NOVA SCOTIA COURT OF APPEAL

Citation: *G.(R.) v. Nova Scotia (Department of Community Services)*, 2018 NSCA 69

Date: 20180727
Docket: CA 463960
Registry: Halifax

Between:

G.(R)

Appellant

v.

Nova Scotia (Department of Community Services), Assistance Appeal Board (Nova Scotia)

Respondents

Restriction on Publication: Confidentiality Order Pursuant to *Civil Procedure Rule* 85.04

Judges:	Farrar, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	January 23, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed with costs per reasons for judgment of Van den Eynden, J.A.; Farrar and Bourgeois, JJ.A. concurring
Counsel:	Claire McNeil, for the appellant Sheldon Choo, for the Department of Community Services Adriana Meloni for the Assistance Appeal Board (not participating)

Restriction on Publication: pursuant to *Civil Procedure Rule* 85.04

Pursuant to *Civil Procedure Rule* 85.04, by Order issued August 3, 2017, this Court imposed the following Order for Confidentiality:

IT IS ORDERED THAT [the appellant] will be identified by the pseudonym "G.(R.)" in pleadings and any court order; **and that the identity of the Appellant, the Applicant on this motion, will not be made public, electronically or otherwise, including print or broadcast and will be identified by the initials "G.(R.)".**

Reasons for judgment:

Overview

[1] The appellant G.(R.) has a medical disability and receives income assistance from the Department of Community Services. G.(R.) had difficulty finding an apartment that accommodated her disability within her approved shelter allowance of $535 per month. She requested a shelter allowance increase which was denied. G.(R.) appealed the denial to the Assistance Appeal Board. The Board granted her request and G.(R.) was able to secure appropriate housing within her increased allowance.

[2] The respondent, Department of Community Services (DCS), sought judicial review of the Board's decision. The DCS claimed the governing legislative framework did not provide discretion to grant such an increase. The reviewing judge quashed the Board's decision and upheld the denial of the increase to G.(R.)'s shelter allowance.

[3] G.(R.) appeals to this Court seeking to restore the Board's decision. She also sought a stay of the reviewing judge's decision pending the outcome of her appeal. The DCS consented to the stay of execution which this Court granted. This Court also granted G.(R.)'s motion for a confidentiality order, also consented to by the respondent. The order directed that the appellant be identified by the pseudonym "G.(R.)".

[4] In my view, the decision of the Assistance Appeal Board was reasonable, and the reviewing judge was mistaken to conclude otherwise. I would allow the appeal and restore the Board's decision. My reasons follow.

Background

[5] This appeal involves the entitlement to assistance under the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27 (*ESIA*) and *ESIA* Regulations (N.S. Reg. 84/2016). Central to this appeal is the interpretation of s. 46 of the Regulations.

Health and housing needs of G.(R.)

[6] In November 2015, the DCS determined G.(R.) was eligible for income assistance. She qualified for a shelter allowance of $535 and a personal allowance of $275—for a total of $810 per month. In April 2016, G.(R.) applied to the DCS for additional financial assistance to meet her housing costs.

[7] G.(R.) suffers from Multiple Chemical Sensitivities (MCS). This medical condition causes her body to react badly to chemicals, scents, dust or other impurities in the environment. The record contains several detailed medical reports supporting this diagnosis and explaining how exposure to these agents affects G.(R.)'s current and long-term health. G.(R.) also suffers from other health issues, however, it is her MCS that limits her safe housing options.

[8] The uncontroverted medical evidence, which the Board accepted, confirmed that G.(R.) required a specific housing environment. Without it, her health could seriously deteriorate. With it, it is possible her health and functioning might improve. In addition, the evidence before the Board established that without additional financial assistance, G.(R.) was unable to find suitable housing to meet her required health needs.

[9] The respondent does not dispute G.(R)'s underlying medical condition, her related disability, nor her related housing needs. Accordingly, it is unnecessary to delve into a detailed review of her medical evidence and housing requirements. Suffice to say, the record establishes that G.(R.)'s condition is serious and the type of accommodation she requires is more readily found in newer apartment complexes (or homes) which, as a general statement, is out of reach on a $535 per month shelter allowance.

[10] G.(R.) found a suitable apartment with a monthly rent of $850 and asked the DCS to increase her shelter allowance to accommodate her rental expense. The DCS denied her request. G.(R.) sought an internal review of the denial—it was unsuccessful. Prior to her appeal to the Board, G.(R.)'s request for an increased shelter allowance was pursued as a "special need" under s. 24; however, G.(R.)'s claim properly fell under s. 46 of the Regulations.

