Citation: Stadler v Director, St Boniface/St Vital, 2020 MBCA 46

Date: 20200505
Docket: AI18-30-09081

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton

BETWEEN:

MARTIN STADLER	)	***K. A. Burwash***
	)	*for the Appellant*
	)	
(Appellant) Appellant	)	***D. L. Carlson*** *and*
	)	***A. J. Ladyka***
- and -	)	*for the Respondent*
	)	
	)	***J. B. Williams*** *and*
DIRECTOR, ST. BONIFACE/ST. VITAL	)	***V. Calderhead***
	)	*for the Intervener*
	)	
(Respondent) Respondent	)	***K. L. Vartsakis***
	)	*on a watching brief*
- and -	)	*for the Social Services*
	)	*Appeal Board*
	)	
THE SOCIAL PLANNING COUNCIL OF WINNIPEG	)	*Appeal heard:*
	)	***October 25, 2019***
	)	
	)	*Judgment delivered:*
Intervener	)	***May 5, 2020***

STEEL JA

[1] This appeal raises the issue of whether an impugned provision perpetuates substantive inequality against disabled persons on income assistance contrary to the *Canadian Charter of Rights and Freedoms* (the *Charter*). In particular, does requiring a disabled recipient of income

assistance to apply for Canada Pension Plan (CPP) retirement benefits early, at age 60 instead of age 65 pursuant to section 12.1(2) of the Manitoba, *Assistance Regulation*, Man Reg 404/88R (the *Regulation*), infringe his equality rights under section 15 of the *Charter*.

Facts

[2] The appellant (Stadler) is a 65-year-old computer engineer. Due to health issues, he has been unable to work. To meet his expenses, he relies on income assistance pursuant to *The Manitoba Assistance Act*, CCSM c A150 (the *Act*) and the *Regulation*.

[3] Section 12.1(2) of the *Regulation* states that:

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

[4] Stadler was informed by letter in 2014 that he must apply to start receiving CPP benefits once he turned 60 years of age in 2015, which was the earliest date that they would have been available to him. Pension benefits are explicitly listed in section 1 of the *Act* as one type of financial resource that must be taken into account in determining benefits. Moreover, pensions are not one of the types of financial resources exempted under section 8 of the *Regulation*.

[5] Stadler informed his caseworker that he did not want to apply at age 60 because the value of his pension would be permanently less if he drew on it now rather than age 65. In response, Stadler was informed that if he did not apply for the CPP benefits, his income assistance benefits would be suspended and, in fact, his benefits were discontinued.

[6] Stadler appealed this decision to the Social Services Appeal Board (the Board), arguing that the decision violated his rights under section 15 of the *Charter*. The Board stated that:

> The Board interprets that this section of the regulation is intended to include application for any federal benefits, including CPP Retirement benefits, at the earliest date on which they are accessible. . . .
>
> [emphasis added]

[7] Pending the hearing of his appeal, Stadler was unable to meet his living expenses and felt he had no choice but to acquiesce and apply for his CPP benefits, which he did.

[8] With respect to the *Charter* issue, the Board found that it did not have jurisdiction to hear Stadler's *Charter* arguments. That decision was appealed to this Court and, in *Stadler v Director, St Boniface*, 2017 MBCA 108, this Court overturned its previous decision in *Fernandes v Manitoba (Director of Social Services (Winnipeg Central))* (1992), 93 DLR (4th) 402 (Man CA), and found that the Board had to consider *Charter* principles when reaching its decision. It affirmed that the Board was able to hear the *Charter* argument and referred the matter back to the Board.

[9] In a decision in 2018, a new panel of the Board upheld the decision requiring Stadler to apply for his CPP benefits at age 60. In reply to Stadler's argument that the decision infringed his rights under section 15 of the *Charter* on the basis of disability, the Board determined that "[t]he correct comparator is the universe of people without disabilities who are in receipt of income assistance under the [*Act*]." Since that universe of people were equally required to access any available source of income pursuant to section 12.1(2) of the *Regulation*, the Board found that the section did not create a distinction on an enumerated or analogous ground as required to find an infringement of section 15.

[10] With respect to the second part of the section 15 test, the Board held that:

> The evidence submitted to the Board demonstrates [the *Act*] and *Regulation* acknowledges the distinctive financial disadvantages faced by people with disabilities through a comprehensive scheme of benefits, including higher base assistance amounts, income top-ups, funding for specific health needs, income exemptions and savings vehicles. . . .

[11] Moreover, the Board indicated that, if Stadler's income from federal pensions and supplements is lower than his needs-based budget, he will receive income assistance to cover the difference. In other words, 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." The Board held that the requirement to access any available financial resources is part of an overall scheme of benefits designed to address the needs of people with disabilities and does not create a disadvantage, or perpetuate prejudice and stereotyping.

[12] Stadler appeals to this Court pursuant to section 23 of *The Social Services Appeal Board Act*, CCSM c S167. He argues that the Board erred in law in not finding that the *Regulation* in question violated his section 15 rights on the basis of a physical disability. Leave to appeal was granted (see 2018 MBCA 103) on the following question of law (at para 29):

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

[13] The Social Planning Council of Winnipeg applied for leave to intervene in the appeal (the intervener), which leave was granted upon the following conditions:

- The intervener was to file a factum not exceeding 20 pages;
- The intervener was entitled to file a case book with the four reports to be considered at the discretion of the panel; and
- The intervener was not to raise new issues on the appeal.

Whether or not it has raised a new issue on appeal became a disputed issue on the appeal, which will be discussed later in these reasons.

