, 2021 ABCA 24, 22 Alta. L.R. (7th) 255, leave to appeal denied, in which a 22-year-old Indigenous woman unsuccessfully sought injunctive

relief against Alberta to suspend an amendment to a social assistance program which would result in the termination of benefits at age 22 instead of 24 on the grounds that the reduction in assistance violated her s. 7 rights (paras. 67 – 68);

(e) ***Scott v. Canada***, 2017 BCCA 422, 417 D.L.R. (4th) 733, in which the plaintiffs' claim that a reduction in veterans' benefits violated s. 7 was struck out on the grounds that their concern was "… not with a deprivation imposed by government, but rather with the inadequacy of a government program designed to ameliorate the situation of the plaintiffs." (para. 89);

(f) ***Hennessey (Litigation guardian of) v. Manitoba***, 2022 MBQB 143, [2022] M.J. No. 483 (QL), in which Toews J. followed and applied ***Gosselin*** to dismiss the plaintiffs' attack on the constitutionality of provincial legislation pursuant to s. 7 (paras. 28 – 29). Like Mr. Hutlet's case, this case also concerned ***The Manitoba Assistance Act*** and the ***Assistance Regulation***. At issue was a scheme permitting a custodial parent to assign child support payments received from a non-custodial parent to the EIA program. But for the assignment, the amount of child support was treated as a financial resource available to the custodial parent, so reducing the amount of EIA assistance payable to that parent. In this sense the plaintiffs found their assistance benefits subject to an offset similar to the CPP-D offset with which Mr. Hutlet's application is concerned.

[104] Mr. Hutlet also challenges the constitutionality of s. 8(1)(b) under s. 7 "because it does not exclude CPP-D as an income source to the extent necessary that an individual who would otherwise be eligible for the IAPD program becomes ineligible for any supplementary prescription, health and medical benefits [i.e. supplemental health care benefits] provided by that program" (Amended Notice of Application, para. 2(t)).

[105] Mr. Hutlet contrasts this aspect of Manitoba's EIA program with the Ontario Disability Support Program created by the ***Ontario Disability Support Program Act***, 1997, S.O. 1997, c. 25, Sched. B. He submits Ontario's program is structured so as to ensure that applicants who do not qualify for cash support nevertheless remain eligible for supplementary health care benefits as a matter of legal right.

[106] Mr. Hutlet contends that because he does not qualify for the IAPD living allowance, his eligibility for supplemental health care benefits is not a matter of legal right, but is instead left to the discretion of the EIA program administrators. He says this is borne out by s. 22.1.6 of the EIA Administrative Manual, entitled "Health Card Only", which provides in part: "Where the applicant's resources are sufficient to meet all basic living costs, other than health care [so leaving the applicant ineligible for the IAPD living allowance], eligibility for Health Services only [i.e., supplemental health care benefits] may be considered" [underlining added]. At best, this element of discretion leaves him at the mercy of the EIA program, adding considerably to his stress and anxiety; at worst, in the event coverage is not approved or paid in advance, he may be deprived of access to necessary medical treatment.

[107] Mr. Hutlet identifies three discretionary elements in the EIA supplemental health benefits program to reinforce his point. First, the ***Assistance Regulation*** does not guarantee coverage for certain treatments, including registered massage therapy, physiotherapy and trauma therapy. Second, there is no guarantee that such treatment will be paid by the EIA program in advance, which is important to Mr. Hutlet because he lacks the means to pay for treatment himself and await reimbursement. Third, as part of its approval process the EIA program considers whether free or lower cost alternatives are reasonably available, setting up the possibility that Mr. Hutlet will be pressed to accept alternatives which he considers unreasonable because they are either not readily available or otherwise unsuitable.

[108] I do not accept Mr. Hutlet's argument. My interpretation of the ***Assistance Regulation*** leads me to a different conclusion.

