**NOVA SCOTIA COURT OF APPEAL**

**Citation:** ***McIntyre v. Nova Scotia (Community Services)***, 2012 NSCA 106

**Date:** 20121002
**Docket:** CA 370045
**Registry:** Halifax

**Between:** Sally McIntyre

Appellant

v.

Department of Community Services (Nova Scotia)

Respondent

| | |
|---|---|
| **Judges:** | Saunders, Hamilton and Fichaud, JJ.A. |
| **Appeal Heard:** | September 20, 2012, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed, without costs, per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton, JJ.A. concurring |
| **Counsel:** | Vincent Calderhead, for the appellant<br>Sheldon Choo, for the respondent |

**Reasons for judgment**:

[1] The Assistance Appeal Board quantified an overpayment of social assistance that is recoverable by the Department of Community Services from the recipient, Ms. McIntyre. The overpayment resulted from an award of retroactive CPP disability benefits to Ms. McIntyre's spouse. The Department, dissatisfied with the quantum of the recoverable overpayment, applied for judicial review. The reviewing judge partially set aside the Board's ruling, and increased the amount that the Department may recover from Ms. McIntyre. Before the Board and the reviewing Court, Ms. McIntyre acknowledged that there was an overpayment, and said that the only contentious issue was the quantum. Ms. McIntyre appealed to the Court of Appeal. In this Court, Ms. McIntyre seeks a declaration that there was no overpayment.

***Background***

[2] In July 2009 Ms. McIntyre and her husband, Mr. Leblanc, attended at the office of the provincial Department of Community Services ("Department") to seek income assistance. The application form named Ms. McIntyre as "Applicant/Recipient", was co-signed by Mr. Leblanc as "spouse" and required both Ms. McIntyre and Mr. Leblanc to disclose their incomes. The Department granted Ms. McIntyre's application and, starting in July 2009, she received benefits under the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27 ("*Act")*.

[3] Meanwhile Mr. Leblanc applied for disability benefits under the *Canada Pension Plan*. In August 2010, due to his health condition, Mr. Leblanc was awarded a retroactive CPP lump sum disability benefit. The retroactive term of that award overlapped the period of Ms. McIntyre's receipt of income assistance from the Department.

[4] On September 17, 2010 Ms. McIntyre notified her Departmental caseworker, Mr. Roy Edwards, of her spouse's recent CPP award. There is no suggestion that Ms. McIntyre failed to make full and proper disclosure. On September 21, 2010 Mr. Edwards told Ms. McIntyre that "there might be an overpayment problem". In January, 2011 the Department calculated the

overpayment at $6,774.51. Since then, the Department has taken the position that Ms. McIntyre must repay $6,774.51.

[5] Ms. McIntyre asked the Department to reconsider, but, after internal review, the Department maintained its position.

[6] Ms. McIntyre appealed to the Assistance Appeal Board ("Board") under ss. 11-13 of the *Act*. At the Board's hearing, Ms. McIntyre appeared without counsel. The Board, constituted by Mr. Douglas MacKinlay, heard the appeal on March 24, 2011. On April 2, 2011, the Board issued a decision that partly allowed Ms. McIntyre's appeal. Under the heading "Arguments of the Appellant", the Board's decision noted:

> [Ms. McIntyre] acknowledged that it was not unreasonable to find that there is an overpayment but asked that it be limited to 6 months of 'dual' payments. This latter request is based on Policy 8.1.1, and ESIA s. 14(3).

[7] The Board, adopting Ms. McIntyre's acknowledgement, upheld the Department's entitlement to recover an overpayment. But the Board reduced the quantum of that recovery to $2,876.92 further to s. 14(3) of the *Act*. Section 14(3) says:

> (3) Where the overpayments were paid notwithstanding full disclosure by the person in receipt of them of all relevant information required by the regulations, the recovery of them is limited to the overpayments for the six months immediately before the making of a demand for the recovery of the overpayment.

The Board's decision reasoned, as to the reduction:

> In the current case, Sally McIntyre provided adequate 'full-disclosure' of "all relevant information required by the regulations"... .
>
> Based on s. 14(3) of the Act, and due to adequate full disclosure having been made by Sally McIntyre, I find that the overpayment demanded by the Department is limited to the six months, "immediately before the making of a demand for a recovery of the overpayment".