Notice of Constitutional Question

[14] After the appeal was heard, it came to light that no notice of constitutional question had been filed or sent to the Attorneys General of Manitoba and Canada pursuant to sections 7(2) and 7(3) of *The Constitutional Questions Act*, CCSM c C180. The Attorney General of Manitoba (the Attorney General) was obviously aware of the matter, since he had filed a

factum on behalf of the respondent and argued on the appeal, but he was never formally served.

[15] Section 7(2) of *The Constitutional Questions Act* states:

> **Notice to Attorneys General required**
> **7(2)** Where in a cause, matter or other proceeding the constitutional validity or constitutional applicability of any law is challenged or an application is made for a remedy, the law shall not be held to be invalid, inapplicable or inoperable and the remedy shall not be granted until
>
> (a) the Attorney General of Canada and the Attorney-General of Manitoba have been served with the notice of the challenge or the application in accordance with this section; and
>
> (b) the Attorney General of Canada and the Attorney-General of Manitoba have replied and have been heard if either or both desire to be heard.

[16] The Court (through the registrar) contacted the parties, requesting that Stadler file and serve a notice within two weeks. Submissions from the Attorneys General were also requested as to their positions with respect to whether they were prejudiced by the late notice and whether they wished to make submissions and, if so, whether orally or in writing. This was the same procedure adopted in *Morine v L & J Parker Equipment Inc*, 2001 NSCA 53 at para 34.

[17] It was at this point that Stadler filed and served the first notice of constitutional question. That first notice challenged the constitutional validity of section 12.1(2) of the *Regulation* on the basis of physical disability "and receipt of social assistance". Shortly thereafter, counsel for Stadler informed the Court that she would be withdrawing that first notice and instead filed a

second notice which stated that the challenge to the constitutional validity of the section in question was on the basis that it "violates the right of individuals to equality before and under the law and not to be discriminated against on the basis of a mental or physical disability which right is protected under s. 15 of the *Charter of Rights and Freedoms*".

[18] Upon that second notice of constitutional question being filed, which notice did not include a reference to "and receipt of social assistance", the Attorney General took the position that he has not been prejudiced by the late notice. Based on that same understanding, the Attorney General of Canada gave notice that he did not wish to intervene in this matter at this stage of the proceedings.

Position of the Parties

Stadler

Stadler argues that, because of his physical disability and need for income assistance and the operation of the *Regulation*, he is not given the same choice or option as an able-bodied employable person to make a decision regarding his CPP benefits. It infringes his freedom of choice. As well, the adverse impact upon him is to reduce him to a permanent situation of financial dependency.

[19] In particular, Stadler's position is that the Board, by using the comparator of all individuals who receive benefits, ignores his physical disability and removes the obligation upon the program to respond to that disability in a manner consistent with the principles of section 15 of the *Charter*. Doing so led the Board to err in the application of the first aspect of

the section 15 test. Instead, the correct comparator group for analysis is between income assistance recipients who are disabled and able-bodied individuals who do not have to rely on income assistance. The key distinction between the two groups is disability. Stadler is in receipt of income assistance benefits solely because of his physical disability. If it were not for his physical disability, he would be able to work and he would have the same choice as able-bodied individuals regarding his CPP benefits. Thus, a distinction has been created between Stadler and others due to his physical disability.

[20] As well, the Board failed to appreciate the second part of the section 15 test in which it must be shown that the law had a discriminatory impact in terms of prejudicing and stereotyping disabled income assistance recipients who were impacted by the requirement that they apply for early CPP benefits. Stadler submits that disabled people have been disadvantaged historically by reasons of their disabilities. The impact of taking CPP benefits early has a substantively differential impact on the physically disabled as opposed to the able-bodied.

[21] The amount of income assistance provided in the *Act* and *Regulation* provides for only the most basic lifestyle. By forcing Stadler to make a decision that permanently affects his financial future, he will be continuously disadvantaged. The *Regulation* does not take into account that differential impact, creating a significant disadvantage for individuals with physical disabilities. In fact, it exacerbates the situation and marginalizes the disabled, thereby infringing section 15 of the *Charter*.

[22] Stadler submits that the *Regulation* is not saved by section 1 of the *Charter*. The *Regulation* reinforces dependency and deprivation of financial

independence, and cost savings to the state does not justify that result (see *Falkiner v Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2000), 188 DLR (4th) 52 (Ont Sup Ct J (Div Ct)) (*Falkiner*), aff'd (2002), 212 DLR (4th) 633 (Ont CA) (*Falkiner CA*)).

Social Planning Council of Winnipeg

[23] The intervener argues that 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 income assistance. It submitted that the impugned obligation imposes multiple disadvantages on persons with disabilities in receipt of income assistance. They are unable to access income assistance without agreeing to apply early. They are denied the choice of when to apply for CPP benefits. The resulting reduction in their CPP benefits leaves them more at risk of remaining in poverty with the possibility of lifetime dependency on income assistance.

[24] In support of Stadler, the intervener also argues that the Board failed to use a proper comparator in the first part of the section 15 test. It submits that recent cases have recognised receipt of income assistance as an analogous ground under section 15 and that the Board used a formalist approach for the first step of its section 15 analysis. Secondly, it argues that the impugned legislation imposes a burden in a manner that has the effect of reinforcing, perpetuating or exacerbating the applicant's disadvantage. Finally, it says that the violation cannot be saved by section 1 as there is no pressing and substantial objective sought to be achieved by the legislation. The only

objective is to effect a cost saving. It also argues that proportionality plays against the section.

