NOVA SCOTIA COURT OF APPEAL

Citation: *Jivalian v. Nova Scotia (Community Services)*, 2013 NSCA 2

Date: 20130103
Docket: CA 375179
Registry: Halifax

Between:

Hamparsoum Jivalian

Appellant

v.

Department of Community Services (Nova Scotia)

Respondent

Judges:	MacDonald, C.J.N.S., Oland and Fichaud, JJ.A.
Appeal Heard:	October 11, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud, J.A., MacDonald, C.J.N.S. and Oland, J.A. concurring
Counsel:	Vincent Calderhead for the appellant Ryan Brothers for the respondent

Reasons for judgment:

[1] This is a sad case. Sometimes the correct result isn't the fair solution. Mr. Jivalian receives both income assistance from the Provincial Department of Community Services under the *Employment Support and Income Assistance Act*, and a caregiver allowance from the District Health Authority, representing the Provincial Department of Health. The caregiver allowance is to assist Mr. Jivalian's care of his disabled son. The issue is whether the caregiver allowance is "chargeable income" to Mr. Jivalian, under the *Regulations* further to the *Employment Support and Income Assistance Act*, that would reduce his income assistance.

Background

[2] Mr. Jivalian receives income assistance further to the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27 ("*Act*") and the *Employment Support and Income Assistance Regulations*, N.S. Reg. 25/2001 ("*Regulations*") under the *Act*.

[3] The Province's Minister of Community Services administers the *Act.* The *Act*'s purpose, according to s. 2, is "to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency". The *Act* and *Regulations* assess need by netting the recipient's available resources against his or her requirements. Key to that process is the determination of the recipient's resources, or "chargeable income". Regulation 2(i) defines "chargeable income":

> 2(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;

[4] Mr. Jivalian also receives a caregiver allowance of $400 monthly to assist the care of his disabled son. The allowance is further to an executed Caregiver Allowance Program Agreement, dated October 1, 2009, between Mr. Jivalian and Her Majesty in right of the Province of Nova Scotia, represented by the District Health Authority. The Agreement refers to Mr. Jivalian as the "Eligible Caregiver", his son as the "qualified Care Recipient", and to Her Majesty in right

of the Province of Nova Scotia, represented by the District Health Authority, as "Continuing Care". The Agreement says:

> Continuing Care, in recognition of the important role played by caregivers will offer funding to eligible individuals under the Caregiver Allowance Program. Whereas the qualified Care Recipient has been assessed as having a high level of functional impairment and the eligible Caregiver is providing 20 or more hours of assistance per week to the qualified Care Recipient, the Eligible Caregiver and Continuing Care agree to the following:
>
> **1. Continuing Care agrees to:**
>
> 1.01 Provide funding in the monthly amount of $400.00 to the Eligible Caregiver [Mr. Jivalian], in acknowledgment of the contribution in providing assistance to a qualified Care Recipient and to support them in sustaining the assistance provided.
>
> ...
>
> **2. The Eligible Caregiver agrees to:**
>
> 2.01 Notify Continuing Care in the event that there is an interruption in the caregiving arrangement with the qualified Care Recipient for a period which exceeds, or is anticipated to exceed, 30 consecutive days.
>
> 2.02 Be accountable to Continuing Care, for compliance to this Agreement.
>
> **3. Liability**
>
> 3.01 All liability related to the provision of care by the Eligible Caregiver to the qualified Care Recipient and use of the funds provided under the Caregiver Allowance Program resides with the Eligible Caregiver and does not reside with Continuing Care.
>
> ...
>
> **4. Discontinuation of Caregiver Allowance Benefit**
>
> 4.01 Funding provided through the Caregiver Allowance Program will be discontinued if it is determined by Continuing Care that:

- the Caregiver is no longer capable or available to provide assistance;
- the Caregiver no longer meets the eligibility criteria;
- there is an interruption in the care giving arrangement of over 30 days duration;
- the qualified Care Recipient is admitted to a regular bed in a long term care facility;
- the qualified Care Recipient no longer meets the program's eligibility criteria;
- the qualified Care Recipient is deceased.

5. General Provisions

5.01 This Agreement does not create the relationship of employer and employee, or of principal and agent, between Continuing Care and the Eligible Caregiver or between Continuing Care and any person or agency employed by or providing service to the qualified Care Recipient.

