

COURT FILE NO.: 01-CV-210868

DATE: 20010531

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KIMBERLY ROGERS (Applicant) v. THE ADMINISTRATOR OF ONTARIO
WORKS FOR THE CITY OF GREATER SUDBURY and ATTORNEY GENERAL
OF ONTARIO (Respondents)

BEFORE: EPSTEIN J.

COUNSEL: *Sean Dewart and Charlene Wiseman*
for the Applicant

Richard Stewart and Lisa Sand,
for the Respondent, Attorney General of Ontario

No one appeared for The Administrator of Ontario Works

HEARD: May 25, 2001

ENDORSEMENT

[1] The applicant, Ms. Rogers moves for interim relief reinstating her as a recipient of 'Ontario Works' benefits (the "benefits") pending the determination of her constitutional challenge to the Regulations pursuant to which her benefits were recently suspended. The motion raises the usual issues relevant to the test for an interlocutory injunction established in *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) in the context of relief sought that would have the effect of suspending the operation of a law or at least exempting Ms. Rogers from its operation.

The Background

[2] There is really no dispute concerning the facts. Ms. Rogers received benefits from the respondent, the Administrator of Ontario Works for the City of Greater Sudbury, until April 30, 2001. Her benefits were then automatically cancelled pursuant to Regulations promulgated under the *Ontario Works Act*, S.O. 1997 c 25, Schedule B, as amended, (the "Regulations") because she pled guilty to welfare fraud on April 25, 2001. The plea and ultimate conviction arose as a result of the applicant's failure to report a portion of certain student loan proceeds she received while she attended college between 1996 and 1999.

[3] Ms. Rogers is 39 years old and about 22 weeks pregnant. The evidence is clear that she is destitute and has no clear means of support. She has no savings. She is unable to obtain assistance from her family or from the father of her unborn child. A counselor and social worker have been trying to help Ms. Rogers obtain basic necessities. However, although they have been able to provide some assistance, most charitable organizations have been unable or unwilling to help. As a result, Ms. Rogers faces the imminent loss of her shelter and has no ready access to food.

[4] When Ms. Rogers benefits were automatically cancelled for three months she commenced this proceeding challenging the provisions of the relevant Regulations that provide as follows:

(1) An administrator shall refuse to provide assistance to an applicant or cancel or reduce the assistance provided to a recipient if a member of the benefit unit has been convicted of a crime or an offence in relation to the receipt of,

- (a) assistance under the *Ontario Works Act, 1997*;
- (a.1) income support under the *Ontario Disability Support Program Act, 1997*;
- (b) benefits under the *Family Benefits Act*; or
- (c) assistance under the *General Welfare Assistance Act*.

(2) If the recipient is a single person, the assistance shall be cancelled; if the recipient's benefit unit includes a dependant, the assistance shall be reduced by an amount equal to the budgetary requirements and benefits for the convicted person.

(3) Assistance shall be refused, cancelled or reduced under this section,

- (a) for three months if it is a first conviction;
- (b) for six months with respect to any subsequent conviction for that person.

[5] As of April 1, 2000, this provision was repealed. As amended, the regulation provides that in the event of conviction of an offence in relation to the receipt of assistance under one of the Acts named above, the person is permanently ineligible for social assistance. Section 36 as it read prior to repeal continues to apply to convictions for offences that were committed in whole before April 1, 2000.

[6] Ms. Rogers, in her application, takes the position that the Regulations violate sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* and are *ultra vires* the Lieutenant-Governor in Council of the Province of Ontario.

The Argument

[7] Counsel for the applicant contends that the impugned Regulations should be suspended or at least the applicant ought to be exempt from their effect pending the

results of the constitutional challenge. There is a serious issue to be tried in regards to each of the four distinct challenges to the constitutional validity of the Regulations. Further, given Ms. Roger's medical condition and financial circumstances, she will suffer irreparable harm if her benefits are suspended for another two months and the balance of inconvenience lies in favour of suspending the Regulations or at least exempting the applicant from their operation.

[8] The administrator of Ontario Works for the City of Greater Sudbury took no position on the motion. Counsel for the Attorney General for Ontario, however, asks that the motion be dismissed. He submits that the various arguments raised by the applicant concerning the constitutional validity of the Regulations are without merit. He also argues that Ms. Rogers has, to date, been able to find ways of addressing her basic needs and therefore has failed to establish irreparable harm. Further, given the strong public interest in preserving the integrity of validly enacted laws that are presumed to promote the welfare of the public, the balance of inconvenience lies strongly in favour of dismissing the motion.

Analysis

[9] The test for granting an interim order such as the one requested by the applicant is as follows:

- (a) There must be a serious *Charter* case to be tried that is not frivolous and vexatious.
- (b) The applicant must show that she will suffer irreparable harm if the relief is not granted prior to the hearing.
- (c) The balance of convenience, taking into account the public interest must favour the granting of the relief.

See: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 and *RJR—MacDonald*, *supra*.

