

**IN THE COURT OF APPEAL**

BETWEEN:

MARTIN STADLER,

(Appellant) Appellant,

- and -

DIRECTOR, ST. BONIFACE/ST. VITAL,

(Respondent) Respondent,

- and -

THE SOCIAL PLANNING COUNCIL OF WINNIPEG,

Intervenor.

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**FACTUM OF THE SOCIAL PLANNING COUNCIL OF WINNIPEG**

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4. Irene A Hamilton, Mel Holley & Shelley Menzikoi, *Manitoba Ombudsman, Report on Manitoba's Employment and Income Assistance Program: Updated with Departmental Responses to Recommendations*, (Winnipeg: Manitoba Ombudsman, December 2010)
5. Manitoba, *EIA Rate Review Fall 2013: A Review of the Total Income Available to Employment and Income Assistance Participants in Manitoba*, (Winnipeg: Government of Manitoba, 2013)
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24. Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000)

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39. Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Books, 2013)

## PART I. INTRODUCTION

1. This Appeal is about ensuring that Manitobans with disabilities in receipt of social assistance enjoy equal benefit of the law and are not condemned to perpetual poverty by a Regulation which effectively forces them to apply “early” for Canada Pension Plan Retirement pension (“CPP”) at a substantial personal and financial cost. The Appellant, Mr. Stadler, is a person with “chronic” physical disabilities. The severity of his condition left him unable to work and in ongoing reliance on Employment and Income Assistance (“EIA” or “social assistance”).<sup>1</sup> As Mr. Stadler approached age 60, he was informed by the Director that he had an obligation under s. 12.1(2) of the *Manitoba Assistance Act Regulation* (the “Regulation” or “impugned provision”) to apply “early” for CPP.<sup>2</sup>
2. Recognizing the substantial reduction in long term CPP benefits that would result from applying 'early' rather than at age 65, Mr. Stadler refused. His social assistance benefits were suspended. In appealing the Director's decision and challenging the Regulation before the Social Services Appeal Board (the “SSAB”), Mr. Stadler argued that the provision “discriminated against him on the basis of his physical disability and need for social

<sup>1</sup> Submission of the Appellant before the Social Services Appeal Board, Supplementary Appeal Book, Tab 1, at 11 (p. 9 of submission) [Appellant SSAB Submission].

<sup>2</sup> *Manitoba Assistance Regulation*, Man Reg 404/88R, s 12.1(2), s 12.1(4) [*Assistance Regulation*] [SPCW BOA TAB 1].

assistance.”<sup>3</sup> Persons with disabilities are disproportionately affected by the impugned provision because they are at greater risk of living in poverty and as a result are dramatically over-represented among those in receipt of social assistance. Similarly, at age 65, persons with severe disabilities such as Mr. Stadler are also more reliant on federal government benefits to ameliorate their poverty. The impugned obligation is discriminatory contrary to section 15 of the *Charter of Rights and Freedoms* (the “*Charter*”), and imposes multiple disadvantages on persons with disabilities in receipt of EIA. They are unable to access EIA without agreeing to apply early. They are denied the choice of when to apply for CPP. The resulting reduction in their CPP benefit leaves them more at risk of remaining in poverty with the possibility of lifetime dependence on EIA. This appeal raises fundamental questions regarding the equality rights of persons like Mr. Stadler. The SSAB erred by failing to apply a substantive equality approach and by failing to conclude that the Regulation perpetuated and exacerbated the burdens of an already disadvantaged group.

<sup>3</sup> Appellant SSAB Submission, *supra* note 1 at 13 (p. 15 of the submission).

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] [SPCW BOA TAB 2].

**PART 2. STATEMENT OF ADJUDICATIVE AND SOCIAL FACTS**

3. The Social Planning Council of Winnipeg (the “SPCW”) was granted leave to intervene on 21 March 2019.<sup>5</sup> It accepts the adjudicative facts underlying this appeal as set out in the Appellant's Statement of Facts. In the SSAB appeal, no legislative or social fact evidence were filed relating to the purpose of the legislation, the historic disadvantage of persons with disabilities or the particular effect of the alleged constitutional infringement. In the Order granting leave to intervene, the SPCW was granted permission to file four additional documents.<sup>6</sup> It relies on the following social facts:

- Persons with disabilities are among the groups at greatest risk of living in poverty in Canada and at higher risk of experiencing greater depths of poverty.<sup>7</sup> People with more *severe* disabilities are more likely to be living in poverty;<sup>8</sup>
- There are enduring concerns with the treatment of persons with disabilities in social assistance programs – with systems too often sidelining “persons with disabilities” and condemning them to “a life of poverty”;<sup>9</sup>

<sup>5</sup> *The Court of Appeal Rules*, Man Reg 555/88R, s 46.1(1) [SPCW BOA TAB 3].