...

This Agreement shall come into force and apply on and after October 1, 2009 and is in recognition for providing assistance to

[Name of Mr. Jivalian's son.]
Name of Care Recipient (Please Print)

[5] Regulations 47(1)(a) and (b) and 47(2)(a) under the *Act* say:

47(1) Chargeable income shall be deemed to include

(a) the income of the spouse of the applicant or recipient;

(b) the income received by the applicant or recipient or the spouse of an applicant or recipient on behalf of a dependent child; and

...

(2) Chargeable income shall include the monthly income from the following sources:

(a) 100% of net wages earned, except as provided for in Section 48;

...

Regulations 47(2) then lists other sources of income that are not pertinent to Mr. Jivalian's case. Section 48(1) of the *Regulations* provides that, to calculate payments, only 70% of wages are "chargeable income".

[6] The Department of Community Services ("Department") classified the caregiver allowance as chargeable income of Mr. Jivalian, and reduced the amount of his income assistance. The Department computed the reduction as follows:

(a) Further to Regulations 47(1), 47(2)(a) and 48(1), the Department classified Mr. Jivalian's caregiver allowance of $400 monthly as "wages", and 70% of the allowance as "chargeable income" that reduces his income allowance under the *Act*. The Department's Administrative Review Report of November 1, 2010 said:

> The Caregiver Allowance is a source of Income received by the recipient to care for his disabled son and is therefore deemed to be wages or chargeable income according to policy.

(b) Regulation 52 says "Income from any of the following sources is not chargeable income: ...", then lists a number of specific exemptions from the definition of "chargeable income". Regulation 52 did not list the caregiver allowance as exempt in November 2009, at the time of Mr. Jivalian's Caregiver Allowance Program Agreement. On November 26, 2010, the Governor in Council (O.I.C. 2010-425) enacted N.S. Reg. 176/2010, which added "a caregiver's benefit under the Department of Health and Wellness's Caregiver Benefit Program" as Regulation 52(k). So Mr. Jivalian's caregiver allowance is now exempted, and does not reduce his income assistance after November, 2010. The Department's position is that his caregiver allowance reduces his $400 monthly income assistance, by 70%, from October 2009 to November 2010.

[7] This litigation concerns 70% of $400 monthly for fourteen months from October 2009 to November 2010. That amount is significant to Mr. Jivalian. His Appeal Request Form for the Department's internal review said:

> My child has severe needs and needs 1 on 1 supervision. My wife has physical needs and is not able to care for him. The caregiver allowance is not a wage. It is

> a grant from the Department of Health intended to help us care for our son in our home.

[8] Mr. Jivalian appealed to the Assistance Appeal Board ("Board") under ss. 11-13 of the *Act*. In a decision dated February 22, 2011, the Board upheld the Department's view. The Board's brief reasons cited Regulations 47(1)(a) and (b).

[9] Mr. Jivalian applied to the Supreme Court of Nova Scotia for judicial review of the Board's decision. Justice Muise received written briefs and heard oral submissions on September 6, 2011. On that day, the judge issued an oral unreported decision that dismissed Mr. Jivalian's application. The judge's reasons included:

> Further, the allowance was received by Mr. Jivalian in recognition of the time he had spent providing assistance to his son on the understanding that he would continue to provide that assistance. Therefore, it could be considered income received by Mr. Jivalian on behalf of his dependent son in accordance with Section 47(1)(b) of the Regulations.
>
> The Board did refer to that provision in its reasons. The payments, in my view, are income. They are not specifically exempt. Therefore, they are chargeable income.

[10] Mr. Jivalian appeals to the Court of Appeal.

Issue

[11] Mr. Jivalian's Notice of Appeal says:

> The judge on judicial review erred in holding that the appellant's receipt of a "caregiver allowance" under the Department of Health and Wellness (NS) Caregiver Allowance Program was "chargeable income" within the meaning of the *Employment Support and Income Assistance Act* and *Regulations*.

Standard of Review

[12] The judge applied a correctness standard to the Board's decision. The judge cited *Nova Scotia (Community Services) v. E.M.*, 2011 NSSC 12. Both parties' factums suggest correctness.