Attorney General

[25] The Attorney General contends that the Board came to the correct conclusion. He submits that there is no discrimination on the basis of disability but, rather, simply a requirement that all persons receiving income assistance meet the same criterion, namely, a requirement to apply for other benefits available to them. He submitted that the Board must take a contextual approach, looking at all the provisions available in the legislative scheme and, when analysed in this manner, the provision in question does not infringe section 15 of the *Charter*.

[26] With respect to the intervener's submissions, the Attorney General argues that the Board correctly found that there was no analogous ground of discrimination and the "in receipt of social assistance" argument, not having been raised before the Board, should not be dealt with by this Court. In any event, poverty and social condition have been rejected as analogous grounds for the purpose of section 15.

[27] Alternatively, he argues that the infringement is justified under section 1 of the *Charter* and is a proportionate response. This legislation is different from the legislation in question in *Falkiner*. Section 12.1(2) of the *Regulation* incorporates the concept of reasonableness, in terms of the efforts that are required to access benefits from other sources. Moreover, any impact on income assistance is pro-rated depending on the amount of the benefit received from the other source. If a recipient receives $300 from that other source, $300 will be deducted—he or she does not automatically lose their

entitlement. The Attorney General submits that both of these features render any infringement of section 15 a proportionate response in support of the pressing and compelling objectives of this legislation of last resort.

Remedy

[28] Stadler seeks an individual remedy with respect to his own application pursuant to section 24(1) of the *Charter*. Section 24(1) remedies are typically limited to the facts of particular cases. If Stadler's appeal is successful, the remedy he seeks is an order that he not be required to apply for CPP benefits retroactive to the original appeal date.

[29] The intervener seeks remedies under section 52 of the *Constitution Act, 1982* (striking or read down of the legislation) in addition to any personal remedies. Section 52(1) remedies include declarations of invalidity but also alternative remedies such as reading down, severance or reading in. These are remedies of general application that will have a broader effect than a section 24(1) remedy. The intervener asks that this Court issue a remedy under section 52 of the *Constitution Act, 1982*, declaring unconstitutional the obligation of income assistance recipients aged 60-64 to apply early for CPP benefits and also reading down the impugned provision so as to exclude any obligation on income assistance applicant/recipients aged 60-64 to apply early for CPP benefits. The *Regulation*'s requirement 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 laws unconstitutional only "to the extent of the inconsistency".

[30] The Attorney General's position is that the appropriate remedy would be an order that Stadler is entitled to income assistance without being required to apply for CPP benefits before the age of 65.

Analysis and Decision

"In Receipt of Social Assistance" as an Analogous Ground—Did the Intervener Raise a New Issue on Appeal?

[31] In his notice of appeal, Stadler asked the Court to set aside the Board's decision on the ground, *inter alia*:

> That requiring [Stadler] to apply for his [CPP] benefits at 60 years of age violates his rights under section 15 of the *Charter* to equality before and under the law and to equal benefit of the law without discrimination on the basis of a physical disability.

[32] He did not raise receipt of income assistance as a discrete ground. As well, no particular bases for discrimination were enumerated in the order granting leave to appeal or in the order granting the intervener leave to intervene.

[33] However, in the order granting leave to intervene, it was a condition of the order that the intervener not introduce any new issue. Is the argument that "in receipt of social assistance" standing by itself is an analogous ground under section 15 of the *Charter*, a new issue?

[34] The intervener argues that "in receipt of social assistance" was not a new issue for a number of reasons. To begin with, the intervener contends that there were numerous occasions where that argument was raised before the Board and in their materials. It points to references in Stadler's

submissions to his physical disability and need for income assistance and similar references in the Board's decision, along with references to *Falkiner CA*.

[35] The Board, in its 2015 decision, named the argument "in essence, disability discrimination" and summarised it in a way that acknowledges the link between disability discrimination and discrimination on the basis of being in receipt of income assistance.

[36] As well, in its 2018 decision, the Board also acknowledged the respondent's submission that the *Act* has different policy objectives for two discrete groups: i) income assistance recipients with disability eligibility; and ii) employable income assistance recipients, who are encouraged to work to find employment. Implicit in this distinction is the acknowledgement that income assistance recipients with disability eligibility have fewer avenues through which they can exit income assistance than employable income assistance recipients.

[37] The intervener relies on two decisions in support of its position that "in receipt of social assistance" can constitute an analogous ground under section 15 of the *Charter*. *Federated Anti-Poverty Groups of British Columbia v British Columbia (Attorney General)*, 1991 CarswellBC 349 (SC), which was in the context of an application to strike out a statement of claim; and, as mentioned above, *Falkiner CA*. In *Falkiner CA*, Laskin JA described receipt of income assistance as "more truly analogous to the enumerated grounds, which themselves are general" (at para 92). He declined to follow *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, which followed the approach of naming only the

combination of grounds as analogous. Thus, he did not define the analogous ground more narrowly as sole support parents on income assistance or single mothers on income assistance, but rather stated, "It seems to me, however, that recognizing the broader or more general category, [in] receipt of social assistance, is preferable" (*Falkiner CA* at para 92).

[38] However, whether this Court will even entertain an argument that being in receipt of income assistance is an analogous ground that can stand by itself, depends on whether it can be considered a new ground of appeal.

[39] The Attorney General argues that being in receipt of income assistance as an analogous ground of discrimination is a new issue that extends beyond the terms of the order permitting the intervener to intervene in this appeal. The matter was not before the Board as a ground standing by itself. It adds an entirely different dimension to the scope of the issues on appeal, prejudicing the Attorney General and having potential implications for provincial and federal legislation that go far beyond an individual appeal to the Board and the constitutionality of a regulation under the *Act*. As mentioned, Stadler's notice of appeal alleges that his rights under section 15 are infringed solely on the basis of physical disability.