<sup>6</sup> Irene A Hamilton, Mel Holley & Shelley Menzikoi, Manitoba Ombudsman, *Report on Manitoba's Employment and Income Assistance Program: Updated with Departmental Responses to Recommendations*, (Winnipeg: Manitoba Ombudsman, December 2010) [Manitoba Ombudsman Report] [SPCW BOA TAB 4]; Manitoba, *EIA Rate Review Fall 2013: A Review of the Total Income Available to Employment and Income Assistance Participants in Manitoba*, (Winnipeg: Government of Manitoba, 2013) [EIA Rate Review] [SPCW BOA TAB 5]; Statistics Canada, *Social Assistance Statistical Report: 2009-13*, Catalogue No HS25-2E-PDF (Ottawa: Statistics Canada, 2016) [Social Assistance Statistical Report] [SPCW BOA TAB 6]; Statistics Canada, *A Demographic, Employment and Income Profile of Canadians with Disabilities Aged 15 Years and Over, 2017*, by Stuart et al., (Ottawa: Statistics Canada, 28 November 2018) [Statistics Canada Report] [SPCW BOA TAB 7]. See: *The Court of Appeal Rules*, *supra* note 5, s 21 [SPCW BOA TAB 3].

<sup>7</sup> Statistics Canada Report, *supra* note 6 at 17, 19 [SPCW BOA TAB 7].

<sup>8</sup> Statistics Canada Report, *supra* note 6 at 11, 19, 23 [SPCW BOA TAB 7].

<sup>9</sup> EIA Rate Review, *supra* note 6 at 4, 6, 17-18 [SPCW BOA TAB 5]; Manitoba Ombudsman Report, *supra* note 6 at 60-61, 65-66 [SPCW BOA TAB 4].



- While constituting 22.3% of the Canadian population,<sup>10</sup> persons with disabilities are over-represented in the EIA program in Manitoba representing 57.9% of EIA applicants.<sup>11</sup> They are in receipt of EIA for a significantly longer duration than other EIA groups;<sup>12</sup>
- At age 65, the receipt of pension benefits along with Old Age Security (“OAS”) and the Guaranteed Income Supplement (“GIS”) is particularly important in terms of poverty outcomes for persons with more severe disabilities.<sup>13</sup>

### PART 3. LIST OF ISSUES

4. At issue is whether the SSAB erred in concluding that the obligation to apply early for CPP in s. 12.1(2) of the *Regulation* does not violate the Appellant's equality rights under the *Charter*. The SPCW position is that:

- The obligation to apply for “early” CPP violates the equality rights of Mr. Stadler and cannot be saved under s. 1 of the *Charter*<sup>14</sup>; and
- In addition to any personal remedies, this Court ought to issue a remedy under s. 52 of the *Constitution Act, 1982*<sup>15</sup>: a) declaring unconstitutional the obligation of EIA recipients aged 60-64 to apply “early” for CPP; and, b) reading down the impugned provision so as to exclude any obligation on EIA applicants/recipients aged 60-64 to apply 'early' for CPP.

<sup>10</sup> Statistics Canada Report, *supra* note 6 at 6 [SPCW BOA TAB 7].

<sup>11</sup> EIA Rate Review, *supra* note 6 at 8 (percentage of applicants per month) [SPCW BOA TAB 5]; Social Assistance Statistical Report *supra* note 6 at 84 [SPCW BOA TAB 6]. See also Manitoba Ombudsman Report, *supra* note 6 at 60 [SPCW BOA TAB 4].

<sup>12</sup> Social Assistance Statistical Report, *supra* note 6 at 86-90 [SPCW BOA TAB 6]; EIA Rate Review, *supra* note 6 at 9 [SPCW BOA TAB 5].

<sup>13</sup> See Statistics Canada Report *supra* note 6 at 17, 19 [SPCW BOA TAB 7].

<sup>14</sup> *Charter*, *supra* note 4, s 1 [SPCW BOA TAB 2].

<sup>15</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52 [*Constitution Act*] [SPCW BOA TAB 8].

## **PART 4. ARGUMENT**

### ***Overview***

5. The obligation on social assistance recipients aged 60-64 to apply 'early' for CPP creates distinctions based on the intersecting grounds of person in 'receipt of social assistance' and disability. The burden imposed by the Regulation has the effect of reinforcing, perpetuating and exacerbating the disadvantage of Mr. Stadler and others in his situation. The impugned provision is not contrary to the *Charter* in all its applications. It is *only* with respect to a requirement to apply 'early' for CPP as a condition of EIA eligibility that the equality guarantee is infringed.