The Board calculated the six months overpayment as $2,876.92, to be repaid by Ms. McIntyre.

[8] The Board's decision did not mention s. 14(4) of the *Act*, which says:

> (4) Subsection (3) does not apply to assistance paid on condition that it would be repaid from the deferred sale of an asset or otherwise, *to sums paid to a person who receives deferred income* with respect to any period for which assistance was provided or to assistance that was agreed in writing to be repayable. [emphasis added]

I have emphasized the words that were the focus of the judicial review and this appeal.

[9] Ms. McIntyre did not apply to the Supreme Court of Nova Scotia for judicial review of the Board's decision.

[10] The Department did apply to the Supreme Court for judicial review. The Department sought an order overturning the Board's decision and reinstating the Department's quantification of the overpayment at $6,774.51. Before the Supreme Court, Ms. McIntyre was represented by counsel. Justice Bourgeois heard the application on October 24, 2011.

[11] The judge issued a decision on October 31, 2011 (2011 NSSC 401). Justice Bourgeois set aside the Board's recalculation of the overpayment and reinstated the Department's quantum of $6,774.51 as the amount recoverable by the Department from Ms. McIntyre. The judge determined that: (1) the standard of review for the Board's interpretation of the *Act* and its regulations was correctness; (2) Mr. Leblanc's CPP disability pension was "deferred income" within the meaning of s. 14(4); (3) the Board erred by not considering s. 14(4); (4) the scheme of the regulations under the *Act* [discussed below, paras 46-48] is that a recipient's chargeable income to calculate an overpayment includes spousal income; and (5) the correct interpretation of s. 14(4), in tandem with the regulations, is that the full $6,774.51 was recoverable as an overpayment.

[12] On the judicial review, Ms. McIntyre accepted that there was an overpayment, but submitted that s. 14(4) did not apply. Her submission was that the Department's recovery be limited to the six months benefits ($2,876.92) capped by s. 14(3), as the Board had determined. Her counsel's oral submission to Justice Bourgeois included:

> However, in the context of our argument today, Ms. MacIntyre [*sic*] has agreed that there was an overpayment. She agreed in front of Mr. MacKinlay at the Commission level. She was prepared to accept the six month limitation. It is ... so it is the application of only the six month limitation under 14(4) that we are arguing, not the overpayment as a whole.

The written submission from Ms. McIntyre's counsel to Justice Bourgeois said "for the purpose of this review, the Respondent will proceed on the assumption that there was an overpayment". Justice Bourgeois' decision commented on the point:

> [16] Ms. McIntyre was not represented at the Board hearing. Her Counsel submits that she may have put forward alternate or additional arguments at that time, should she have had the benefit of legal advice. What Counsel is referring to, is Ms. McIntyre's acknowledgment at the Board hearing that an overpayment was owing. Counsel for Ms. McIntyre submitted that a proper interpretation of the legislation would fail to establish there was an overpayment, as she personally had not received the deferred income. However, Counsel indicated that Ms. McIntyre was not pursuing that argument, was prepared to acknowledge there was an overpayment, but that the Board was correct in applying s. 14(3) to limit the overpayment period to six months. Further, the Board was correct in not considering the provisions of s. 14(4).

[13] Ms. McIntyre appeals to the Court of Appeal.

## ***Issues***

[14] Ms. McIntyre's Amended Notice of Appeal and factum describe the principal issue as whether Ms. McIntyre was "overpaid" social assistance at all. The Order or Relief Sought in Ms. McIntyre's factum is that the Court of Appeal "declare that the spouse's receipt of a CPP lump-sum payment did not fall within the scope of 'overpayment', as defined in s. 3(f) of the *Act*".

[15] In the alternative, Ms. McIntyre's factum asks the Court of Appeal to "dismiss the [Department's] application for judicial review, effectively affirming the Appeal Board's decision" that the recoverable overpayment be capped at $2,876.92.

[16] The Department moves for the admission of fresh evidence in the Court of Appeal.

***Standard of Review***

[17] The judge (para 20) quoted *Legere v. Nova Scotia (Community Services)*, 2010 NSSC 67, para 9:

> The findings of fact of an appeal board under the Employment Support and Income Assistance Act are reviewable only for their reasonableness in light of the decision as a whole and the record, but an interpretation of the statute or regulations is reviewable for its correctness: ...