Appeal to Board

[11] G.(R.) appealed the DCS's denial to the Assistance Appeal Board (the Board). Board member Ian Gulliver heard the appeal on August 18, 2016 and rendered a written decision on August 22, 2016. Appeals are heard *in camera*, and Mr. Gulliver's decision is unreported.

[12] Before the Board G.(R.) argued that the DCS failed to consider s. 46 of the Regulations when determining her entitlement to an increase in shelter allowance greater than $535 per month. The Board determined it had discretion to increase her shelter allowance under s. 46. It found that G.(R.) qualified for an increase in her basic shelter allowance because this was necessary to protect her health and safety. The Board increased G.(R.)'s allowance to $850 per month. Later, I will review the Regulations and the statutory framework in more detail.

[13] The DCS sought judicial review of the Board's decision. The reviewing judge, Justice Ann E. Smith of the Nova Scotia Supreme Court, allowed the application and quashed the decision (2017 NSSC 41). The reviewing judge found that the Board's interpretation of s. 46 was unreasonable. With the Board's decision quashed, the DCS's denial of assistance was reinstated.

[14] In my analysis, I will supplement additional background as required and address the decision of the Board and reviewing judge in more detail.

[15] Although a named respondent in the Notice for Judicial Review and the Notice of Appeal, the Board did not participate in the court below nor on appeal.

Issue

[16] The single issue before this Court is whether the Board's interpretation and application of s. 46 of the Regulations is reasonable.

Standard of review

[17] This Court's role is to "step into the shoes" of the reviewing judge—my focus is on the Board's decision and whether it is reasonable (see *Nova Scotia (Agriculture) v. Rocky Top Farm*, 2017 NSCA 2, ¶ 41 and *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, ¶ 46).

[18] As set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, if the Board's decision-making process was justified, transparent, and intelligible, and the result falls within a range of acceptable outcomes, it is reasonable.

[19] The Board is a specialized tribunal. It was interpreting its home statute and supporting Regulations—deference is afforded. Justice Abella said, writing for the majority in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, absent a finding that the decision,

based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed.

[20] If there are several reasonable permissible outcomes, the Board chooses among them. As Justice Fichaud said in *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one conclusion and the tribunal's conclusions aren't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. [. . .]

Analysis

[21] The competing positions are these: the appellant says s. 46 expressly provides the discretion to authorize an increase in G.(R.)'s shelter allowance when necessary to protect her health or safety; the respondent says her shelter allowance is capped at $535 and there is no discretion to increase notwithstanding the appellant's legitimate health and safety concerns.

[22] I will expand upon the parties' arguments and review the legislative framework; however, at this juncture, I make the following overarching determinations. This case does not involve a difficult interpretative process. Section 46 of the Regulations is not ambiguous. It grants the clear discretion to provide relief from the prescribed shelter allowances provided certain criteria are met. Such is the case here. The interpretation of the reviewing judge and the position being advanced by the DCS on appeal, with respect, is contrary to the most basic principles of statutory interpretation. On the other hand, the Board's interpretation clearly falls within a range of possible outcomes. In fact, but for a caveat which I will explain, I would go further and say that it is the only reasonable interpretation of s. 46.

Principles of statutory interpretation

[23] A brief outline of statutory interpretative principles is in order. The approach to statutory interpretation is well-established. In *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, the Supreme Court of Canada said:

> [21] [. . .]
>
> > It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804 at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> **The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.**
>
> [Emphasis added]

[24] The approach is the same when interpreting Regulations. Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis, 2014) makes this point clear:

> **13.18** ***Interpretation of regulations***. It is well-established that delegated legislation, like Acts of the legislature, must be interpreted in accordance with Driedger's modern principle. Generally speaking, the rules governing the meaning of statutory texts and the types of analysis relied on by interpreters to determine legislative intent apply equally to regulations. There are some differences, however. As explained by Binnie J. and Bastarache J. in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions. Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read.
>
> [Citations omitted]

Legislative framework and how a shelter allowance is determined

[25] I now turn to provide an overview of the legislative framework and how a shelter allowance is determined. Section 7(1) of the *ESIA* mandates the Minister of Community Services to provide assistance to all persons in need, subject to the *Act* and Regulations. The term "assistance" is defined in the *ESIA* as:

> 3 (a) "assistance" means the provision of money, goods or services to a person in need for
>
> (i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,
>
> (ii) special needs,
>
> (iii) employment services;

[26] The *ESIA* contains just 29 sections. The substantive provisions that determine eligibility and the level of financial assistance are found in the Regulations. The *ESIA* permits the Governor in Council to enact Regulations which can prescribe maximum amounts of assistance and grant relief from any prescribed maximum (*ESIA* ss. 21(d), (e) and (r)).