### ***Standard of Review***

6. Given the constitutional nature of the question, the SPCW agrees with the Appellant that the appropriate standard of review is correctness.<sup>16</sup>

### ***Overview of section 15 of the Charter***

7. The purpose of s. 15 of the *Charter* is to promote a society where laws recognize that “human beings are equally deserving of concern, respect and consideration.”<sup>17</sup> Since *Andrews*, the Supreme Court has consistently

<sup>16</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 58 [SPCW BOA TAB 9]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 30 [SPCW BOA TAB 10]; Donald J M Brown & The Honourable John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on 22 April 2019, Toronto, ON: Thompson Reuters, 2016) at 14-64 to 14-65 [SPCW BOA TAB 11].

<sup>17</sup> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 15 [SPCW BOA TAB 12] citing *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 171 [Andrews], *per* McIntyre J [SPCW BOA TAB 13]; *Quebec (AG) v*

emphasized that the equality guarantee is focused on substantive equality.<sup>18</sup> Substantive equality is “an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuate those disadvantages.”<sup>19</sup> The Supreme Court recently reaffirmed that the applicable test to establish a *prima facie* violation of 15(1) is:

- does the impugned law, on its face or in its impact, create a distinction based on an enumerated or analogous ground;
- if so, does the law impose “burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”<sup>20</sup>

***Part one: Distinction based on intersecting grounds of disability and “receipt of social assistance”***

8. The impugned Regulation requires social assistance recipients to make all reasonable efforts to obtain the maximum amount of benefits available under other Acts or programs including those of the Government of Canada.<sup>21</sup>

While neutral on its face, the *effects* of the impugned obligation and the

*A*, 2013 SCC 5, [2013] 1 SCR 61 at para 41 [Quebec v A] [SPCW BOA TAB 14].

18 *R v Kapp*, *supra* note 17 at para 15 [SPCW BOA TAB 12] citing *Andrews*, *supra* note 17 at 167-69 [SPCW BOA TAB 13]; *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 at para 39 [Withler] [SPCW BOA TAB 15].

19 *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548 at para 17 [Taypotat] [SPCW BOA TAB 16].

20 *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 SCR 464 para 25 [Alliance] [SPCW BOA TAB 17]; See also: *Taypotat*, *supra* note 19 at paras 19-20 [SPCW BOA TAB 16].

21 *Manitoba Assistance Regulation*, *supra* note 2, s 12.1(2) [SPCW BOA TAB 1].

corresponding Director's decision create *distinctions* based on disability and the 'receipt of social assistance.' The EIA program is intrusive and imposes significant obligations upon its recipients.<sup>2223</sup> The distinction is that the choice of when to apply for CPP is denied, further diminishing the already compromised autonomy of persons with disabilities in receipt of social assistance.<sup>24</sup>

*i. Disability and historic disadvantage*

9. It is “an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization.”<sup>25</sup> Facing historic disadvantage and “paternalistic attitudes of pity and charity,”<sup>26</sup> persons with disabilities are more likely to be “outside the labour force,” unemployed or at “the lower end of the pay scale.”<sup>27</sup> They face a disproportionately higher risk of poverty as well as greater depths of poverty.<sup>28</sup> While many Manitobans will receive a

22 See for example *Manitoba Assistance Act*, RSM 1987, c S160, CCSM c A150, s 5.4(1) [*Manitoba Assistance Act*] [SPCW BOA TAB 18] and *Assistance Regulation*, *supra* note 2, s 10(1) requiring an EIA recipient to meet specific employment obligations not to terminate or refuse employment and to undertake “employability enhancement measures.” [ SPCW BOA TAB 1]

23 See also *Manitoba Assistance Act*, *supra* note 22 at 18(3) [SPCW BOA TAB 18] and *Assistance Regulation*, *supra* note 2, s 3 [SPCW BOA TAB 1] requiring that EIA recipients who are not married but are “cohabitating in a conjugal relationship” will be treated as “two persons who are legally married” and a recipient and their spouse or common-law partner “shall provide information and evidence” required by EIA to determine eligibility.

24 Social Assistance Statistical Report, *supra* note 6 at 84 [SPCW BOA TAB 7].

25 *Eldridge v British Columbia (AG)* [1997] 3 SCR 624 at para 56 [Eldridge] [SPCW BOA TAB 19]; *Dixon v 930187 Ontario*, 2010 HRTO 256 at para 51 (It is widely understood that persons with disabilities “have undergone a long history of discrimination”) [SPCW BOA TAB 20].

26 *Eldridge*, *supra* note 25 at para 56 [SPCW BOA TAB 19].