[40] Alternatively, if this Court were to consider the issue, the Attorney General argues that poverty and/or social condition has been rejected as an analogous ground of discrimination for the purposes of section 15 in a number of cases. For example, *R v Banks*, 2007 ONCA 19 at para 105, leave to appeal to SCC refused, 31929 (23 August 2007), distinguished *Falkiner CA* (see also *Boulter v Nova Scotia Power Incorporated*, 2009 NSCA 17 at paras 33, 38-39).

[41] As I mentioned earlier in these reasons, it was discovered after the argument of the appeal that a notice of constitutional question was never filed or served, contrary to section 7 of *The Constitutional Questions Act*. As noted above, *The Constitutional Questions Act* requires that matters determining the constitutional validity of a regulation cannot be determined until the Attorneys General have been served with notice and been given an opportunity to respond. In *Corbiere*, in order to determine whether to analyse the constitutionality of the impugned law beyond its impact on the Batchewana Band, L'Heureux-Dubé J considered how the constitutional question was phrased and what notice was given to the Attorney General of Canada (see paras 49-50).

[42] Given that the Attorney General argued on the appeal, it could be argued that the lack of a formal notice did not really prejudice him. He addressed the question of the new issue in the factum and it could be said, given the above references, that the issue had indeed been considered at the level of the Board.

[43] However, there is no question that no notice was given to the Attorney General of Canada until after the appeal. Moreover, pivotal in my mind is what happened after the appeal was argued. Stadler attempted to file a notice that referred to both disability and receipt of income assistance. That notice was subsequently replaced by Stadler with a second notice that referred only to disability. It was only then that the Court received correspondence from the Attorneys General that they did not object to the late service, in one case, and the lack of any notice in the other case.

[44] I understand that, while notice of a *Charter* issue is generally required, failure to provide such notice is not fatal to an appeal (see *R v Bialski*, 2018 SKCA 71 at para 76, leave to appeal to SCC refused, 38370 (21 February 2019). However, the notice requirements fulfil important functions. Absent exceptional circumstances, the court should not exercise its discretion to hear the matter if no notice has been given. As was stated by the Supreme Court of Canada in *Guindon v Canada*, 2015 SCC 41 (at para 111):

> . . . [P]rovisions that require litigants to file notice of a constitutional question serve two central purposes: extending a full opportunity to governments to defend their legislation and ensuring that an evidentiary record that is the result of thorough examination is before the court [see also *Corbiere* at para 49].

[45] While the issue of "in receipt of social assistance" was raised at various points in time, I am not sure that one could say that a proper evidentiary record was laid. But, more importantly, the concern for me is one of prejudice to the other party. Can the issue be raised without procedural prejudice to the opposing party and will the refusal to do so risk an injustice? This is particularly relevant for constitutional issues which "engage additional concerns beyond those that are considered in relation to new issues generally" (*Guindon* at para 23). Lack of notice to the Attorney General of Canada in particular raises the issue of prejudice. As well, it was only after the second notice of constitutional question was filed which deleted the reference to "and receipt of social assistance" that the Attorneys General indicated they had no objection.

[46] Given all of that, I find that, to consider "in receipt of social assistance" as an analogous ground in this appeal would be contrary to the

order that the intervener could not raise a new issue as a condition of its intervention.

[47] However, although it cannot be considered on its own, the fact that Stadler was in receipt of income assistance gives important texture to his argument of adverse impact. In *Canada (Justice) v Khadr*, 2008 SCC 29, the Supreme Court of Canada dealt with a motion to strike paragraphs from certain interveners' factums, in part on the basis that the interveners' arguments raised new issues. The Court did not allow the motion to strike. It stated that, "interveners must have some latitude to approach legal arguments from a different perspective" (at para 18).

[48] Equality is a comparative concept that must be viewed in context. I view the intervener's submissions as explaining and substantiating the context in which Stadler faces disadvantage as a disabled person. It offers the Court a different perspective to the argument and highlights the implications of the *Regulation*.

[49] Thus, I consider the argument that Stadler received differential treatment based only on the enumerated ground of disability in the first step of the section 15 analysis. However, when considering whether that distinction was discriminatory for the purposes of section 15, I must consider Stadler's full context. The need for income assistance is part of the context of Stadler's claim (see *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (*Alliance*) at para 27, quoting *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 40). The evidence put forward by the intervener can be used

to substantiate Stadler's arguments that the law, in its impact, had a particularly adverse impact on him on the basis of his disability.

[50] This approach is not only most consistent with the notice of constitutional question, it is also most consistent with what Stadler seems to be arguing in his factum and submissions. He appears to primarily use his receipt of income assistance as the background in which his disability is exacerbated even more as a result of the requirement to apply early for CPP benefits.

[51] I conclude that:

i) the intervener did not raise a new issue to the extent that they would have this Court analyse how Stadler's receipt of income assistance forms the context of the differential treatment he received on the ground of his disability;

ii) the intervener did raise a new issue when it argued that Stadler was treated differently on the combined grounds of disability and income assistance receipt; and

iii) the intervener did raise a new issue in asking for a determination that receiving income assistance is, on its own, an analogous ground for the purposes of section 15.

Standard of Review

[52] The parties agree that the standard of review with respect to the constitutional issue is correctness. Where questions of constitutionality and possible infringement of an individual's *Charter* rights are raised on appeal,

the courts have held that such issues must be reviewed on a standard of correctness given a court's unique role as an interpreter of the *Constitution*. The rule of law requires a standard of correctness for constitutional questions arising from the decision of a tribunal (see *Lau v Commonwealth of Australia and Canada*, 2006 BCCA 484; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58; *Nucci et al v Canada (Attorney General)*, 2015 MBCA 122; and *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

Equality Rights

[53] Section 15(1) of the *Charter* states:

> **Equality before and under law and equal protection and benefit of law**
> **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.