[27] As noted, at the center of this dispute is s. 46 of the *ESIA* Regulations. Section 46 provides the discretion to modify and does not cap the discretion. Section 46 provides:

> Supervisor can modify calculation of budget deficit
>
> 46 A supervisor may exempt an applicant or recipient from the provisions regarding the calculation of the budget deficit where a supervisor considers it necessary to
>
> (a) [Clause 46(a) repealed: O.I.C. 2011-308, N.S. Reg. 251/2011.]
>
> (b) protect the health or safety of an applicant or recipient or dependent child or spouse of an applicant or recipient; or
>
> (c) preserve the dwelling of an applicant or a recipient.

[28] Section 46 provides the authority to exempt (in this case the recipient G.(R.)) from "the provisions regarding the calculation of the budget deficit" where a supervisor considers it necessary to protect health or safety. I will now explain the significance of being exempted from a "budget deficit" calculation and how that relates to G.(R.)'s appeal. This requires an overview of the eligibility process and calculation of the amount of assistance G.(R.) was entitled to but for the discretion set out in s. 46.

[29] To qualify for social assistance, one must be a "person in need". The *ESIA* defines a "person in need" as:

> 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.

[30] Put another way, eligibility is determined based on a budget deficit calculation which is defined in 2(g) of the Regulations as:

> 2(g) "budget deficit" of an applicant or recipient means the amount by which the total expenses of the applicant or recipient exceed the total chargeable income of the applicant or recipient;

[31] The budget deficit calculation is non-discretionary. It did not permit G.(R.) to claim a shelter expense in the range she required—the prescribed permissible expense was much lower. Section 29(2) provides:

> 29 (2) In determining ongoing eligibility for assistance, a caseworker shall include
>
> (a) expenses as prescribed in the regulations for basic needs and special needs; and
>
> (b) expenses for participation in an employment plan
>
> in the calculation of the budget deficit of a recipient.

[32] Section 30 provides:

> 30 The amount of assistance payable shall be 100% of the budget deficit except as provided for in subsection 27(2).

Section 27(2) pertains to special needs and is not applicable to G.(R.)'s pursuit of increased shelter assistance. (Special needs include dental care, optical care, pharma care coverage, special diets, transportation and child care). Shelter costs are excluded from the definition of "special needs" (s. 24(2)(e)).

[33] Section 31(2) provides that the permissible shelter allowance (expense) is as prescribed in Appendix "A" to the Regulations. This Appendix is a chart that establishes the various allowances, including shelter. The shelter allowance for a single person who rents (which G.(R.) is and does) is $300 per month. Under s. 31(2), G.(R.) was also entitled to a personal allowance and Appendix "A" fixed this at $275 per month. Any chargeable income G.(R.) had would be deducted

from these amounts; however, the DCS acknowledged she had no chargeable income. Thus, the total amount G.(R.) could receive under this provision was $575 per month.

[34] Section 32 of the Regulations gives a supervisor discretion to increase a shelter allowance in the case of terminal illness or if barrier free access to, from or within an accommodation is required. This provision did not apply to G.(R.).

[35] However, under s. 45 of the Regulations, G.(R.)'s case worker increased her shelter allowance from $300 to $535 because G.(R.) was a single and disabled person. Section 45(a) of the regulations provides:

> 45 Despite clauses 31(1)(a) and 31(2)(a), the shelter allowance for any of the following persons shall be allowed as an expense in an amount up to $535 for those who own or rent their shelter:
>
> (a) single person who is disabled;
>
> …

[36] Apart from the discretion found in s. 46, G.(R.) qualified for total assistance of $810 per month to cover her basic needs, including shelter. However, she was unable to secure housing that met her health needs caused by her medical condition.