27 *Ibid* [SPCW BOA TAB 19].

28 Statistics Canada Report, *supra* note 6 at 17, 19 [SPCW BOA TAB 7].

larger CPP pension by choosing to wait to apply until age 65,<sup>29</sup> Mr. Stadler was denied that choice because his severe physical disabilities left him reliant on social assistance.<sup>30</sup> The adverse financial consequences are particularly harsh given the increased vulnerability of persons with severe disabilities to poverty and their heightened reliance on federal benefits at age 65 to ameliorate poverty.<sup>31</sup>

ii. *In “receipt of social assistance” as an analogous ground*

10. The barriers faced by persons with disabilities are only compounded by reliance on social assistance. There is a close relationship between disability, poverty and receipt of social assistance. The status of being 'in receipt of social assistance' has been accepted by at least two superior courts in Canada as an analogous ground of discrimination within the meaning of section 15 of the *Charter*.<sup>32</sup> By definition, persons in receipt of social assistance are among those in society living in the most extreme conditions of poverty. Their condition is not easily changeable.<sup>33</sup> This is especially the case for

29 Appellant SSAB Submission, *supra* note 1 at 35.

30 *Quebec v A*, *supra* note 17 at para 139 [SPCW BOA TAB 14].

31 Statistics Canada Report, *supra* note 6 at 17, 19 [SPCW BOA TAB 7].

32 *Falkiner v Ontario (Minister of Community and Social Services)*, 59 OR (3d) 481, [2002] OJ No 1771 (CA), paras 84-93, 110 [Falkiner 2002] [SPCW BOA TAB 21] and *Federated Anti-Poverty Groups of British Columbia v British Columbia (AG)* [1991] 70 BCLR (2d) 325 (BCSC) at 29-30 [SPCW BOA TAB 22]. See also *Falkiner v Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2000) 188 DLR (4<sup>th</sup>) 52, 75 CRR (2d) 1 (ONSCDC) [Falkiner 2000] at paras 86-111 (the Court ultimately concluded that being a sole support parent on social assistance is an analogous ground) [SPCW BOA TAB 23].

33 *Falkiner 2002*, *supra* note 32 at para 89 [SPCW BOA TAB 21].

those living with disabilities who tend to rely on EIA benefits for a much longer duration.<sup>34</sup> By virtue of living in poverty and receiving social assistance, these individuals are commonly excluded from political decision making and power and are often seen as less worthy.<sup>35</sup> In terms of recognizing analogous grounds, it is important to recall that in *Andrews*, the Supreme Court held that the principles applied in human rights codes “are equally applicable in considering questions of discrimination under s. 15(1).”<sup>36</sup> The Manitoba *Human Rights Code* includes 'source of income' as a prohibited ground of discrimination.<sup>37</sup> In fact, a legislative consensus exists among all provinces and territories that discrimination against persons in receipt of social assistance is endemic and has required legislative remediation through inclusion in human rights legislation.<sup>38</sup>

11. It is also well accepted that courts should strive to interpret the *Charter* in a manner consistent with Canada’s international human rights obligations.<sup>39</sup>

34 Social Assistance Statistical Report, *supra* note 6 at 86-90 [SPCW BOA TAB 6]; See also EIA Rate Review, *supra* note 6 at 9 [SPCW BOA TAB 5].

35 See more generally, Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 106-112 [SPCW BOA TAB 24].

36 *Andrews*, *supra* note 17 at 175 [SPCW BOA TAB 13].

37 *The Human Rights Code*, SM 1987-88, c 45, CCSM C H175, s 9(2)(j) 'source of income.' [SPCW BOA TAB 25] It should be noted that the human rights legislation of all Canadian provinces and territories have provided some version of protection from discrimination related to source of income, receipt of public assistance or social condition.

38 See Canadian Human Rights Act Review Panel, *Promoting Equality*, *supra* note 35 at 109-117 [SPCW BOA TAB 24]. For more recent provincial and territorial amendments, see *The Human Rights Act*, NB 2011 c 171, s 2.1(o) [SPCW BOA TAB 26]; *The Human Rights Act*, SNWT 2002 c 18, s 5(1) [SPCW BOA TAB 27].