[109] To begin, where an applicant is determined to be ineligible for an IAPD living allowance because of the amount of that applicant's CPP-D, they nevertheless remain eligible for supplemental health care benefits in accordance with s. 4, s. 4.1 and Schedule A of the ***Assistance Regulation***. There is nothing in the ***Assistance Regulation*** to suggest otherwise, and I do not interpret s. 22.6.1 of the EIA Administrative Manual as being inconsistent with those eligibility provisions. As I read that section, the phrase "may be considered" simply means that an applicant's eligibility for health care benefits in those circumstances remains to be determined by the criteria set out in the ***Assistance Regulation***.

[110] Second, the mere fact that some supplemental health care benefits are discretionary does not amount to a violation of his s. 7 rights. It is true that the three matters which Mr. Hutlet highlights involve an element of discretion, but that does not make them unique. Indeed, the determination of all of the amounts payable in respect of health care under Division 3 of Schedule A of the ***Assistance Regulation*** involve the exercise of some measure of judgment or discretion by those administering the EIA program. For instance, an applicant must demonstrate that claims falling under clauses (a) to (d) are "essential"; claims falling under clause (e) must be "prescribed by a duly qualified medical practitioner"; claims falling under clauses (f) to (h) must be authorized by the director. In this way, I assume, the EIA program retains a degree of control over its expenditures. Manitoba argues it would be unreasonable to expect a government social assistance program like EIA to make payments to an applicant in respect of their health care based on an estimate of health care expenses, rather than on verified, actual expenses supported by information which speaks to their reasonableness, and I agree.

[111] Third, I find, despite his submissions to the contrary, that Mr. Hutlet's argument with respect to supplemental health care benefits amounts to a claim for a self-standing right to social assistance. In effect, he aims to secure a right to a guaranteed level of health care coverage. But as McLachlin C.J. observed in ***Chaoulli*** (para. 104): "The *Charter* does not confer a freestanding constitutional right to health care."

[112] To conclude this portion of my reasons, I find Mr. Hutlet has not established that s. 8(1)(b) of the ***Assistance Regulation*** works to deprive him of his s. 7 rights, either

by depriving him of access to the IAPD living allowance or by depriving him of access to supplemental health care benefits.

[113] Having found no deprivation of his rights under s. 7, it is unnecessary for me to consider the second branch of the test in ***Carter***, whether the deprivation is not in accordance with the principles of fundamental justice.

### (c) Section 80.1(4) of the *Canada Pension Plan* does not violate s. 7 of the *Charter*.

[114] Section 80.1 of the ***Canada Pension Plan*** is entitled "Agreements respecting the apportionment of payments." It was added to the ***CPP*** in 1998. Among other things, it creates a legal framework whereby the federal government can enter into intergovernmental agreements with provinces to coordinate the total amount received by a CPP-D beneficiary who is also eligible for coverage under a qualifying provincial program.

[115] As noted earlier, Canada submits s. 80.1 is primarily directed at the coordination of CPP-D with provincial Workers Compensation Board benefits. It permits Canada to enter into federal-provincial agreements that limit the total benefits payable to an individual by both CPP-D and the provincial WCB. As also noted earlier, s. 80.1 has never been used, and at present there is no agreement between Canada and Manitoba with respect to CPP-D and EIA benefits.

[116] In theory, s. 80.1(4) could be amended to require terms in intergovernmental agreements to limit coordination provisions from reducing the amount of CPP-D and provincial assistance benefits payable to a recipient below what is necessary for their subsistence support. So, in the context of this application, s. 80.1(4) could be amended

to limit Canada from entering into an agreement with Manitoba to coordinate CPP-D and EIA benefits that does not include a term that the recipient's combined CPP-D and EIA benefits (including supplemental health benefits) will not be reduced below what is necessary for their subsistence support.

[117] Mr. Hutlet goes further. He submits not only could s. 80.1(4) contain such a limiting provision, but that it must, because without it, s. 80.1(4) violates s. 7. His argument is based on a novel application of the principle of underinclusivity established in ***Dunmore v. Ontario (Attorney General)***, 2001 SCC 94, [2001] 3 S.C.R. 1016, which until now has been restricted to protection of the fundamental freedoms set out in s. 2.

