

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160307

**Docket: A-197-14
A-198-14**

Citation: 2016 FCA 77

**CORAM: STRATAS J.A.
WEBB J.A.
SCOTT J.A.**

BETWEEN:

IZABELA POPOVA

Appellant

and

**THE EMPIRE LIFE INSURANCE COMPANY and
MAUREEN WHEELER, MANAGER OF THE
GROUP LIFE AND DISABILITY CLAIMS**

Respondents

Heard at Toronto, Ontario, on February 23, 2016.

Judgment delivered at Ottawa, Ontario, on March 7, 2016.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**STRATAS J.A.
SCOTT J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160307

**Docket: A-197-14
A-198-14**

Citation: 2016 FCA 77

**CORAM: STRATAS J.A.
WEBB J.A.
SCOTT J.A.**

BETWEEN:

IZABELA POPOVA

Appellant

And

**THE EMPIRE LIFE INSURANCE COMPANY and
MAUREEN WHEELER, MANAGER OF THE
GROUP LIFE AND DISABILITY CLAIMS**

Respondents

REASONS FOR JUDGMENT

WEBB J.A.

[1] Ms. Popova has appealed two Orders of Hughes J. of the Federal Court, both dated April 2, 2014 and both in Docket T-2067-13. The appeals (A-197-14 and A-198-14) were consolidated by an Order dated June 27, 2014 with A-197-14 to be considered as the lead appeal. These reasons shall be filed in A-197-14 and a copy thereof shall be filed in A-198-14.

[2] The issue in relation to both Orders and these Appeals is whether Ms. Popova's father, who is not a solicitor, should be allowed to represent her in her matter before the Federal Court. In one Order, Hughes J. dismissed the motion made on behalf of Ms. Popova for an Order granting her father permission to act on her behalf and in the other Order, Hughes J. dismissed an appeal from an Order of the Prothonotary who had also denied a similar request.

[3] Ms. Popova has commenced an Application in the Federal Court against the Respondents. The Respondents note in their Memorandum of Fact and Law that a case management Judge was appointed on March 6, 2014.

[4] Rules 119 and 121 of the *Federal Courts Rules*, SOR/98-106, provide that:

119. Subject to rule 121, an individual may act in person or be represented by a solicitor in a proceeding.

...

121. Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.

119. Sous réserve de la règle 121, une personne physique peut agir seule ou se faire représenter par un avocat dans toute instance.

[...]

121. La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières, n'en ordonne autrement.

[5] Although Ms. Popova referred to Rule 121, this Rule only applies if a party is under a legal disability or is seeking to act in a representative capacity. The two references to "who" would both be referring to "a party". Therefore this Rule should be read as applying to either a

party who is under disability or a party who is acting or seeking to act in a representative capacity.

[6] In this case, there is no indication that Ms. Popova is under a legal disability. Since her father is not a party, Ms. Popova cannot rely on Rule 121 to have her father represent her.

[7] As a result, the applicable Rule is Rule 119. This Rule is clear – Ms. Popova may either act in person or be represented by a solicitor. Since her father is not a solicitor, he cannot represent her.

[8] Prior to the hearing of this appeal, Ms. Popova's father filed, on her behalf, a Notice of Constitutional Question in which Ms. Popova was attempting to raise the issue of whether Rule 119 breached section 12 and subsection 15(1) of the *Canadian Charter of Rights and Freedoms, 1982 (Charter)* and whether Rule 121 breached subsection 15(1) of the *Charter*. Since Rule 121 would not be applicable in any event, the alleged challenge would be to Rule 119.

[9] Section 12 and subsection 15(1) of the *Charter* provide as follows:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

...

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

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[...]

15.(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des

origin, colour, religion, sex, age or mental or physical disability.

discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[10] The issue of whether these provisions of the *Charter* are applicable had not been raised before the Prothonotary or the Federal Court Judge.

[11] In *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 268, [2009] F.C.J. No. 1152, this Court stated that:

2 In *Coca-Cola Ltd. v. Parnham (c.o.b. Universal Exporters)*, 2003 FCA 11, leave to appeal dismissed, [1999] S.C.C.A. No. 338, this Court held that it would not entertain Charter arguments that were not raised before the Federal Court because to do so would deprive this Court of the benefit of the application judge's reasoning and analysis on the arguments.

3 Further, by raising the issues for the first time at the appellate level, the appellant will have deprived the respondent of any opportunity to lead evidence relating to the alleged breaches.

[12] Since Ms. Popova did not raise her *Charter* arguments before the Prothonotary or the Federal Court Judge and since evidence would be necessary to advance these arguments, they cannot be raised for the first time in this Court in her appeal of the Orders of the Federal Court Judge. The assertions made in the Notice of Constitutional Question with respect to the potential consequences if Ms. Popova's father is not permitted to represent her are not evidence. Evidence must be introduced through a witness, which is generally done either by the witness testifying during a hearing or deposing an affidavit. An opposing party would have the right to cross-examine the witness. Allegations made only in argument are not evidence.

[13] In any event, in the interest of avoiding any further delays in this matter and for the benefit of Ms. Popova, I would refer to the following comments made by the Supreme Court of Canada in relation to sections 12 and 15 of the *Charter*.

[14] In relation to section 12 of the *Charter*, Lamer J. (as he then was) in *R. v. Smith*, [1987] 1 S.C.R. 1045, [1987] S.C.J. No. 36 stated that:

53 The limitation at issue here is s. 12 of the Charter. In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in *Miller and Cockriell*, *supra*, where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

[15] The alleged implications arising from a refusal to allow Ms. Popova's father to represent her in her Application before the Federal Court, even if they would have been established by evidence, would fall far short of what would be required to establish cruel and unusual punishment for the purposes of section 12 of the *Charter*.

[16] With respect to subsection 15(1) of the *Charter*, I would refer to the following excerpt from the decision of the Supreme Court of Canada in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548:

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

inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.

19 The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.

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

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

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

[17] It would appear that Ms. Popova, in relation to her challenge to Rule 119, is alleging that Rule 119 creates a distinction based on whether a person is a solicitor or is not a solicitor. This is not an enumerated ground in subsection 15(1) of the *Charter* and it is far from clear on what basis it could be considered to be an analogous ground.

[18] Although the Respondent was seeking enhanced costs, in my view, costs should be awarded in accordance with the tariff. As well, since the issue is the same for both appeals, I would only award one set of costs.

[19] As a result, I would dismiss the appeals, with one set of costs. Since A-197-14 is the lead appeal, I would award costs in that appeal.

"Wyman W. Webb"

J.A.

"I agree.

"David Stratas J.A."

"I agree.

"A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-197-14
A-198-14

**(APPEAL FROM TWO ORDERS OF THE HONOURABLE MR. JUSTICE HUGHES
DATED APRIL 2, 2014, DOCKET NUMBER T-2067-13)**

STYLE OF CAUSE: IZABELA POPOVA v. THE EMPIRE LIFE
INSURANCE COMPANY and MAUREEN
WHEELER, MANAGER OF THE GROUP
LIFE AND DISABILITY CLAIMS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 23, 2016

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: STRATAS J.A.
SCOTT J.A.

DATED: MARCH 7, 2016

APPEARANCES:

Dimitri Popov ON BEHALF OF THE APPELLANT

Cory Young FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Hughes Amys LLP FOR THE RESPONDENTS
Toronto, Ontario