[54] Section 15 requires an inherently comparative analysis, which prioritises substantive equality as opposed to formal equality. The Supreme Court of Canada has established a two-step test to determine if a law violates section 15 of the *Charter*. First, does the challenged provision, on its face or in its impact, create a distinction that is based on an enumerated or analogous ground set out in section 15 of the *Charter* and, if so, second, does the distinction impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage (see *Withler*; *Alliance*; and its companion case, *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 25).

[55] It is not any legal distinction that would amount to a violation of section 15, but only distinctions that create an adverse impact on a group and reinforce historical disadvantages. Such discrimination may arise either from treating an individual differently from others or from failing to treat the individual differently from others. Sometimes differential treatment will be revealed as discriminatory because of prejudicial impact or negative stereotyping and sometimes differential treatment may actually be required in order to ameliorate the situation of the claimant group (see *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 82; and *Withler* at para 39). As was stated in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 164, quoting Frankfurter J in *Dennis v United States*, 339 US 162 (1950): "It was a wise man who said that there is no greater inequality than the equal treatment of unequals" (at p 184).

[56] Further, to determine whether the impugned law is discriminatory, it must be viewed as a whole. What is required is an approach that takes account of the full context of the claimant group's situation. That context will include the legislative, political and social context as well as the actual impact of the law on that situation. "*Law* [*Law v Canada (Minister of Employment and Immigration*, [1999] 1 SCR 497], *Gosselin* [*Gosselin v Quebec (Attorney General)*, 2002 SCC 84] and cases like them, while accepting that comparison is at the heart of a s. 15(1) equality analysis, emphasized a contextual inquiry into whether the impugned law perpetuated disadvantage or negative stereotyping" (*Withler* at para 47; see also paras 40-41, 43).

[57] Moreover, where the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, as is the case here, the discrimination assessment must focus on the

object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries. Social benefit programs must necessarily draw distinctions to achieve certain policy goals while properly allocating resources. As stated in *Withler* (at para 71):

> . . . It is in the nature of a pension benefit scheme that it is designed to benefit a number of groups in different circumstances and with different interests. The question is whether the lines drawn are generally appropriate, having regard to the circumstances of the group impacted and the objects of the scheme. . . .

[58] What must be asked is whether the purpose of the provision corresponds to the needs of the claimant groups when considered in the context of the whole scheme, or does it force them to carry a burden that others do not? The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation (see *Withler* at para 37).

[59] Thus, section 15(1) of the *Charter* requires a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group.

Comparator Groups

[60] In order to determine whether a distinction existed between the individual or group and others, equality jurisprudence developed the concept of comparator groups. In *Andrews*, equality was described as "a comparative concept, the condition of which may only be attained or discerned by

comparison with the condition of others" (at p 164). *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 reiterated that the test under section 15 was an inherently comparative one and stated that "a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment" (at para 56).

[61] However, as affirmed in *Lavoie v Canada*, 2002 SCC 23 (at para 40):

> . . . Although Iacobucci J. stressed the importance of identifying an appropriate comparator group, there is nothing in *Law* to indicate that the first inquiry is anything but a threshold test. On the contrary, the precise inquiry at the first stage is whether the law draws a formal distinction "between the claimant and others" . . .

[62] The proper selection of a comparator has proven fatal in a variety of cases (see, for example, *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 18; and *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 55). In *Withler*, the Court recognised that the selection of an appropriate comparator group perhaps ought not to be an "important battleground" proving fatal for claimants' equality claims (at para 48 quoting *Hodge* at para 18).

[63] In *Withler*, the Court observed that, in order to achieve substantive equality, the inquiry must consider all context relevant to the claim at hand, which often was not achieved when the analysis was truncated by a quick conclusion that the improper comparator group was selected (see para 43). The Attorney General argues that *Withler* does not stand for the proposition

that there is no room for comparison in the section 15 analysis. That is true. However, while not creating a new test for section 15, the Court did centralize the focus of section 15 cases to one main question: "Does the challenged law violate the norm of substantive equality in s. 15 (1) of the *Charter*?" (at para 2).

[64] In pursuit of that central concern, the Court focussed on the "actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group" (at para 39).

[65] There is still room for comparison following *Withler*. Comparison plays a role throughout the equality guarantee. However, following *Withler*, it is unnecessary to point to a particular group that precisely corresponds to the claimant save for the characteristic alleged to ground the discrimination. "Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis (*Withler* at para 63).

[66] This is confirmed more recently in *Alliance*. In that case, Abella J said (at para 26):

> The first step of the section 15(1) analysis is not . . . an onerous hurdle designed to weed out claims on technical bases. Rather, its purpose is to ensure that section 15(1) of the *Charter* is accessible to those whom it was designed to protect. The "distinction" stage of the analysis should only bar claims that are not "intended to be prohibited by the *Charter*" because they are not based on enumerated or analogous grounds.

[67] The Board identified the comparator group as individuals with a physical disability in receipt of income assistance compared to all individuals

who are in receipt of income assistance. In doing so, the Board erred in its application of the first step of the section 15 analysis by adopting a formal rather than substantive equality analysis and failing to assess the adverse effects of the impugned *Regulation*. Doing so fails to recognise that Stadler's physical disability creates special needs that require accommodation. It completely ignores his physical disability and removes any obligation upon the program to respond to his physical disability. He is in receipt of income assistance benefits solely because of his physical disability and, because of that, the program has to respond to and address his situation in a manner that does not violate the protection he is guaranteed under section 15 of the *Charter*.