[118] The ***Dunmore*** test for underinclusiveness may be summarized: first, that the claim be grounded in a fundamental freedom enumerated in s. 2; next, that the lack of access to a statutory regime, in purpose or effect, substantially interferes with a fundamental freedom; finally, that the government is responsible for the inability to exercise the fundamental freedom. In ***Dunmore***, the application of this principle led the court to conclude the wholesale exclusion of agricultural workers from Ontario's labour relations regime under its ***Labour Relations Act*** infringed their right to freedom of association under s. 2(d) in a manner that was not justifiable under s. 1.

[119] Mr. Hutlet contends that the ***Dunmore*** test can be applied by extension to s. 7, as follows. First, s. 80.1 is a protective statutory provision that safeguards his s. 7 interests to life and security of the person through s. 80.1(4)(c), by prohibiting any intergovernmental agreement which results in a CPP-D recipient receiving less than the

amount of CPP-D that would otherwise be payable if there were no such agreement. Next, in the absence of the benefit coordination provision for which he contends, he is substantially deprived of his s. 7 interests, because s. 8(1)(b) of the ***Assistance Regulation*** "claws back" his CPP-D from him. And finally, by failing to enact s. 80.1(4) in appropriate form to prevent such a "clawback", Canada is responsible for his deprivation.

[120] Canada and Manitoba respond, correctly in my view, that this argument is seriously flawed.

[121] To begin, the application of the ***Dunmore*** test depends on the existence of a positive rights claim (***Toronto (City) v. Ontario (Attorney General)***, 2021 SCC 34, 462 D.L.R. (4th) 1, at paras. 22 – 24). As I noted earlier, Mr. Hutlet has conceded that he is not advancing a claim to a "self-standing right" under s. 7. Such an attack would be inconsistent with settled jurisprudence to the effect that s. 7 does not impose a positive obligation on governments to enact legislation, and therefore could not serve as a basis to compel Canada to enact s. 80.1 in any particular form (***Canadian Doctors for Refugee Care v. Canada (Attorney General)***, 2014 FC 651, [2015] 2 F.C.R. 267, at paras. 568-69).

[122] Second, not only is Mr. Hutlet's proposed extension of underinclusiveness to s. 7 novel, ***Dunmore*** itself appears to militate against it. The court in ***Dunmore*** held that a claim of underinclusivity must be grounded in a fundamental ***Charter*** right, and not merely access to a statutory regime. Indeed, the majority held that while claims for inclusion in legislation would "normally be the province of s. 15(1) of the ***Charter***, claims

for inclusion may, in rare cases, be cognizable under the fundamental freedoms [i.e., s. 2]" (para. 30; underlining added). Needless to say, Mr. Hutlet's application does not raise a "rare" case under s. 2, but an unprecedented case under s. 7.

[123] Third, even if s. 80.1(4) read as Mr. Hutlet suggests it should, Canada would still be under no obligation to enter into an agreement with Manitoba to coordinate CPP-D and EIA benefits under s. 80.1. Section 7 does not impose an obligation on governments to enter into intergovernmental agreements. From a purely practical perspective, his proposed modification of s. 80.1(4) would bring him no closer to securing a right to receive IAPD benefits on top of CPP-D.

[124] For these reasons, I conclude s. 80.1(4) does not violate s. 7 of the ***Charter***.

### (d) The absence of CPP-D as an exempt resource in s. 8(1)(b) of the *Assistance Regulation* does not discriminate against Mr. Hutlet in violation of s. 15(1) of the *Charter*.

[125] Mr. Hutlet submits Manitoba's failure to include CPP-D as an exempt financial resource in s. 8(1)(b) of the ***Assistance Regulation*** discriminates against him on the basis of his disability, in violation of s. 15(1) of the ***Charter***.

[126] Disability is a protected ground under s. 15(1), which provides:

> 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.