The judge continued:

> [21] I agree with the approach as outlined above. As this review involves a determination of whether the Board was correct in its statutory interpretation, the standard to be applied is one of correctness.

[18] Both parties say that the standard of review to the Board is correctness.

[19] Ms. McIntyre's factum cites, in support of the correctness standard, this Court's statement in *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43; [leave to appeal denied, [2012] S.C.C.A. No. 237], at para 87, that "the judge must be correct on issues of law and not commit a palpable and overriding error on issues of either fact or mixed fact and law with no extractable legal error".

[20] That statement from *T.G.* refers to the Court of Appeal's standard to the decision of the lower court. It does not refer to the reviewing court's standard to the decision of the administrative tribunal. In *T.G.*, paras 113 and 116, this Court agreed with the principle that generally the reviewing court's standard of review to the administrative decision maker, when applying its home statute, was reasonableness.

[21] Agreement of the parties does not necessarily determine the standard of review: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at para 6; *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, para 33, per Abella, J., for the Court.

[22] I disagree that an administrative tribunal's interpretation of its home legislation generally attracts a correctness standard of review. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, Justices LeBel and Cromwell for the Court said:

> 24 ... In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, Justice Rothstein for the majority said:

> [30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

To similar effect *Celgene,* para 34.

[23] The Board's interpretation and application of the *Employment Support and Income Assistance Act,* and the regulations and policies under that *Act* - the Board's home legislation - would be entitled to deference, meaning a reasonableness standard, subject to the exceptions mentioned in these passages from *Canadian Human Rights Commission* and *Alberta Teachers' Association*. Here, there is no constitutional issue, conflict or overlap between two tribunals, or issue of jurisdiction or *vires*. Had Ms. McIntyre submitted that the regulations

were *ultra vires* the *Act,* that issue would be of central legal importance, not within the particular institutional expertise of the Board, and would be subject to correctness review. Ms. McIntyre does not suggest that the regulations are *ultra vires*. Her submissions are purely interpretive.

[24] In the judicial review of the Board's decision, the reviewing court's standard to the Board's application of the Board's home legislation is reasonableness.

[25] Due to the unusual circumstances that have evolved here, nothing in this appeal turns on the court's selection of a standard of review to the Board. I say this for the following reasons.

[26] Ms. McIntyre has recast the issue to the Court of Appeal. Ms. McIntyre's principal submission to the Court of Appeal - that there is no "overpayment" - was not put to the Board. Before the Board, and in the Supreme Court, Ms. McIntyre accepted that the CPP award to her spouse resulted in an "overpayment" of social assistance to her (above paras 6 and 12). Because of that acknowledgement, the Board did not address the provisions of the *Act* or regulations that discuss whether spousal income is chargeable, for overpayment purposes, to the recipient of social assistance. The Board's decision contains no raw material for judicial review on that matter. So the degree of judicial deference due to the Board's reasoning, on whether there is any "overpayment", is a somewhat sterile issue.

[27] The Board just interpreted and applied s. 14(3). If there is an "overpayment" - *i.e.,* if spousal income is chargeable to the recipient of social assistance to calculate an overpayment to the recipient - then nobody challenges the Board's interpretation of s. 14(3) *simpliciter*. This would mean that the six month limitation would govern, unless the exception in s. 14(4) applies.

[28] Section 14(4) states an explicit exception to s. 14(3). The Board did not mention s. 14(4). This is not a case where the Board distinguished s. 14(4) with an interpretation - express or implied - of that provision to which the court should give some deference. If, properly interpreted, s. 14(4) does not apply, then the reviewing judge erred in her interpretation of s. 14(4) and the Board's decision under s. 14(3) should be reinstated. That result would obtain, whatever standard of review governs judicial review of the Board's decision. On the other hand, if s.

14(4) does apply, then the Board's decision is both incorrect and unreasonable. It would be unreasonable - *i.e.,* outside the range of acceptable outcomes - for the Board to just ignore, without comment, s. 14(4)'s explicit exception to the principle in s. 14(3).