39 See *Health Services & Support-Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at para 70 [SPCW BOA TAB 28]. Please also see cases cited in *Divito v Canada (Public*

'Economic and Social Situation' is recognized under international human rights law binding on Canada as a ground of discrimination and is, therefore, akin to other listed grounds of discrimination.<sup>40</sup> The SPCW submits that 'receipt of social assistance' meets the criteria to be accepted by this Honourable Court as an analogous ground of discrimination.<sup>41</sup>

*The SSAB incorrectly applied the first step of the s. 15(1) analysis*

12. The SSAB erred in its application of the first step of the s. 15 analysis by:
- Adopting a formal rather than substantive equality analysis;
  - Failing to assess the adverse effects of the impugned regulation; and,
  - Failing to apply the intersectional approach *required to truly* reflect Mr. Stadler's lived experience.

i. *The SSAB misapplied section 15 by adopting a formal equality analysis*

13. In assessing Mr. Stadler's discrimination claim, the SSAB determined "[t]he correct comparator is the universe of people without disabilities who are in receipt of income assistance under *The Manitoba Assistance Act*."<sup>42</sup>

Embarking on this tautological analysis, it compared the treatment of EIA recipients with and without disabilities before concluding there was no distinction because both groups faced a similar obligation to apply 'early.'

This is precisely the 'similarly situated' approach first identified, criticized

*Safety and Emergency Preparedness*), 2013 SCC 47, [2013] 3 SCR 157 at paras 22-23 [SPCW BOA TAB 29].

40 UN Committee on Economic, Social and Cultural Rights, General Comment 20: *Non-Discrimination in Economic, Social and Cultural Rights* E/C.12/GC/20 (10 June 2009), at para 35 [SPCW BOA TAB 30].

41 See for example *Wihler*, *supra* note 18 at para 33 [SPCW BOA TAB 15].

42 Social Services Appeal Board Order and Reasons for Decision, Order #AP1516-06-0146, 16 May 2018, Appeal Book of the Appellant, Tab 2, at 13 (p. 7 of the decision) [SSAB Decision].

and rejected in *Andrews* and which subsequently re-emerged as the ‘mirror comparator’ analysis only to be rejected again in *Withler*.<sup>43</sup> Comparing the treatment of members within the same disadvantaged claimant group will inevitably eliminate any substantive disadvantage.<sup>44</sup>

14. The ‘formalist’ approach of asking whether all EIA recipients aged 60-64 are treated alike is what the Supreme Court warned against in *Withler* when it stated that the first step of the s. 15 test is not meant to be a “preliminary merits screen nor an onerous hurdle designed to weed out claims on technical bases.”<sup>45</sup> The objective of the first step is to ensure the “*Charter* is accessible to those whom it was designed to protect.”<sup>46</sup> The sole purpose is to “exclude claims that have “nothing to do with substantive equality.”<sup>47</sup> Rather than applying a ‘mirror comparator group’ approach, the SSAB ought to have asked itself whether the effects of the impugned provision were inconsistent with substantive equality for persons such as Mr. Stadler.<sup>48</sup>

15. A substantive equality approach must avoid an overly ‘formalistic’ and ‘artificial’ approach to comparisons.<sup>49</sup> The relevant comparison, (if there

43 *Withler*, *supra* note 18 at para 40 [SPCW BOA TAB 15].

44 *Ibid* at paras 55- 67 [SPCW BOA TAB 15].

45 *Alliance supra* note 20 at para 26 [SPCW BOA TAB 17]. See also *Withler*, *supra* note 18 at paras 40-67 (recognizing that ‘equality’ is an “inherently comparative concept,” the SCC warned again in *Withler* against “sterile similarly situated test focused on treating “likes” alike.” at para 52) [SPCW BOA TAB 15].

46 *Alliance supra* note 20 at para 26 [SPCW BOA TAB 17].

47 *Alliance supra* note 20 at para 26 citing *Taypotat supra* note 19 at para 19 [SPCW BOA TAB 17].

48 See generally *Withler supra* note 18 at paras 39-67 [SPCW BOA TAB 15].

49 *R v Kapp*, *supra* note 17 at para 22 [SPCW BOA TAB 12].



needs to be one) should be people in Manitoba *not* in receipt of assistance who are free to decide whether they will apply for CPP at age 60 or wait until age 65.<sup>50</sup>

ii. *A failure to assess the adverse effects*

16. The SSAB failed to recognize that laws which are neutral on their face, can have adverse *effects*.<sup>51</sup> By focusing on whether EIA recipients are all treated alike, it denied itself the opportunity to consider the adverse effects of the Regulation on persons with disabilities.

iii. *An intersectional approach is required*

17. Discrimination may be “experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.”<sup>52</sup> Mr. Stadler sought to persuade the SSAB that 'social assistance recipients' were “disadvantaged and prejudiced” by the impugned provision.<sup>53</sup> He suggested that the obligation to apply early “discriminated against him on the basis of his physical disability and need for social

<sup>50</sup> It is worth recalling that the Supreme Court of Canada stated in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at para 58 [SPCW BOA TAB 31].