[127] At the outset, it is worth noting that Mr. Hutlet's assertion that the ***Assistance Regulation's*** treatment of CPP-D is discriminatory is not unprecedented, and similar provisions have been found not to violate s. 15. For instance, in ***Franks v. British Columbia (A.G.)***, 1999 BCCA 407, [1999] B.C.J. No. 1672, the court held that reducing

social assistance benefits by the amount of the applicant's CPP-D benefits was not discriminatory because there was no distinction based on the grounds of disability. In ***MacKay v. British Columbia (Ministry of Social Development and Economic Security)***, 2003 BCCA 137, [2003] B.C.J. No. 496, the court held that the deduction of Canada Pension Plan survivor's benefits from the petitioner's social assistance benefits was not discriminatory because there was no distinction based on an enumerated ground – anyone, regardless of gender, was subject to the same deduction.

[128] By contrast, in ***Stadler v. Manitoba (Social Services Appeal Board, St. Boniface-St. Vital, Director)***, 2020 MBCA 46, [2020] M.J. No. 112, the Manitoba Court of Appeal found s. 12.1(2) of the ***Assistance Regulation*** infringed s. 15(1) of the ***Charter*** by forcing Mr. Stadler, who was disabled, to apply for Canada Pension Plan benefits at his first opportunity, at age 60. This had the profound impact on Mr. Stadler of permanently reducing his Canada Pension Plan income by 36% of the amount to which he would otherwise be entitled if he took his pension at age 65 – an adverse impact to which all disabled Canada Pension Plan recipients would be subject upon reaching the age of 60. The court found the gap between the historically disadvantaged group of disabled individuals and the rest of society was widened, rather than narrowed, as a result of this adverse impact, so leading to the conclusion that it was discriminatory (see paras. 94 – 95).

[129] Turning to Mr. Hutlet's challenge, in order to prove a *prima facie* violation of s. 15(1), he must demonstrate that s. 8(1)(b), on its face or in its impact, creates a distinction based on disability, and imposes on him burdens or denies him benefits in a

manner that has the effect of reinforcing, perpetuating or exacerbating his disadvantage. (See ***Fraser v. Canada***, 2020 SCC 28, 450 D.L.R. (4th) 1, at para. 27.) This test was recently restated by the majority in ***R. v. Sharma***, 2022 SCC 39, [2022] S.C.J. No. 39 (released subsequent to the hearing of this application) in these terms:

> [31] The first step examines whether the impugned law created or contributed to a *disproportionate impact* on the claimant group based on a protected ground. This necessarily entails drawing a *comparison* between the claimant group and other groups or the general population (*Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that *has the effect of reinforcing, perpetuating, or exacerbating a disadvantage*. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).

[130] On its face, s. 8(1)(b) is not discriminatory. To the extent it draws explicit distinctions, it does so on the basis of the financial resources available to applicants, and not on the basis of disability.

[131] Thus, it falls to Mr. Hutlet to demonstrate that s. 8(1)(b) creates or contributes to a disproportionate impact based on disability, and that this impact operates to deny him benefits available under the ***Assistance Regulation*** in a manner that reinforces, perpetuates or exacerbates his disadvantage.

[132] The identification of the group in relation to which Mr. Hutlet claims unequal treatment under s. 15(1) is important (***Granovsky v. Canada (Minister of Employment and Immigration)***, 2000 SCC 28, [2000] 1 S.C.R. 703, at para. 45). For the purpose of his argument, Mr. Hutlet identifies himself as a disabled Canada Pension Plan contributor whose disability is severe and prolonged, and who is therefore unable to

work at any gainful employment. As such, he qualifies for CPP-D benefits. He compares himself in relation to two groups.

[133] The first comparator group is disabled IAPD recipients who are also Canada Pension Plan contributors, but who do not qualify for CPP-D because their disabilities do not satisfy the "severe and prolonged" requirements set out in the ***CPP***. The second comparator group is disabled IAPD recipients whose disabilities do not prevent them from supplementing their benefits with labour market income pursuant to a limited earnings exemption of $200 per month contained in s. 8(4) of the ***Assistance Regulation***. Mr. Hutlet reasons that in both scenarios s. 8(1)(b) leaves him worse off than persons who are less disabled than he.