***Fresh Evidence***

[29] The Department moves to add to the appeal record the affidavit, sworn July 20, 2012 by Ms. Catherine Meaney, a Project Coordinator employed by the Department. The affidavit attaches the Employment Support and Income Assistance Application signed on July 31, 2009, by Ms. McIntyre and Mr. Leblanc.

[30] Rule 90.47(1) authorizes the Court of Appeal to receive fresh evidence on "special grounds". In *T.G.*, this Court said (para 77) that the test stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, and the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further (*T.G.*, para 78), the fresh evidence must be in admissible form.

[31] The Department tenders the fresh evidence to address the issue - whether there was any "overpayment" - that Ms. McIntyre has introduced on the appeal. Given this is a new issue, I agree that the Department has exercised sufficient due diligence.

[32] There is no question of credibility. The evidence is relevant and reasonably may affect the result. The evidence is in admissible form.

[33] Ms. McIntyre's reply factum says (para 2) "the Appellant has consented to the application to enter new evidence". Ms. McIntyre's factum then submits that the fresh evidence supports her position on the merits.

[34] I would grant the Department's motion to add the fresh evidence.

### *First Issue - Is There an "Overpayment"?*

[35] To reiterate, Ms. McIntyre, unrepresented by counsel, acknowledged to the Board that there was an overpayment, because of her spouse's receipt of the CPP benefit. The Board's decision relied on that acknowledgement. Ms. McIntyre, represented by counsel, filed no motion for judicial review from the decision of the Board, and in the Supreme Court again acknowledged that there was an overpayment. Until Ms. McIntyre's appeal to the Court of Appeal, the issue was whether the quantum of the Department's recovery should be limited to $2,876.92 under s. 14(3), or comprise the full $6,774.51.

[36] In the Court of Appeal, Ms. McIntyre, represented by new counsel, seeks a declaration that there was no overpayment.

[37] The submission effectively is a fresh motion for judicial review. Motions for judicial review are supposed to be made to the Supreme Court of Nova Scotia, not initiated in the Court of Appeal.

[38] The Court of Appeal is supposed to determine whether the decision of the Supreme Court contains an appealable error. Assessment for error is inexpedient when the judge, in the decision under appeal, merely adopted the position that was acknowledged by the appellant's counsel.

[39] The task of both the reviewing judge and the Court of Appeal, is to consider whether, under the appropriate standard of review, the Board committed a reviewable error. An assessment of the Board's reasoning, to that end, is conjectural when the Board's decision also was predicated on the appellant's acknowledgement.

[40] Nonetheless, the submissions in this Court fully canvassed the merits of the new issue. At the appeal hearing, the Department's counsel was content that this Court address the point.

[41] I will turn to the merits. Ms. McIntyre cites ss. 3(f) and 14(1) and 14(4) of the *Act*. Sections 3(f) and 14(1) say:

> 3 In this Act,

...

> (f) "overpayment" means any assistance paid pursuant to this Act that was paid in error, was overpaid or was paid based on false or misleading information supplied by an applicant or that otherwise ought not to have been paid according to this Act and the regulations, and includes sums paid to a person who receives deferred income with respect to any period for which assistance was provided and sums paid to a person that were agreed to be repayable, whether out of the proceeds of the deferred sale of an asset, from deferred income or otherwise;
>
> 14(1) An overpayment may be recovered from the person to whom it was paid or from that person's estate.

Section 14(4) is quoted above (para 8). The key wording is that the Department's recovery of overpayments is not capped at six months for "sums paid to a person who receives deferred income".

[42] Section 3(b) of the *Act* defines "deferred income" as including "retroactive pay, retroactive pension or other benefits and any form of compensation for loss of income". Ms. McIntyre accepts that Mr. Leblanc's CPP award is "deferred income" within s. 3(b). Her factum says (para 64) "it is obviously the case that a retroactive lump-sum CPP benefit would fall within the definition of 'deferred income' within the definition in s. 3(b) of the *ESIA*".

[43] Mr. Leblanc's "deferred income" retroactively covered the period of Ms. McIntyre's social assistance. So Mr. Leblanc's CPP award was "deferred income with respect to any period for which assistance was provided" under the definition of "overpayment" in s. 3(f).