[68] In assessing Stadler's discrimination claim by comparing the treatment of income assistance recipients with and without disabilities before concluding there was no distinction because both groups faced a similar obligation to apply early, the Board adopted the mirror comparator analysis approach rejected in *Withler*. Sometimes, it is discriminatory to treat everyone equally.

[69] As Wagner CJC has said on mirror comparators, "By isolating a single distinction, their use tended to obscure the contextual impact of intersecting grounds of discrimination" and "[t]hey failed to capture the nuance of identity" (The Honourable Mr. Justice Richard Wagner, "How Do Judges Think about Identity? The Impact of 35 Years of *Charter* Adjudication" (2017-18) 49 Ottawa L Rev 43 at 50-51). The Board's comparator analysis told only part of the story of Stadler's experience under the *Regulation*. Comparing him only with the universe of potential

beneficiaries may have kept the Board from appreciating how keenly the burden affected Stadler.

[70] As well, the Board's analysis treated the first step of the section 15 test as too high of a threshold. The first part of the analysis is intended to weed out claims that have nothing to do with substantive equality and focus on those who are disadvantaged in the larger social and economic context (see *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19, quoting *Corbiere* at para 8; see also *Alliance* at para 26). It is a threshold test (see *Lavoie* at para 40). Dismissing cases at the first stage using comparators is a red flag for formalism: comparison must be "approached with caution" so that substantive equality does not succumb to formalism (*Withler* at para 42; see also para 41). It should not preclude Stadler from making his case, including his "adverse impact" argument.

[71] The Board ought not to have dismissed Stadler's case on the basis that, compared to others who receive income assistance under the *Regulation*, he was not treated differently. Whether Stadler is compared to the universe of potential beneficiaries under the *Regulation* (as the Attorney General argues) or with non-disabled persons not receiving income assistance (as Stadler and the intervener argue), to achieve substantive equality, the analysis ought to proceed past the first step of the section 15 test. As Abella J stated in *Withler*, "It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination" (at para 63).

[72] If I am wrong in that analysis, then I would adopt the argument of Stadler and the intervener that the Board erred in its selection of the

comparator group and that the correct comparator group is non-disabled persons not receiving income assistance.

Adverse Impact

[73] The key argument made by Stadler and the intervener in this case is one of adverse impact. While on its face, the *Regulation* is neutral and treats all persons receiving income assistance identically, the *Regulation* impacts persons with disabilities to a greater extent, perpetuating their disadvantage.

[74] An apparently neutral law may have a disproportionate effect on a particular group which, as a consequence, may result in that group being treated unequally. To establish an adverse impact for the purposes of section 15, a claimant need not show that all members of a group suffer the impact to the same extent (or at all). As the Court stated in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 (*Martin*) (at para 76):

> This Court has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated.

[75] So, it is not necessary to show that all persons with disabilities would be disproportionately impacted by the *Regulation* in order for Stadler to show that the law impacted him adversely on the basis of his disability (*ibid*).

[76] Jonnette Watson Hamilton & Jennifer Koshan, in their article "Adverse Impact: The Supreme Court's Approach to Adverse Effects

Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const Stud 191, define "adverse impact" discrimination as occurring (at p 196):

> . . . [W]hen a neutral rule, which is applied equally to everyone, has a disproportionate and negative impact on members of a group identified by a prohibited ground of discrimination. Its indirect nature is identified by the existence of a measure that does not obviously rely on a prohibited discriminatory ground. . . .

[77] Distinctions arising under benefits programs are common as these schemes attempt to address the needs of disparate groups. Moreover, social benefits programs are often expressed in a complex web of interwoven provisions so that altering one filament of the web can disrupt related filaments in unexpected ways, with considerable damage to legitimate government interests. Benefit schemes such as income assistance under the *Act* must balance different claimants' interests and cannot be perfectly tailored to every individual's personal circumstances, and must of necessity make distinctions based on general criteria. Therefore, distinctions arising under social benefits legislation will not lightly be found to be discriminatory. In *Withler*, the Court explained (at para 67):

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant

> group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

[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.

[79] Viewing section 12.1(2) in the context of the entire benefit scheme, it is significant that the *Regulation* makes specific provision for those with disabilities, providing additional benefits, including, for example, the trust property exemption for persons with disabilities, the exemption for recurring or non-recurring gifts of up to $500 per month, higher monthly basic needs budget and additional funding for a telephone and special diet, among other things.

[80] However, the program makes special provisions for a variety of different claimants. Where, as here, the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries.

[81] Thus, the issue is how an analysis under section 15(1) is to proceed where the impugned law is part of a wide-reaching legislative scheme of

government benefits, as is the case here (see *Withler* at para 25). The primary focus in the disability analysis should be on the appropriateness of the legislative or administrative response of the government (see *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28).

[82] The bedrock of Stadler's argument is that, in his case, because of his disability, the adverse impact of this particular *Regulation* will not last merely while he is on income assistance. The adverse impact in this case is permanent. None of the other benefits referred to will have such permanent impact on its recipients. The other benefits affected by this *Regulation* deal with the present. However, the impact on Stadler affects the rest of his future forever and may very well doom him to a life on income assistance. Once CPP benefits are applied for at age 60, the reduction in the pension is irrevocable.

[83] Moreover, Stadler disputed the assertion that everyone on income assistance is treated the same. He noted that able-bodied recipients are rewarded for working, because earned income has a $200 monthly exemption and a zero per cent recovery rate, while CPP benefits are recovered at a 100 per cent rate. In addition, the government has a financial incentive for persons that earn income through employment, but does not allow a similar incentive for persons with a disability when they have pension-type income. This, it is submitted, is additional evidence of discrimination on the basis of disability.