The Board's decision

[37] The Board determined that s. 46 of the Regulations provided discretion to further increase G.(R.)'s shelter allowance. The Board found an increase was necessary to protect her health and safety. For convenience, I repeat s. 46:

> 46 A supervisor may exempt an applicant or recipient from the provisions regarding the calculation of the budget deficit where a supervisor considers it necessary to
>
> (a) [clause 46(a) repealed: O.I.C. 2011-308, N.S.Reg. 251/2011]
>
> (b) protect the health or safety of an applicant or recipient, or dependent child or spouse of an applicant or recipient; or
>
> (c) preserve the dwelling of an applicant or a recipient.

[38] The Board's findings of fact and reasons are as follows:

[. . .] She has been diagnosed with the medical condition of multiple chemical sensitivities. Because of her disability she was approved a shelter allowance of $535 per month pursuant to s. 45 of the *Regulations*. G.(R.) reported having difficulty finding an apartment that accommodated her medical needs. In April 2016 she advised DCS that she wished to move into an apartment with monthly rent of $850 and electrical costs of approximately $40 per month. She requested a higher shelter allowance to accommodate the rent at the new apartment. DCS denied this request on April 13, 2016. G.(R.) appealed the decision. On May 10, 2016 the decision was upheld by DCS on the basis that G.(R.) did not qualify for an exemption for barrier-free access. The decision notes that "although the Department does acknowledge the diagnoses of multiple chemical sensitivities, it does not provide incremental shelter funding for this diagnosis through regulations of (*sic*) policy"

The normal calculation of the applicant's budget deficit would be calculated under Regulation 45, as a diagnosed disable (*sic*) individual. Regulation 46 however allows a supervisor to exempt a recipient from the provisions regarding the calculation of the budget deficit when it's necessary to protect the health and safety of the recipient.

Regulation 46 clearly identifies that there will be circumstances where in the case of the Health and Safety of a person there may be a need to expand or have allowances to the calculations of needs if the health and safety of an individual are in danger.

Therefore when a need arises that is unique and the Health and Safety of an individual is affected there must be a mechanism for the department to deal with this. Regulation 46 isn't one that is expected to be used to override or supersede regulations that are in place to deal with every circumstance. When a client supplies well documented medical information that clearly shows that a major health concern and long term impact to health is at risk the board believes there must be a way for the department to address these concerns. In the appellants case the needs for accommodations are numerous, unique and well out of the norm for her to be safe and healthy.

Regulation 46 allows for a supervisor to exempt an applicant or recipient from the provision regarding the calculation of the budget deficit if it is necessary to protect the health and safety of the applicant or recipient. In order for the health of the appellant to be protected due to a unique medical condition that requires specific accommodations.

The Board finds that the budget required by the appellant exceeds the maximum of $535 and should be covered at $850 per month; the appellant has provided medical documentation to fully support this need. The appellant also paid 50% of the rent as a damage deposit and she hasn't claimed a damage deposit in the past so she should therefore be reimbursed for the damage Deposit in the amount of $425, as per Policy 6.2.29 "An applicant/recipient may be eligible for security/damage deposits, under the following circumstances:

> 1. The health and safety of the client/family is in question.
>
> [. . .]

[39] I note that the Board refers to "health and safety" conjunctively; however, s. 46 reads "health or safety". Nothing turns on this, I simply point out that the terms are disjunctive. It appears obvious that in this case, the Board was satisfied the increase was necessary to meet both G.(R.)'s health and safety needs.

Decision of the reviewing judge

[40] Next, I turn to the reasons of the reviewing judge. She asked herself this question:

> [39] What is a reasonable interpretation of the phrase "A supervisor may exempt an applicant or recipient from the provisions regarding the calculation of the budget deficit" as set forth in s. 46 of the Regulations?

[41] Her reasoning came down to this:

> [45] A reasonable interpretation of s. 46 is that it allows a supervisor to deem a recipient or an applicant to have a budget deficit. Having a budget deficit means that that individual may access allowances and special needs in stated circumstances; i.e. where it is necessary to do so to protect the health or safety of the individual, or his or her dependent child or spouse or to preserve the individual's dwelling. In other words, an applicant or recipient who is not then a "person in need" may nonetheless be provided with assistance.
>
> …
>
> [47] G.(R.) is a person in need of assistance. She does not need to be deemed so. G.(R.) has no chargeable income. Section 45 of the Regulations sets out an exhaustive list of the circumstances where a person may have an increased shelter allowance, and the maximum of that increase is to $535. G.(R.) has allowed expenses for shelter in the maximum amount of $535.
>
> …
>
> [48] The Board's interpretation of s. 46 has the effect of removing the regulatory cap on shelter allowances, a result inconsistent with the scheme of the Act as a whole.
>
> …
>
> [50] I conclude that an interpretation of s. 46 which removes the cap on the amount of allowance on basic needs (shelter) is an unreasonable interpretation.

