IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. Brenna, 2005 NSSC 67

Date: 20050404
Docket: SN 232357
Registry: Sydney

Between:

The Department of Community Services

Applicant

v.

Anthony Brenna

Respondent

Judge: The Honourable Justice Frank Edwards

Heard: March 23, 2005, in Sydney, Nova Scotia

Counsel: Terry D. Potter, for the applicant
Graham Steele, for the respondent

By the Court:

[1] This is an application for an Order in the nature of certiorari quashing the decision of the Assistance Appeal Board dated June 24, 2004.

[2] Facts: The relevant facts, as set out in the Respondent's brief, are as follows:

> 1. Anthony Brenna has been receiving social assistance for a disability since 1963 (Record: unsigned handwritten notes, page 2).
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> 2. The Department of Community Services "came across" the fact that Mr. Brenna was the registered owner of several real properties (Record: Appeal Decision). There were three properties. The earliest registration of a property in his name was in 1992, and the last one was taken out of his name in 2002. Mortgages were taken out on these properties. (Record: Various property documents.)
>
> 3. The Department of Community Services asked Mr. Brenna to sign a consent form "to allow the Department to look up some information about the properties" (Record: Appeal decision). A copy of the consent form is not in the Record.
>
> 4. Mr. Brenna "was not comfortable about signing any papers. He asked if it was okay for his sister to look it over" (Record: Appeal decision). Mr. Brenna never did sign the consent form.
>
> 5. Because Mr. Brenna had not signed the consent form, the Department of Community Services terminated Mr. Brenna's benefits and declared an overpayment of every payment Mr. Brenna had received from the Department since 1992. The declared overpayment is $98,167.20 (Record: Summary of Overpayment Calculations).

> 6. Mr. Brenna appealed the Department's decision to the Social Assistance Appeal Board. The appeal was heard on June 22, 2004, and the decision was rendered on June 24, 2004. The appeal was allowed.

[3] ***Standard of Review:*** An application for an order in the nature of certiorari is not an appeal such that the supervising court might simply amend, vary or reverse the decision appealed from. The court entertaining certiorari does not substitute its own views for those of the statutory decision-maker. Nathanson, J. states in ***Levandier v. Police Review board (N.S.) Et al*** (1994), 128 N.S.R. (2d) 66 (N.S.S.C.), at pp. 68-69:

> "Judicial review is not an appeal. It is, rather, a review of the decision of an administrative tribunal against the background of the tribunal's jurisdiction. Where a tribunal is called upon to interpret a statutory provision which defines and limits its jurisdiction, and the governing statute does not contain a privative clause, the test is that of correctness. Where a tribunal may have exceeded its jurisdiction in the performance of its function, the test is whether the error was patently unreasonable. The patently unreasonable test applies to specialized tribunals whose decisions are protected by privative clauses...."

The Supreme Court's decision in ***Levandier*** was upheld on appeal.

[4] The standard of judicial review is to be determined by considering four contextual factors - the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the

provision in particular; and, the nature of the question - law, fact, or mixed law and fact. In some instances there will be overlap of the contextual factors. The pragmatic and functional approach was more recently articulated by the Supreme Court of Canada in ***C.U.P.E. v. Ontario (Minister of Labour)*** [2003] S.C.J. No. 28, (SCC) at para 149:

> 149 To put the Bibeault question in its proper perspective, the courts have enlarged the inquiry beyond the specific formula of words conferring the statutory power. This 'pragmatic and functional' approach to ascertain the legislative intent requires an assessment and balancing of relevant factors, including (1) whether the legislation that confers the power contains a privative clause; (2) the relative expertise as between the court and the statutory decision maker; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the question before the decision maker. ... The examination of these four factors, and the 'weighing up' of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent."

[5] There is no privative clause in the ***Employment Support and Income Assistance Act***. The Appeal Board has no particular expertise in relation to the determination of whether an asset should be considered for eligibility. The purpose of the Act is a very important one and leads to less deference to the decision maker. The nature of the question before the Appeal Board was

largely factual but is to be based on the legal definition. The appropriate standard of review here is one of correctness, upon which the reviewing court can interfere with the Appeal Board decision where the decision is not supported by the facts on the Record. Where the Board errs on a question of law, the standard of review is correctness.

[6] ***Analysis:*** The required content of the Social Assistance Appeal Board's decision is prescribed by the ***Employment Support and Income Assistance Act***. The Appeal Board is further directed to make its decision in compliance with the Act and regulations.

> "13(2) The board shall determine the facts and whether the decision made, on the basis of the facts found by the board, is in compliance with this Act and the regulations."

[7] Further Appeal Board regulations require:

> 13(1) A decision of an appeal board
>
> (a) shall be made on the basis of the evidence presented at the appeal hearing; and
>
> (b) must comply with the Act and the ***Employment Support and Income Assistance Regulations*** and these regulations.

[8] The relevant portion of Section 5 of the Regulations reads:

> 5 (1) In order to determine the eligibility of an applicant or the ongoing eligibility of a recipient to receive assistance, or to verify information obtained from an applicant or recipient in respect of their eligibility or ongoing eligibility to receive assistance, the applicant or recipient shall provide the following information to a caseworker, in the case of an applicant at the time of application, or in the case of a recipient as requested at any time during which the recipient is in receipt of assistance:
>
> (e) an authorization for the release, obtaining or verifying of information about the applicant or recipient and spouse and dependent child of the applicant or recipient including information or documents.
>
> (2) ***Where an applicant or recipient refuses to provide the information or the authorization specified in subsection (1), the applicant shall be refused assistance or assistance to the recipient shall be discontinued, as the case may be.*** (Emphasis mine)

[9] The Board's decision references the fact that the Respondent did not sign the authorization ("consent form"). It continued:

> "Mr. Brenna was not comfortable about signing any papers. He asked if it was okay for his sister to look it over. Since there was no information given, the Department followed policy and denied Mr. Brenna his benefits."

[10] With respect, the Board erred in law when, in the face of such evidence, it allowed the Respondent's appeal. The Board had no discretion on this issue. Once the Board was satisfied that the Respondent had refused to sign the authorization, it had no alternative but to uphold the decision to deny

benefits to the Respondent. Further, the denial of benefits was clearly retroactive to the date of the earliest registration of a property in the Respondent's name in 1992. Thus, the Board was also obliged to confirm the overpayment of $98,167.20 (assuming it was satisfied with the mathematical calculation).

[11] I am therefore quashing the decision of the Appeal Board dated June 24, 2004 and directing that the Appeal be remitted to a new Board for rehearing.

Order accordingly.

J.