[13] I respectfully disagree. *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106 was an appeal from a judicial review of the Assistance Appeal Board under the *Employment Support and Income Assistance Act*. This Court referred to the clear statements in recent decisions of the Supreme Court of Canada governing the standard of review to an administrative tribunal's interpretation of its home statute. *McIntyre* says:

> [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* [*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3], 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.

[14] As in *McIntyre*, the issue in this appeal involves the interpretation of the Board's home legislation - the *Regulations* under the *Act*. The exceptions to deference, mentioned in *Canadian Human Rights Commission* and *Alberta Teachers' Association*, do not apply. The reviewing court's standard to the Board's decision is reasonableness.

[15] Reasonableness is neither mechanical acclamation of the tribunal's conclusion nor a euphemism for the court to impose its own view. Rather the reviewing court shows respect for the Legislature's choice of a decision maker, by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of possible outcomes. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* [2011] 3 S.C.R. 708, paras 11, 14-17, per Abella, J. for the Court.

Analysis

[16] The difficulty facing Mr. Jivalian is that Regulation 47(1)(b) says that "[c]hargeable income shall be deemed to include" an amount received by the applicant on behalf of his dependent child, such as the Caregiver Allowance. Mr. Jivalian's submission attempts to sidestep Regulation 47(1)(b) as follows:

(a) Mr. Jivalian's factum characterizes the process design of the "chargeable income" computation in the Regulations:

> 36. In designing the method by which income would be treated under the *ESIA Regulations*, the Governor in Council adopted a regime in the *Regulations* for the treatment and calculation of income that is characterized by four features:
>
> 1. A statement as to *whose* income is to be included (s. 47(1));
>
> 2. An ostensibly *exhaustive list* of income sources/types of income to be included (s. 47(2) through s. 50);
>
> 3. An accompanying statement as to *how much* of a specific income should be included in the budget deficit calculation; and
>
> 4. A non-exhaustive list of the income sources that are (or the Respondent simply treats as) *exempt from inclusion* (ss. 52-53A).
>
> [Factum's italics]

(b) Based on that suggested premise, Regulation 47(1)(b), which the Board and the reviewing judge relied on, would not even address the "sources/types of income to be included" in "chargeable income". Rather, whether a caregiver allowance is a "chargeable" source or type of income would occupy the exclusive domain of the "ostensibly exhaustive list" in Regulations 47(2) through 50.

(c) Turning to that list, Regulation 47(2) says "[c]hargeable income shall include the monthly income from the following sources: ...". There follows a list that includes "net wages earned" [Reg. 47(2)(a)], income from boarders, roomers and rent, income from a business, Canada Pension Plan benefits paid to a dependent child, amounts set aside in trust from a court, "unearned income" [Reg. 47(2)(h)], income from a trust or estate, value received in lieu of wages, gratuities and commissions. Regulation 49 includes income from a training allowance. The remaining provisions of Regulations 47(3), 48 and 50 deal with some exceptions to those listed sources and with the percentages of income that are "chargeable" from those listed sources.

(d) The Department characterized the caregiver allowance as "wages" from the list in Regulation 47(2)(a). Mr. Jivalian contests that characterization, pointing out that the allowance displays none of the indicia of wages, such as taxability or source deductions. Further, Article 5.01 of the Caregiver Allowance Program Agreement said "[t]his Agreement does not create the relationship of employer and employee, or of principal and agent" [see above, para 4].

(e) As to "unearned income" in the list [Reg. 47(2)(h)], Regulation 2(ag) says:

> "unearned income" includes income maintenance payments, workers' compensation, regular periodic insurance payments, income from mortgages, any maintenance payments, superannuation and income from investments such as stock and bonds".

Mr. Jivalian's counsel notes that the Department did not characterize the caregiver allowance as "unearned income", choosing "wages" instead, and submits that some semantic liberties are needed to force the caregiver allowance into the definition.

(f) None of the other types of chargeable income that are specifically listed in Regulation 47(2) remotely address the caregiver allowance.

(g) Accordingly, Mr. Jivalian submits that the caregiver allowance is outside the "ostensibly exhaustive list" in Regulations 47(2) - 50, and is not "chargeable income".