Position of the parties

[42] G.(R.) argues that the interpretation of s. 46 adopted by the Board falls well within the range of acceptable outcomes. In contrast, she says the interpretation adopted by the reviewing judge, offends principles of statutory interpretation and should be rejected. She says the reviewing judge essentially replaced the Board's acceptable interpretation with her own and that was an error. I agree. G.(R.) points to the discretionary nature s. 46 affords a decision-maker and makes the valid point that the reviewing judge had to pay attention to the significant deference owed to the Board.

[43] The DCS urges a very narrow interpretation of s. 46 which the plain wording of the section cannot bear. The DCS suggests that s. 46 should be focused on the income side of the budget deficit calculation and is intended to assist, over a very short term, those who might not otherwise qualify for income assistance because their income is too high. In the alternative, the DCS says that even if total allowable expenses were also exempted, s. 46 was not intended to provide shelter assistance outside the allowance of $535 under s. 45. In short, the DCS says the Board's decision falls outside the range of acceptable outcomes and the interpretation adopted by the reviewing judge was reasonable.

[44] The reviewing judge was correct in her selection of reasonableness as the standard of review. However, with respect, I disagree with her application of the standard.

[45] The interpretation adopted by the reviewing judge ignores the plain wording of s. 46. It says, and I repeat, "A supervisor may exempt an applicant or recipient **from the provisions** regarding the calculation of the budget deficit…". The exemption relates to the amounts to be used in the calculation of the budget deficit and G.(R.)'s shelter expense is part of that calculation. To put it simply, s. 46 allows the supervisor to exempt an individual from the limitations otherwise imposed on the calculation of the budget deficit. Nothing in s. 46 leads to the narrowed interpretation adopted by the reviewing judge and which the DCS continues to advocate for on appeal.

[46] In G.(R)'s case, the Board found that she was exempted from the $535 shelter limit and increased the expense/allowance to $850 for the purpose of determining her budget deficit. Under s. 30, 100% of that budget deficit is then the available assistance (s. 30 is reproduced in ¶32 above). That approach logically

flows from the simple and straightforward wording of s. 46. Given the absence of any ambiguity, the clear words of s. 46 must dominate the analysis. And in any event, the Board's interpretation is harmonious with the scheme and object of the *ESIA*, and the clear intention expressed by the legislature. To accept the position of the DCS would gut the otherwise clear meaning of the provision.

Conclusion

[47] As required by s. 13(2)(b) of the *ESIA*, the task before the Board was to determine the facts and whether the denial of assistance, based on the facts as found by the Board, were compliant with the *ESIA* and Regulations. The Board's findings of fact respecting G.(R.)'s medical condition and housing needs are solidly supported on the record. The Board's findings were not challenged by DCS in the court below nor on appeal. Based on its factual findings, the Board exercised the discretion afforded under s. 46 to exempt G.(R.) from the provisions limiting the calculation of her budget deficit.

[48] I am mindful that the DCS has budgetary concerns and that social assistance funding is not unlimited. But, as the Board found, s. 46 is not to be used to generally override or supersede the Regulations that are in place with budget calculations. However, when G.(R.) satisfied the Board there was a major health concern and a long-term risk to health, the Board found it had the ability to act.

[49] The Board was interpreting its home statute and supporting Regulations. The outcome of the Board's clear reasoning path fell within an acceptable range given the facts and the law. Subject to the caveat that it is only necessary to meet either criteria under s. 46(b) (health or safety), I repeat that the interpretation given by the Board was not only one of several permissible outcomes—it was the only reasonable conclusion that could be drawn when reading the words in their grammatical and ordinary sense, harmoniously with the scheme and object of the *ESIA*, and the intention of the legislature. Even if the interpretation adopted by the reviewing judge were sustainable, which I reject, when there is more than one permissible outcome, it is the Board, not the court, that chooses among them.

[50] For the foregoing reasons, I would allow the appeal and order the DCS to pay costs to the Dalhousie Legal Aid Service in the amount of $3,000.00 inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

Farrar, J.A.
Bourgeois, J.A.