[10] Generally, in *Charter* cases the motions judge does not have to engage in an extensive review of the merits of the constitutional arguments and need only be satisfied that the application is not frivolous or vexatious. The Attorney General argued that this case may fall within one or both of the exceptions to that general rule in that the question of constitutionality presents itself as a simple question of law alone or that the result of the motion would amount to a final determination of the application. I should proceed, therefore, with an in-depth analysis of the merits of the case. I do not agree. The determination of this motion in no way can be said to resolve the application. Further, some, if not all, of the aspects of the applicant's constitutional challenge require a contextual analysis. Accordingly, the threshold for demonstrating there is a serious case to be tried is low.

[11] Notwithstanding this low threshold I did hear and consider extensive submissions concerning the various arguments upon which the applicant relies in her challenge to the Regulations. While I cannot say that I accept all of them, some of them clearly have

merit. The matter is anything but frivolous and vexatious. I find there is a serious case to be tried. I therefore must turn to consider the second and third stages of the test.

[12] *RJR-MacDonald* makes it clear that irreparable harm refers to the nature of the harm rather than its magnitude. It is harm that cannot be quantified in monetary terms or that cannot be cured. It is only the harm to the applicant that is to be considered at this stage of the test. And the applicant has easily persuaded me that she will suffer, or at the very least is seriously threatened with, irreparable harm if the relief sought is not granted.

[13] Ms. Rogers has no reliable alternative source of income. She is at the brink of being homeless. She is at this moment unable to feed herself adequately. The medical evidence in the record is clear that as a pregnant woman in the last trimester of her pregnancy the applicant is exposed to serious and perhaps permanent health problems unless, at the very least, she has access to proper nutrition if not shelter. The irreparable harm is clear and obvious.

[14] In constitutional cases assessing the balance of inconvenience is often very difficult. The public interest must be considered along with the interests of the litigants. In fashioning a remedy the court should weigh the severity of the present and potential harm to the individual against any possible short-term harm to the public interest.

[15] There are two types of interlocutory orders that may be sought in a Charter proceeding. An applicant may seek an order suspending the operation of the impugned law pending determination of the case on the merits or may only seek to be exempted personally from the operation of the law. The Supreme Court has indicated that public interest considerations will weigh more heavily where the applicant seeks suspension of the impugned law, than in an exemption situation where she seeks personal exemption. Obviously, that is because the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the law in question.

[16] According to *RJR- MacDonald* I must assume that the operation of a properly enacted but challenged law serves a valid public purpose. Further, according to the Supreme Court of Canada decision in *Attorney General of Canada v. Harper*, [2000] 2 S.C.R. 764, courts "will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged constitutionality succeed."

[17] While the test has been described as creating " a very low hurdle for governments and a high one for applicants seeking an interim injunction to restrain, even briefly, the operation of a law enacted by a democratically elected legislature" it cannot be said that the public interest in the application of its laws always trumps any inconvenience demonstrated by the record resulting from the failure to enjoin, in some fashion, the operation of a law. See: *Ferrel v. Ontario (Attorney General)*, unreported decision, December 28-29, 1995, Ontario Court (General Division), *Al Yamani v. Canada (Solicitor General)*, [1994] F.C.J. No. 966 p.1 (F.C.A.) and *Smith v. Canada (Minister of Employment and Immigration)*, [1993], O.J. p.1.


[18] In my view this is one of the "clear cases" where the applicant has demonstrated that the balance of inconvenience favours the granting of an order exempting the applicant from the operation of the Regulations pending the final determination of the application.

[19] In the unique circumstances of this case, if the applicant is exposed to the full three month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus thereby adversely affecting not only mother and child but also the public – its dignity, its human rights commitments and its health care resources. For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.

[20] While the integrity of our social assistance programs must be respected and maintained it simply has to be that the 'inconvenience' of a pregnant woman living on the streets is far greater than is the 'inconvenience' of any threat, perceived or real, that the order exempting Ms. Rogers from the operation of the Regulations may seriously jeopardize that integrity. I have considered the argument that an exemption may be a 'slippery slope' leading to a suspension of the operation of the Regulations but there is no convincing evidence in the record before me of the real likelihood of such a consequence. More importantly, the order is being granted in light of the particular facts in this case that centre on Ms. Rogers' medical condition.

[21] In the result I order an interlocutory declaration that Ms. Rogers is constitutionally exempted from the application of the Regulations (as well as section 36.1 of the regulations as amended effective April 1, 2001). I also grant a mandatory order directing the Administrator to reinstate Ms. Rogers' benefits retroactive to April 30, 2001.

[22] I regret that the obvious need for me to provide the parties with my decision on an urgent basis precluded me from doing justice to the comprehensive and thorough arguments presented by counsel in their factums and oral submissions. But the matter is urgent and should be resolved as quickly as possible. It is common ground that the application should proceed by way of judicial review pursuant to sections 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J. The application is therefore transferred to be heard in the Divisional Court at the very earliest date that the parties are able to arrange with the Registrar.


EPSTEIN J.

Released: May 31, 2001