[17] In assessing this submission, I will start with Regulation 47(1)(b), which says "[c]hargeable income shall be deemed to include ... the income received by the applicant ... on behalf of a dependent child". It was not unreasonable for the Board to conclude that the caregiver allowance is received by Mr. Jivalian on behalf of his dependent child. I refer to the following:

(a) The Caregiver Allowance Program Agreement recites that Mr. Jivalian's son has "a high level of functional impairment" and Mr. Jivalian "is providing 20 or more hours of assistance per week" to his son. Mr. Jivalian received the caregiver allowance, according to Article 1.01 of

the Agreement, "in acknowledgment of the contribution in providing assistance to [Mr. Jivalian's son] and to support them in sustaining the assistance provided".

(b) Article 2.02 says that Mr. Jivalian is "accountable to Continuing Care, for compliance to this Agreement".

(c) Article 4.01 states that the "[f]unding ... will be discontinued" if "there is an interruption in the care giving arrangement of over 30 days duration".

(d) Above the parties' signatures is the statement that the Agreement "is in recognition for providing assistance to [Mr. Jivalian's son]". The agreement defines the Province as "Continuing Care" and Mr. Jivalian as the "Eligible Caregiver".

The caregiver allowance is not an unconditional grant. It is paid to Mr. Jivalian for the dedicated purpose of "funding" and "sustaining the assistance" of Mr. Jivalian's "continuing care" of his dependent child who has a "high level of functional impairment". In my view this is "income received by the applicant [Mr. Jivalian] ... on behalf of a dependent child" within Regulation 47(1)(b).

[18] At the heart of Mr. Jivalian's submission is the premise [above para 16(a)] that Regulation 47(1) is "[a] statement as to *whose* income is to be included" while Regulations 47(2) -50 are an "ostensibly *exhaustive list* of income sources/types of income to be included" [factum's emphasis]. It would follow that, though the Caregiver Allowance falls within 47(1)(b) - as "income received by the applicant ... on behalf of a dependent child" - the allowance would not be "chargeable income" unless it *also* falls within a specific source or type of income on the list in Regulations 47(2) - 50.

[19] In my respectful view, the premise is mistaken. The source or type of chargeable income is not the exclusive province of Regulations 47(2) - 50. Regulation 47(1)(b) also pertains to the source or type of chargeable income. I say this for the following reasons.

[20] Regulation 2(i) says " 'chargeable income' ... means income that is included ... pursuant to these regulations". Regulations 47(1)(b) and 47(2) each

"include" income. Nothing in Regulation 47(2)'s inclusive list negates the separate deemed "inclusion" by Regulation 47(1)(b).

[21] Regulation 47(2) says chargeable income "shall include" the listed items. It does not say chargeable income "means" the listed items. The word "means" would connote an exhaustive list. The word "include" does not. Regulation 47(2) provides greater certainty, not an exhaustive list.

[22] As an example, Regulation 47(2) does not mention training allowances. Yet Regulation 49 expressly includes a "training allowance" as chargeable income. Regulation 47(2)'s list coexists with sources or types of chargeable income mentioned in other Regulations.

[23] More to the point, Regulation 47(1) does not mention the direct income of the applicant - *i.e.* Mr. Jivalian. If, as Mr. Jivalian submits, Regulation 47(1) was meant as "[a] statement as to *whose* income is to be included", then clearly the applicant would be cited in Regulation 47(1).

[24] In my view, the dichotomy is not, as Mr. Jivalian's factum suggests, "whose income" governed by Regulation 47(1) and "which source or type of income" governed by Regulation 47(2). Rather, Regulation 47(2) refers to income that the applicant receives from the income source without the involvement of another possible beneficiary who is within the applicant's arm's length. That is why Regulation 47(2) does not use the word "deemed" income. Regulation 47(1), on the other hand, addresses income that involves another family member who arguably might be seen as a beneficiary - *i.e.* the applicant's spouse or dependent child. Because the legislators have chosen to treat the family as a unit, Regulation 47(1) finds it necessary to "deem" those amounts as income of the applicant. Mr. Jivalian's case involves an allowance on behalf of his dependent child. So s. 47(1)(b) applies to "deem" this *source or type* of income as "chargeable".

[25] The Board's construction, that Regulation 47(1)(b) covered Mr. Jivalian's caregiver allowance, occupies the range of acceptable interpretive outcomes, and satisfies the reasonableness standard. I would dismiss the appeal, and confirm the judge's dismissal of the application for judicial review.