[134] In the first scenario, Mr. Hutlet argues, his less disabled counterparts qualify for the IAPD living allowance as well as the full suite of health care coverage available under the ***Assistance Regulation***. Meanwhile, Mr. Hutlet is denied the IAPD living allowance, because his CPP-D exceeds his basic needs budget, and his entitlement to supplemental health care benefits is reduced to a purely discretionary item. In the second scenario, his less disabled counterparts can avail themselves not only of their IAPD living allowance, but also to whatever opportunities they might have to augment their income through some form of employment within the exemptions permitted by s. 8(4). Mr. Hutlet says such opportunities are foreclosed to him because of his disability. Because s. 8(1)(b) does not permit him to make up for that perceived disadvantage by letting him stack the IAPD living allowance on top of his CPP-D, he is left in a worse financial position than his counterpart.

[135] I disagree. I find Mr. Hutlet has failed the first step of the two-step analysis on a s. 15(1) claim, in that he has not demonstrated s. 8(1)(b) creates or contributes to a disproportionate impact on him as compared to his two comparator groups.

[136] As regards Mr. Hutlet's first scenario, the impact of s. 8(1)(b) leaves him in no worse position under the EIA regime than less disabled persons who do not qualify for CPP-D. To the contrary, he is slightly better off. First, because of his CPP-D, Mr. Hutlet receives slightly more than the maximum amount of IAPD living allowance available under the ***Assistance Regulation***. Second, he remains eligible for EIA supplemental health benefits. On this latter point, in my view Mr. Hutlet has based his argument on an incorrect interpretation of his eligibility for supplemental health care benefits. As I have explained, on a proper interpretation of the ***Assistance Regulation***, Mr. Hutlet remains eligible for supplemental health care benefits even if he is not eligible for the IAPD living allowance.

[137] As regards the second scenario, there is no evidence that the $200 earnings exemption in s. 8(4) of the ***Assistance Regulation*** has a disproportionate impact on people who, like Mr. Hutlet, receive CPP-D because they suffer a severe and prolonged disability which prevents any type of substantially gainful work. The leading case describing the kind of evidence required to establish a claim of adverse impact is ***Kahkewistahaw First Nation v. Taypotat***, 2015 SCC 30, [2015] 2 S.C.R. 548, helpfully summarized by the Manitoba Court of Appeal in the following paragraph of ***Stadler***:

> [87] *Taypotat* is the leading case describing the evidence required by a claimant to be successful in a potential adverse impact claim. Whether Stadler in fact suffers

> an adverse impact is a question to be determined based on the record, in keeping with the evidentiary principles laid out in *Taypotat*, while reading the entire legislative scheme and purpose in its context. Statistical evidence is not required in every case to show that a facially neutral law infringes section 15 (see para 33); intuition may play a role; and the evidentiary burden "need not be onerous"—yet the claimant must point to more than a "web of instinct" (at para 34).

[138] Thus, while Mr. Hutlet need not present statistical evidence in support of his claim, and intuition may play a role, his claim does call for something more than a "web of instinct" based on his personal experience.

[139] On the one hand, while Mr. Hutlet may not be fit for any type of substantially gainful work, there is no evidence that he is not fit for any type of occasional work which might generate some income within the limits set by s. 8(4). On the other hand, there is no evidence that the disabled IAPD recipients to whom he compares himself are fit for substantially gainful work. At best, it seems Mr. Hutlet and his disabled counterparts in his second scenario are equally eligible to augment their income under the exemption provided in s. 8(4). Simply put, in these circumstances I see no evidence of an adverse impact being visited on Mr. Hutlet by the omission of CPP-D from the list of exempt income in s. 8(1)(b) of the ***Assistance Regulation***.