[44] Ms. McIntyre's point is that the *Act* contemplates an "overpayment" only when the same person receives both payments. Section 3(f) defines "overpayment", in the context of deferred income, as "sums paid to a person who receives deferred income". The sums of income assistance were paid to Ms. McIntyre. The deferred income was received by Mr. Leblanc. Ms. McIntyre submits that there is no common identity of recipients, thus no "overpayment", and the Department is not entitled to any recovery.

[45] Ms. McIntyre's submission is inconsistent with the *Regulations* under the *Act*.

[46] The *Employment Support and Income Assistance Regulations*, N.S. Reg. 25/2001, as amended, ("*Regulations*") were enacted under s. 21 of the *Act*. Ms. McIntyre does not challenge the *vires* of the *Regulations*.

[47] Regulation 2(i) says:

> **2** In these regulations
>
> ...
>
> (i) "chargeable income" of an applicant or recipient means income that is included for the purpose of computing the amount of assistance payable to the applicant or recipient pursuant to these regulations;

Regulation 47(1)(a) says:

> **47 (1)** Chargeable income shall be deemed to include
>
> (a) the income of the spouse of the applicant or recipient".

Regulations 5(1)(d) and 7(1) require the applicant/recipient to provide the Department with details of the income and financial circumstances of the applicant/recipient's spouse. Ms. McIntyre's application form for income assistance was signed by both Ms. McIntyre and Mr. Leblanc and requested Mr. Leblanc's income information.

[48] Regulation 47(1)(a) has "deemed" Mr. Leblanc's income to be Ms. McIntyre's chargeable income. If the *Regulations* apply, then Ms. McIntyre was "deemed" to have received Mr. Leblanc's deferred income. She actually was paid the assistance. So, for legal purposes, there would be commonality of recipients, and an "overpayment" within s. 3(f).

[49] Ms. McIntyre's counsel submits that, to determine whether there is an "overpayment", the Court should confine its examination within the four corners of the *Act*, and should not venture into the *Regulations*. Ms. McIntyre's factum puts it this way:

> 54. ... While it is conceded that the *ESIA* *Regulations* expressly stipulate that the income/assets of a spouse are to be taken into account in calculating both eligibility for and the amount of benefits, the *Act* nowhere provides for this - as it easily could have.
>
> 55. Thus, in choosing not to refer to a spouse's income either in the definition of "overpayment" (section 3 (f)) or in the substantive overpayment provision (section 14) - the legislature cannot be understood to have intended the same meaning as is found in the *Regulations*. Simply stated, the fact that a recipient and a spouse's income and assets are jointly referred to repeatedly in the *Regulations*, but not the *Act*, speaks powerfully to the point that an implied exclusion was being conveyed in both the statutory definition and recovery powers regarding "overpayments".

No wording in the *Act* expressly deems that a spouse's income is chargeable to a recipient. So Ms. McInryre submits that Mr. Leblanc's deferred income is not Ms. McIntyre's income, and there is no "overpayment", notwithstanding anything in the *Regulations*.

[50] This appeal turns on the question - Does the *Act* contemplate that the *Regulations* should assist the analysis of whether Mr. Leblanc's income is chargeable to Ms. McIntyre?

[51] In my view, the answer is Yes. I respectfully disagree with Ms. McIntyre's submission that the *Regulations* are out of bounds.

[52] The question calls for interpretation of the *Act*. Under *Driedger*'s "one principle" of interpretation, legislation should be read according to its plain meaning and grammatical sense, harmoniously with its statutory context and legislative objective: *R. v. Sharpe*, [2001] 1 S.C.R. 45, para 33 [referring to E.A. Driedger, *Construction of Statutes,* 2nd ed. Toronto: Butterworths, 1983), p. 87], *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, para 27, *Taylor v. Dairy Farmers of Nova Scotia*, 2012 NSCA 1, para 30, among many other decisions of the Supreme Court of Canada and this Court.

[53] I will start with the plain meaning and grammatical sense of the *Act*'s definition of "overpayment".

[54] Section 3(f) says that " 'overpayment' *means* any assistance ... that was paid in error, was overpaid ... or that otherwise ought not to have been paid *according*

*to* this Act and *the regulations*", which "*includes* sums paid to a person who receives deferred income with respect to any period for which assistance was provided" [emphasis added]. Whether the assistance was payable "according to this ... regulations" expressly pertains to the "meaning" of "overpayment". The receipt of deferred income for the overlapping period is an "included" instance.