[26] I will add comments on two points that were the subject of argument in this Court.

[27] First, the Department classified Mr. Jivalian's caregiver allowance as "wages" under Regulation 47(2)(a). That meant only 70% was treated as "chargeable income", under Regulation 48, instead of the full amount as chargeable had the allowance been non-wage income. I follow the logic in Mr. Calderhead's submission that the "wages" classification is inconsistent with Article 5.01 of the Caregiver Allowance Program Agreement (quoted above, para 4). But if the allowance was not "wages" then, given the proper interpretation of Regulation 47(1)(b) that I have discussed, the result would be that the full Caregiver Allowance would be "chargeable income". Then Mr. Jivalian's income assistance would suffer a further clawback. At the Supreme Court hearing, the Department's counsel said to Justice Muise:

> This could be caught under a number of different scenarios, and, honestly, it was called a wage as a way of giving this reduction of benefit, and the caseworker at the time was doing that as a way of helping Mr. Jivalian out.

[28] The Department has not sought judicial review of the Board's treatment of the allowance as "wages". The Department has not cross-appealed to this Court. Whether the allowance from October 2009 to November 2010 should be reclassified as non-wage chargeable income is not before this Court, and is a dead issue.

[29] I respectfully disagree with Mr. Calderhead's suggestion that the Department's questionable classification of the caregiver allowance as "wages" shows the legal fallacy of treating the allowance as "chargeable income" under Regulation 47(1)(b) before November 2010. Rather, it reflects the Department of Community Services' unease with a clawback of income assistance that, for the neediest recipients, deflates the rationale for the Department of Health's Caregiver Allowance Program. That interdepartmental incongruity was resolved by the enactment of Regulation 52(k) in November 2010. Ideal policy symmetry would have enacted Regulation 52(k) from the outset, and Mr. Jivalian would have his unreduced income assistance from October 1, 2009. But policy choice is not the court's job. The court interprets, and Regulation 52(k)'s enactment does not alter the earlier interpretation of the *Regulations* that existed before Regulation 52(k) came into force. The significance, if any, of Regulation 52(k)'s enactment is to

highlight that before November 2010, the law treated the caregiver allowance as chargeable income.

[30] Second, the Department's factum cites in support of its interpretation, ss. 5.7.1 and 5.7.2 of the Employment Support and Income Assistance Policy:

> **5.7.1 Policy: Chargeable Income - Initial Eligibility**
>
> For the purpose of determining initial eligibility, all sources of income received by the applicant, the spouse of the applicant and/or income paid to or on behalf of a dependent child(ren) of an applicant and/or the spouse of the applicant within thirty (30) days of application will be applied as chargeable income unless otherwise exempt. ...
>
> **5.7.2 Policy: Chargeable Income - Ongoing Eligibility**
>
> For the purpose of determining ongoing eligibility, all sources of income received by the recipient, the spouse of the recipient, and income paid to or on behalf of a dependent child(ren) of a recipient and/or the recipient's spouse will be applied as chargeable income unless otherwise exempt. ...

The Department's factum frames the issue for the Court of Appeal with reference to these Policies:

> 37. The question in this appeal is, how are the words "chargeable income" to be interpreted? Do they mean that "chargeable income" shall only include income specifically referenced in s. 47(2) of the *Regulations* as suggested by the Appellant, OR as the Respondent suggests, in the broadest sense of the words, to include any income not otherwise excluded by *Regulations* or *Policy*.

[31] I agree with Mr. Calderhead's submissions respecting the legal effect of Policies 5.7.1 and 5.7.2. Section 21 of the *Act* authorizes the Governor in Council to enact Regulations. But nothing in the *Act* enables Departmental employees to create Policies that have the effect of law. There is no enabling provision such as, for instance, s. 183 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, that expressly authorizes "policies", apart from regulations, and provides that those policies shall have legal effect. It may be administratively convenient that the Department of Community Services operate with consistent standards, termed "policies". But those Policies are not legislative instruments, and have no legal

effect, either before the Board or in court. The legal issues on this appeal should be determined based on the interpretation of the *Act* and *Regulations*, not the Policies.

Conclusion

[32] I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred:

MacDonald, C.J.N.S.

Oland, J.A.