[84] In *Granovsky*, Binnie J noted that adverse impact claims are particularly relevant for claimants with disabilities. Government will rarely single out disabled persons for discrimination; rather, laws of facially neutral

application may have a disproportionate impact on persons with disabilities (at para 30):

> . . . [M]any of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual's condition at all but are located in the problematic response of society to that condition. . . . Problematic responses include, in the case of government action, legislation which discriminates *in its effect* against persons with disabilities, and thoughtless administrative oversight. The appellant says that his treatment by the CPP shows the inequality that can result when government enacts social programs with inadequate attention, at the design stage, for the true circumstances of people with disabilities.

[85] Thus, it is the adverse impact on disabled persons coupled with the unique situation of CPP pension benefits (the permanent negative effect of the forced election) that Stadler argues leads to the infringement. There is no dispute that the amount one would receive at age 65 is greater than the amount one would receive if one elected to receive the benefit at age 60. Forced to receive the benefits at age 60, Stadler will always receive a lower amount of income. While, as the Board indicated, if he falls below a certain level he will still be able to access income assistance, it may be that he would have been able to live at a higher level if he had been able to delay until the age of 65. He would perhaps have been able to remove himself from the stigma of receiving income assistance. In effect, he is doomed to a "life of poverty".

[86] The Attorney General, quite rightly, makes the point that it is incumbent upon Stadler to establish the evidentiary foundation to demonstrate a discriminatory adverse impact as a result of this regulation.

[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).

[88] The evidence filed by Stadler and the intervener substantiates the argument that there is a significant financial difference to a person taking his or her CPP benefits early at age 60 as opposed to the normal age of 65. According to the information provided by the Government of Canada, the standard age for beginning to receive CPP benefits is 65. If you start before age 65, payments will decrease by 0.6 per cent each month (or by 7.2 per cent, per year). If a person takes his pension before age 65, his pension will be reduced by up to 36 per cent at age 60. Thus, Stadler would lose up to one-third of his CPP benefits. (The pension will continue to increase up to the age of 70, however Stadler and the intervener adopted the age of 65 as being the standard age.)

[89] A regulation that requires a disabled individual presently on income assistance to give up a significant portion of what little financial security they may have for the future only continues and entrenches their disadvantaged financial positon. "It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization." Facing historic disadvantage and "paternalistic attitudes of pity and charity," persons

with disabilities are more likely to be "outside the labour force," unemployed or at "the lower end of the pay scale" (*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 56).

[90] 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. Persons with disabilities statistically face poverty at higher levels than persons without disabilities, as well as greater levels of poverty (see, for example, Canada, Federal-Provincial-Territorial Directors of Income Support, *Social Assistance Statistical Report: 2009-13*, (Ottawa: Her Majesty the Queen in Right of Canada, 2016), online (pdf): www.publications.gc.ca/collections/collection_2017/edsc-esdc/HS25-2-2013-eng.pdf (date accessed: 29 April 2020) at 84 (the 2009-13 report); *Eldridge* at para 56; *Dixon v 930187 Ontario*, 2010 HRTO 256 at para 51; and Statistics Canada, *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017*, by Stuart Morris et al, Catalogue No. 89-654-X2018002 (Ottawa: Statistics Canada, 28 November 2018) online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.pdf> (date accessed: 29 April 2020) at 17, 19 (the 2018 report)).

[91] When the Social Planning Council was granted leave to intervene, it was granted permission to file four additional documents: The Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, section 46.1; Irene A Hamilton et al, Manitoba Ombudsman, *Report on Manitoba's Employment and Income Assistance Program: Updated with Departmental Responses to Recommendations* (Winnipeg: December 2010), online (pdf): <www.ombudsman.mb.ca/uploads/document/files/eia-report-with-departme

ntal-responses-2010-en.pdf> (date accessed: 29 April 2020); 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), online (pdf): <www.gov.mb.ca/fs/eia/pubs/eia_rate_rev.pdf> (date accessed: 29 April 2020); the 2009-13 report; and the 2018 report. 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. People with more severe disabilities are more likely to be living in poverty.

[92] These documents substantiate the following social facts. While constituting 22.3 per cent of the Canadian population, persons with disabilities are over-represented in the income assistance program in Manitoba representing 58 per cent of income assistance recipients. The disability category provides income assistance to the largest number of income assistance program participants. They are in receipt of income assistance for a significantly longer duration than other income assistance groups.

[93] At age 65, the receipt of CPP benefits along with old age security (OAS) benefits and the guaranteed income supplement (GIS) is particularly important in terms of poverty outcomes for persons with more severe disabilities.

[94] Forced to apply for CPP benefits at age 60, Stadler will face permanently reduced CPP benefits and a heightened reliance on federal benefits when he does reach the age of 65. Although the *Regulation* refers to all benefits, CPP is the only benefit that decreases the sooner it is taken. As a result of the requirement to apply for CPP benefits at age 60, Stadler and

others in his position are forced to accept a reduction of 36 per cent in their CPP income. The adverse impact on Stadler needs to be assessed contextually as a disabled person in receipt of income assistance. The *Regulation* creates a situation where some income assistance recipients with greater needs/expenses (likely those with greater medical or health needs) will be forced to rely on income assistance in perpetuity if their total (reduced) CPP, OAS and GIS income is inadequate to meet their needs.