[55] The statutory context incorporates the *Regulations* for guidance as to what "income" and "resources" are "available" to the applicant in the assessment of the applicant's "need". Section 7(1) and 3(g) of the *Act* say:

> 7(1) Subject to this Act *and the regulations*, the Minister shall furnish assistance to all persons in need.
>
> 3(g) "person in need" means a person whose requirements for basic needs, special needs and employment services as prescribed *in the regulations* exceed the income, assets and other resources available to that person as determined pursuant to the regulations. [emphasis added]

Similarly, ss. 21(m) and (o) of the *Act* authorize regulations respecting "the income, assets and other resources that are available to a person in need" and "the recovery of overpayments". Ms. McIntyre does not suggest that the *Regulations* are *ultra vires* the enabling provisions of the *Act.*

[56] Section 2 of the *Act* states the legislative objective:

> **Purpose of Act**
>
> 2 The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency.

The *Act* aims to address "need". Need is determined by netting available resources against requirements. A reliable assessment of need acknowledges the reality that cohabiting spouses share their resources and requirements.

[57] That was how the Department calculated the monthly allowance to Ms. McIntyre. Regulations 31(1) and (2) provide personal and shelter allowances for "each of" the applicant/recipient and the spouse. The other side of the coin is that

the available resources include the income of both the applicant/recipient and the spouse. Justice Bourgeois' decision says:

> [27] There is no question from the material before this Court, that when she received income assistance benefits, Ms. McIntyre's eligibility was assessed based upon both her income and that of her husband. Further, the amount of the monthly payment was comprised of a shelter allowance contemplating Mr. Leblanc's presence in the household, as well as a personal allowance for him.

[58] To summarize, I disagree with Ms. McIntyre's submission that the *Regulations* are irrelevant. Section 3(f) says that an "overpayment" means assistance that should not have been paid "according to this Act and the regulations". By Regulation 47(1)(a), Mr. Leblanc's income is "deemed" to be income of Ms. McIntyre. That establishes the definitional condition for an "overpayment" within s. 3(f).

[59] The analysis I have just recited was the reasoning of the reviewing judge. In my view, the judge made no error. Insofar as the Board's decision rested upon an assumption that there was an overpayment, the Board made no error, under either standard of review.

### ***Second Issue - Quantum***

[60] This issue refers to whether the six month cap applies under s. 14(4), if there is an "overpayment". The point is cited as an alternative order requested in Ms. McIntyre's factum. But the substance of the submission was barely mentioned in either the written or oral presentations to the Court of Appeal.

[61] Section 14(4) says that the six month cap on recoverable overpayments, under s. 14(3), does not apply to "sums paid to a person who receives deferred income". As discussed, Ms. McIntyre is "deemed" to have received the deferred income, resulting in an "overpayment". Clearly the six month cap is excluded by s. 14(4), and does not assist Ms. McIntyre. In reaching that conclusion, the reviewing judge made no error.

[62] As I have discussed, the Board did not address s. 14(4), expressly or impliedly. The Board's failure to consider the unequivocal exception in s. 14(4) means that the Board's conclusion rests outside the range of acceptable outcomes.

The Board's application of the six month cap under s. 14(3) offended the reasonableness standard of review.

### *Conclusion*

[63] I would dismiss the appeal.

[64] The Department requests costs. I note the following comments from the Board's decision:

> Sally McIntyre properly notified the Department in October 2010, in writing, that by mid September 2010, her spouse received a retroactive CPP lump sum payment for a period reaching back to July 2009.
>
> ...
>
> However, it appears that Sally McIntyre gave full disclosure.
>
> ...
>
> Four months to calculate an overpayment amount is inexplicable. Delaying 4 months to tell a low-income family that they owe over $6,700.00 is unconscionable and unfair to the recipient household.

[65] What the Board termed the Department's "unconscionable" delay does not affect the interpretation of the legislation, or the merits of the appeal. But, in my view, it is pertinent to the court's discretion on costs in these circumstances. Despite the Department's success on the appeal, the parties should bear their own costs.

Fichaud, J.A.

Concurred:

Saunders, J.A.

Hamilton, J.A.