<sup>51</sup> *Andrews*, *supra* note 17 at 164 [SPCW BOA TAB 13]. See also *Eldridge*, *supra* note 25 at paras 63-65 [SPCW BOA TAB 19]; *Withler*, *supra* note 18 at para 64 [SPCW BOA TAB 15].

<sup>52</sup> Dissenting judgment of L'Heureux Dubé in *Canada (AG) v Mossop* [1993] 1 SCR 554 at 645-646 [SPCW BOA TAB 32]; *Law*, *supra* note 50 at paras 93-94 [SPCW BOA TAB 31]; *Withler*, *supra* note 18 at para 63 [SPCW BOA TAB 15].

<sup>53</sup> Appellant SSAB Submission, *supra* note 1 25-26 (p. 23, para 16 – p. 24, para 15 of the submission)

assistance.”<sup>54</sup> He asserted that because of “his physical disability and need for social assistance” he was “not being given the same choice of options” as able bodied employable persons.<sup>55</sup>

18. But the SSAB ignored Mr. Stadler's submission that his discriminatory treatment flowed both from his disability *and* his 'need for social assistance'. It failed to apply the intersectional approach to discrimination necessary to capture the lived experience of people who are directly affected by the impugned provision of the Regulation.<sup>56</sup> Mr. Stadler's disability and status as a recipient of social assistance are inextricably linked. They cannot be rigidly categorized or separated. To artificially “delink” them is antithetical to the values and principles of the *Charter*.<sup>57</sup> Such an approach is profoundly inconsistent with a substantive conception of equality.

***Part two: s. 12.1(2) imposes burdens in a manner that has the effect of reinforcing, perpetuating, or exacerbating Mr. Stadler's disadvantage***

19. The focus at the second stage of the s. 15 analysis is whether the *impacts* of the distinction are discriminatory.<sup>58</sup> Requiring social assistance recipients aged 60-64 who are disproportionately persons with disabilities to apply

<sup>54</sup> *Ibid* at 15 (p. 13 of the submission).

<sup>55</sup> *Ibid* at 18 (p. 16, para 6 of the submission).

<sup>56</sup> Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14 CJWL 185 at 187 [Brodsky & Day] [SPCW BOA TAB 33].

<sup>57</sup> *Ibid* [SPCW BOA TAB 33].

<sup>58</sup> *Alliance*, *supra* note 20 at para 28 [SPCW BOA TAB 17] citing *Quebec v A*, *supra* note 17 at paras 327, 330 [SPCW BOA TAB 14].

early for CPP automatically results in actuarially reduced pensions for individuals like Mr. Stadler. It perpetuates the devaluation and exclusion of persons with disabilities by exacerbating their historical socio-economic disadvantage.<sup>59</sup> Specifically, the impugned provision imposes burdens and exacerbates Mr. Stadler's disadvantage in four ways:

- First, Mr. Stadler and others in his position are unable to access EIA without agreeing to apply *early* for CPP. The Respondent agrees that s. 12.1(2) is a general provision that requires all applicants to make reasonable efforts to avail themselves of benefits under any legislation. According to the Respondents, this case 'happens to' relate to CPP but the section also affects other benefits.<sup>60</sup> However, this argument fails to consider the uniqueness of CPP which are the *only* benefits that decrease the sooner they are taken;
- Second, the impugned provision removes the individual's choice and autonomy as to when to apply for CPP;
- Third, as a result of the requirement to apply for CCP at age 60, Mr. Stadler and others in his position are forced to accept a reduction of 36% in their CPP income in their 'old age';<sup>61</sup> and,
- Fourth, the impugned provision creates a situation where some social assistance recipients with greater needs/expenses (likely those with greater medical or health needs) will be forced to rely on EIA in perpetuity if their total (and *reduced*) CPP, OAS and GIS income is inadequate to meet their basic and special needs.

*The SSAB erred in its application of the second step of the s. 15 test*

20. In light of the manifest disadvantages faced by Mr. Stadler, the SSAB erred

in its analysis of the second element of the s.15 test by:

<sup>59</sup> *Quebec v A*, *supra* note 17 at para 199 [SPCW BOA TAB 14]; *Eldridge*, *supra* note 25 at para 56 [SPCW BOA TAB 19].

<sup>60</sup> Submission of the Respondent at the Social Services Appeal Board, Appellant's Supplementary Appeal Book SSAB at 44 (p. 7, para 25 of the submission) [Respondent SSAB Submission].

<sup>61</sup> Appellant SSAB Submission, *supra* note 1 at 15 (p. 14, para 1 of the submission), 35.