[95] In this case, the state conduct widens the gap between the historically disadvantaged group of disabled individuals and the rest of society rather than narrowing it and consequentially, it is discriminatory (see *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332; and *Taypotat* at para 20). As a result, I would conclude that requiring Stadler to apply for CPP benefits at age 60 infringes his equality right under section 15(1) of the *Charter*.

Section 1 Analysis

[96] Having found an infringement under section 15(1) of the *Charter*, the question then becomes whether that infringement can be justified under section 1 of the *Charter*. Section 1 states:

> **Rights and freedoms in Canada**
> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[97] It is clear that the legislation is "prescribed by law". It is also clear that the onus is on the Attorney General to show that requiring disabled income assistance 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" (*Alliance* at para 43).

[98] Thus, first, one has to identify the "pressing and substantial objective". That objective is the objective relevant to the infringing measure "since it is the infringing measure and nothing else which is sought to be justified" not the whole legislative scheme (*Alliance* at para 45).

[99] Second, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" (*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 139).

[100] There are three important components of this proportionality test. First, the measures adopted must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question (*ibid*). "Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'" (*R v Oakes*, [1986] 1 SCR 103 at para 70).

[101] In short, the proportionality analysis requires consideration of a rational connection to the objective; whether the law impairs the protected right as little as reasonably possible and proportionality between the objective of the law and the limits it imposes on constitutionality guaranteed rights (see *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 148-50).

[102] To satisfy the onus, the Supreme Court of Canada has indicated that section 1 of the *Charter* requires a reasoned demonstration by way of evidence if a legislative provision is to be saved. There is no evidence before this Court that would justify a conclusion that the province has met this burden.

[103] The Attorney General argues that the *Regulation* contains within it a "reasonableness" component. Yet, pension benefits were listed in the definition of benefits that had to be included and all caseworkers insisted that Stadler apply for the CPP benefit, to the extent that his income assistance benefits were discontinued when he refused at first. The *Charter* may be infringed not only by the legislation itself, but by the actions of a delegated decision-maker applying it (see *Eldridge*).

[104] When considering the *Regulation*, the Board considered the objective of the *Act* and legislative scheme as a whole rather than the impugned provision. The Board found that "the *Act* and the *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 Supreme Court of Canada 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" (*Alliance* at para 45).

[105] Even if one accepts the objective of the *Regulation* itself as the legislative expression of being a program of last resort, as the Attorney General argues, no empirical or other evidence has been advanced to show that the province would in reality save money over the long term by forcing

disabled income assistance recipients to apply for CPP benefits early. In fact, the Board's decision indicates that forcing Stadler and other disabled income assistance recipients to apply early for CPP may lengthen their period of reliance on income assistance beyond age 65. In other words, the province could spend more on income assistance in the long run.

[106] Even if it were shown that it saved the province money, that would not automatically discharge the Attorney General's burden. Cost savings was rejected as a section 1 justification in *Falkiner CA*. "[T]he negative effects of the definition outweigh its positive effects. . . . [T]he only possible positive effect of the definition is cost savings" (at para 111).

[107] Nor is Stadler's equality right minimally impaired. His choice about when to apply for CPP benefits 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. The Attorney General has not discharged its onerous burden of demonstrating that the impugned provision is the only mechanism to address its legislative objectives.

[108] The Legislature may create particular benefits (such as income assistance) targeted at particular groups of people with specific eligibility requirements. However, the disproportionate harm created by section 12.1(2) of the *Regulation* in further entrenching poverty for persons with disabilities cannot be justified under section 1 of the *Charter*.

Conclusion

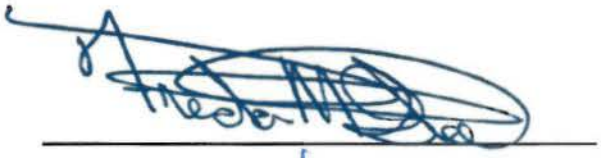
[109] The *Charter* cannot eliminate physical disabilities, but it can address the way in which the state responds to people with disabilities when

apparently neutral legislation has unintentional adverse effects on them (see *Eldridge* at para 64; *Granovsky* at para 33; and *Quebec (Attorney General)* at para 332).

[110] The *Regulation* widens the gap between persons with disabilities who receive income assistance and the rest of society by perpetuating their dependence on income assistance. Its effect is to permanently reduce their income for the rest of their lives due to a temporary or situational need at the age of 60. Persons with disabilities are disproportionately affected by the *Regulation* in question because they are at greater risk of living in poverty and, as a result, are dramatically over-represented among those in receipt of income assistance. Being forced to apply early for CPP benefits rather than at the age of 65, permanently reduces the income of a person with physical disabilities. The resulting reduction in their CPP benefits leaves them more at risk of remaining in poverty with the possibility of lifetime dependence on income assistance. As well, the forced choice takes away recipients' autonomy and affects their dignity (*Quebec (Attorney General)* at para 139).

[111] Thus, the *Regulation* perpetuates and exacerbates the burdens of an already disadvantaged group. Because of the permanent nature of the CPP application, once the pension is taken at the age of 60 at a reduced amount, that reduction is permanent and, at 36 per cent, it is a significant reduction. That is not the case with other benefits. None of the other benefits are permanently reduced as a result of accessing them sooner. The Board's analysis fails to account for the adverse impact of the law on Stadler on the basis of his disability.

[112] I would allow the appeal and order the remedy requested by Stadler, that he not be required to apply for CPP benefits until the age of 65. That order will be retroactive to the date of his original application. I would order that section 12.1(2) of the *Regulation* be read down to exclude disabled recipients of income assistance from the requirement to apply for CPP benefits before the age of 65.



JA

I agree: 

CJM

I agree: 

JA