[140] Mr. Hutlet's situation differs from the applicant in ***Stadler***. In that case, the Court of Appeal found the discriminatory component of s. 12.1(2) to be the requirement forcing applicants to apply for Canada Pension Plan benefits at the earliest opportunity. This had a disproportionately adverse impact on disabled people. Section 8(1)(b) does not contain a comparable requirement, nor does it impose an adverse impact on disabled people. Rather, it merely requires applicants to seek out other income sources by taking such sources into account as available financial resources for the purpose of determining an

applicant's eligibility for benefits. In ***Stadler***, the same requirement was found to be not only lawful, but commonplace:

> [78] It is common ground that neither the general requirement in section 12.1(2) of the *Regulation*, that income assistance recipients must avail themselves of all other sources of income, nor its application to CPP benefits, directly targets disabled persons. The legislation is neutral on its face. Also, the requirement to make reasonable efforts to avail oneself of benefits applies to all manner of provincial and federal legislation, such as employment insurance and workers' compensation benefits.

[141] Leaving Mr. Hutlet's two comparator groups aside, his situation seems to compare favourably to the general population of income assistant recipients. Were I to accept his argument – that is, were I to accept that Mr. Hutlet has a right to stack the IAPD living allowance on top of his CPP-D up to an amount equal to the MBM benchmark – it would leave him in a much better position than income assistance recipients who are not eligible for Canada Pension Plan benefits, and who therefore lack Mr. Hutlet's financial resources. In short, while I am sympathetic to Mr. Hutlet's very difficult circumstances, at its core his argument seems to assert a right to social assistance without regard to the other financial resources available to him.

[142] To conclude, I find the exclusion of CPP-D as a financial resource in s. 8(1)(b) of the ***Assistance Regulation*** does not discriminate against Mr. Hutlet on the basis of disability.

**(e) Section 1 is not engaged.**

[143] Having found no infringement of Mr. Hutlet's s. 7 or s. 15 ***Charter*** rights, it is unnecessary to address whether s. 8(1)(b) is a reasonable limit under s. 1.

### (f) Mr. Hutlet's application in respect of CERB and CRB is premature

[144] Mr. Hutlet seeks an order prohibiting Canada from recovering any CERB or CRB payments from him for which he may not have been eligible. Any recovery of overpayments against him, he submits, would violate s. 7 of the ***Charter***, because it would place him at severe risk of eviction and homelessness.

[145] Canada argues in reply that Mr. Hutlet's application in this respect is premature, inasmuch as no collection efforts have been initiated against him to date, and whether any efforts will ever be taken against him remains uncertain. It also argues that the relief sought against Canada falls within the exclusive jurisdiction of the Federal Court pursuant to s. 18(1) of the ***Federal Courts Act***, R.S.C., 1985, c. F-7. Finally, it argues that recovery of CERB and CRB benefits would not engage s. 7 in any event, because s. 7 does not protect purely economic interests (a point discussed earlier in these reasons), and does not shield individuals from the financial effects of a court-sanctioned debt (citing ***Beals v. Saldhana***, 2003 SCC 72, [2003] 3 S.C.R. 416).

[146] In my opinion, it is sufficient to dispose of this aspect of Mr. Hutlet's application simply on the basis that it is premature. Ms. Humbert's evidence suggests that Canada has not made a decision to conduct CERB and CRB eligibility reviews, nor has it made a decision with respect to the form such a review process would take. For now, Mr. Hutlet's rights have not been affected by any decision made by Canada with respect to CERB or CRB, and he therefore has no basis on which to seek a remedy.

## Conclusion

[147] For these reasons, Mr. Hutlet's application is dismissed. While costs would ordinarily be granted in favour of the successful parties, in the particular circumstances of this case I order that each side bear its own costs. Mr. Hutlet's concerns are serious and genuine. He has raised important constitutional questions, with wide-ranging social implications. Finally, any award of costs against him, however modest, would have disproportionately serious and negative financial consequences for him.

[148] I granted an interim order in favour of Mr. Hutlet on July 22, 2022. Counsel should make arrangements for a further appearance before me to address whether, and on what terms, that order should be continued pending any appeal that might be taken from this decision, as well as any other issues that might flow from that order.

_____ J.