- failing to acknowledge the disadvantage of having to accept a reduced CPP retirement pension;
- applying justificatory or ‘reasonableness’ factors to the s.15 analysis. The SSAB rationalized the financial disadvantage experienced by the Appellant by making reference to (1) the fact that it was part of a “comprehensive scheme of benefits” and (2) that Mr. Stadler will not be financially worse off than he is now “although he may be worse off at age 65 than he would have been with an unreduced pension.”<sup>62</sup> The conflation of s. 15 adverse impacts with the supposed ‘reasonableness’ of the situation was decried by the Supreme Court in both *Withler* and *Quebec v A.*<sup>63</sup>

21. Fundamentally, the SSAB ignored the undeniable socio-economic burdens imposed upon social assistance recipients with disabilities while seeking to balance them against other considerations.

***The equality rights violation cannot be saved under section 1 of the Charter***

22. Should this Court find a violation of the Appellant’s *Charter* rights, the Respondent has the onus of establishing that requiring EIA recipients to apply ‘early’ for CPP benefits has a “pressing and substantial objective, and that the means chosen to achieve that objective are proportionate to it.”<sup>64</sup> The SPCW agrees with the Appellant that the impugned provision cannot be

<sup>62</sup> SSAB Decision, *supra* note 42 at 13-14 (pp 7-8 of the decision)

<sup>63</sup> *Quebec v A*, *supra* note 17 at paras 333-4 (The majority was very clear in referring to the “crucial distinction” between s. 15 considerations and those that might be used to regard the legislation as reasonable/justifiable - warning that conflating the approaches would leave “virtually no role” for s. 1) [SPCW BOA TAB 14]. See also *Withler*, *supra* note 18 at para 54 [SPCW BOA TAB 15].

<sup>64</sup> *Alliance* *supra* note 20 at para 43 [SPCW BOA TAB 17]. See also *RJR-MacDonald Inc. v Canada (AG)* [1995] 3 SCR 199 at paras 143-144, 150 [RJR MacDonald] [SPCW BOA TAB 34]; *R v K.R.J.*, 2016 SCC 31, [2016] 1 SCR 906 at paras 61-62 [SPCW BOA TAB 35].

justified under s.1. The SPCW accepts that the limitation is “prescribed by law.”

1. *'Pressing and substantial objective'*

23. The Supreme Court has repeatedly insisted that s. 1 of the *Charter* demands a reasoned demonstration by way of evidence if a legislative provision is to be saved.<sup>65</sup> However, the Respondent has chosen not to introduce *any* evidence regarding the legislative purpose underlying s. 12.1(2) of the Regulation or supporting the claim that it is pressing and substantial. The Appellant anticipated that the Respondent would claim that the objective of s. 12.1(2) of the Regulation is the legislative expression of being a 'program of last resort.'<sup>66</sup> However, the Respondent did not present *any* evidence with respect to EIA being a 'program of last resort'. In contrast, a 2013 report by the Province Manitoba argues that while EIA was originally designed in the 1960s as a 'program of last resort,' the EIA program now goes *beyond* that mandate.<sup>67</sup> The SSAB also erred at this step of the analysis because it considered the objective of the *Act* and legislative scheme as a whole rather

<sup>65</sup> *MacKay v Manitoba* [1989] 2 SCR 357 at 361 says “*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions.” [SPCW BOA TAB 36].

<sup>66</sup> Factum of the Appellant, AI 18-01-09081, 20 December 2018 at para 29. This argument is consistent with the argument of the Respondent: “[i]n the context of this statutory scheme, which establishes a program of last resort, it is reasonable to expect any recipient to apply for CPP pension benefits at age 60”: Respondent SSAB Submission, *supra* note 60, at 41 (p. 4, para 14 of the submission).

<sup>67</sup> EIA Rate Review, *supra* note 6 at 4 [SPCW BOA TAB 5].

than the impugned provision.<sup>68</sup> The Board found that “the Act and Regulation, read as a whole, attempt to create a framework of assistance that maintains horizontal and vertical equity, both within the program and between the program and other people.” This approach is contrary to the direction of the SCC that “[w]here a court finds that a specific legislative provision infringes a *Charter* right, the state's burden is to justify *that limitation*, not the whole legislative scheme.”<sup>69</sup>

## 2. *Proportionality*

### i. *Rational connection*

24. The proportionality analysis requires consideration of the rational connection to the objective. No empirical or other evidence has been advanced to show that the Province would in reality save money over the long term by forcing social assistance recipients to apply for CPP 'early.' The SSAB decision indicates that forcing Mr. Stadler and other social assistance recipients to apply 'early' for CPP may lengthen their period of reliance on EIA beyond age 65<sup>70</sup>. In other words, the Province could spend more on social assistance in the long run.

<sup>68</sup> SSAB Decision, *supra* note 42 at 14 (p. 8 of the decision).

<sup>69</sup> *Alliance*, *supra* note 20 at para 45 [SPCW BOA TAB 17]; *RJR-MacDonald*, *supra* note 64 at para 143 SPCW BOA TAB 34].

<sup>70</sup> SSAB Decision, *supra* note 42, at 12 (p. 6 of the decision).

ii. *Minimal impairment*

25. The Respondent argued before the SSAB that the limitation was reasonable because “any impact on assistance is pro-rated depending on the amount of the benefit received from the source” and that social assistance recipients do not “automatically lose their entitlement.”<sup>71</sup> However, Mr. Stadler's equality right is not minimally impaired because:

- His choice about when to apply for CPP-R is completely taken away from him; and,
- There is no evidence of any efforts by the Province to tailor the impugned provision to minimally impair recipients' equality rights.<sup>72</sup>

26. The Respondent has not discharged its “onerous”<sup>73</sup> burden of demonstrating that the impugned provision is the *only* mechanism to address its legislative objectives.

iii. *Is the law Proportionate in Its Effect?*

27. An overall proportionality assessment requires consideration of whether: i) “the overall effects of the law on the claimant [are] disproportionate to the government's objective”; and, ii) whether the impact of the rights

71 Respondent SSAB Submission, *supra* note 60 at 46 (p. 9, para 33 of the submission).

72 *Falkiner 2000*, *supra* note 32 at para 144 (the Court found that “These impairments, as is articulated by the Respondents, do not just limit the equality rights of individuals; these impairments “negate” their equality rights”). Just two paragraphs below, in its conclusions at paragraph 146, the Court finds that the regulation “creates a distinction between sole support parents on social assistance and sole support parents not on social assistance.” [SPCW BOA TAB 23]

73 See for example *Lavoie v Canada*, 2002 SCC 23, [2002] 1 SCR 769 at paras 6, 86 [SPCW BOA TAB 37].

infringement is disproportionate to the likely benefits of the impugned law.<sup>74</sup> There no evidence before this Court that would justify a conclusion that the Province has met this burden. The legislature may, without *Charter* infringement, create particular benefits (such as EIA) targeted at particular groups of people with specific eligibility requirements. However, the disproportionate harm created by s.12.1(2) in further entrenching poverty for persons with disabilities cannot be justified under section 1.

### **Remedy**

28. It is anticipated that the Appellant will request a personal remedy under s. 24(1) of the *Charter*.<sup>75</sup> Without commenting on any remedy sought by the Appellant, the SPCW recommends that this Court order remedies under s. 52 of the *Constitution Act, 1982*.<sup>76</sup>

29. The obligation in s. 12.1(2) of the Regulation to seek other sources of income is not constitutionally problematic as a whole. Rather, it is *only* the requirement to apply 'early' for CPP retirement pension that is unconstitutional. Section 52 of the *Constitution Act, 1982* directs courts to find *Charter* violative laws unconstitutional only "to the extent of the

<sup>74</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at paras 73, 76-77 [SPCW BOA TAB 38].

<sup>75</sup> *Charter*, *supra* note 4, s 24(1) [SPCW BOA TAB 2].

<sup>76</sup> *Constitution Act, 1982*, *supra* note 15 [SPCW BOA TAB 8].

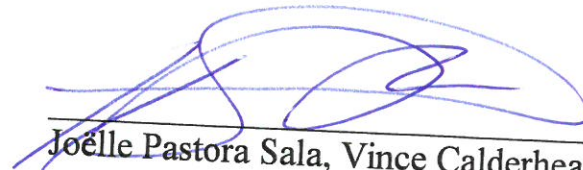


inconsistency.”<sup>77</sup> Here, valid and legitimate legislative intentions and *Charter* purposes can best be balanced by Orders: a) declaring unconstitutional the obligation for EIA recipients aged 60-64 to apply for CPP; and, b) reading down the impugned provision so as to exclude any obligation on EIA applicants/recipients aged 60-64 to apply 'early' for CPP.<sup>78</sup>

**PART 5. CONCLUSION**

30. The obligation to apply for 'early' CPP in the impugned provision violates Mr. Stadler's right to equal benefit of the law and perpetuates the longstanding disadvantage flowing from the intersection of his physical disability and reliance on social assistance. It cannot be reasonably and demonstrably justified. It ought to be declared unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF  
APRIL, 2019



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Solicitor for the Intervenor

<sup>77</sup> *Ibid* [SPCW BOA TAB 8].

<sup>78</sup> Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Books, 2013) ch 14 at 14-150, 14- 470 [SPCW BOA TAB 39].