SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Community Services) v. Boudreau, 2011 NSSC 126

Date: 20110329
Docket: Hfx. No. 338621
Registry: Halifax

Between:

Department of Community Services

Applicant

v.

Brian E. Boudreau

Respondent

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	March 9, 2011, in Halifax, Nova Scotia
Counsel:	Terry Potter, for the Applicant Jennifer Cox, for the Respondent

By the Court:

Introduction

[1] Brian Boudreau is 34 years of age. His mother Anne Boudreau is a single parent and has devoted herself to caring for Brian in her home. Brian has autism and it is not disputed that he requires constant (i.e. 24-hour per day) care. To this end, his mother requires the assistance of part-time and full-time personal-care workers (PCWs).

[2] Mrs. Boudreau receives funds in trust for Brian from the Department of Community Services pursuant to the Services to Persons with Disabilities (SPD) program to assist her to care for Brian. These monies pay for part-time and full-time PCWs. Mrs. Boudreau found she was unable to retain the continous services of PCWs to care for Brian, because she was unable to pay a sufficient hourly rate.

[3] Mrs. Boudreau also noted that this constant turnover makes it very difficult to establish the necessary sympathetic working relationships that Brian requires because of his very high level needs.

[4] In the last year she had a turnover of seven PCWs. Mrs. Boudreau had been receiving between $1971 - $2160 a month for in-home support and $862- $960 for respite [the hourly rates of which have remained unchanged since 1998] – which herein I will, as the parties did at the hearing, collectively refer to as “respite care”.

[5] Mrs. Boudreau was only funded to pay $10 an hour and $12 an hour respectively for part-time and full-time PCWs. It is not disputed in the circumstances of this case that the average hourly wage is $14 per hour plus benefits for PCWs in HRM.

[6] Mrs. Boudreau was seeking approval from the Department of Community Services to obtain extra funding to allow her to pay $12 and $15 respectively to part-time and full-time PCWs.

[7] The request was not for more hours of PCW assistance, but rather more dollars per hour for care, to ensure continuity of personnel and its attendant benefits. The record reveals that Dr. H. Orlik, psychiatrist with the IWK Health Centre in Halifax who is familiar with Brian Boudreau wrote in his August 11, 2010 letter to Cole Webber in part:

> I understand that Mrs. Boudreau is appealing the DCS hourly pay rate or the amount of money she currently receives for respite. I hereby support Mrs. Boudreau's request to improve the pay structure so that competent staff can be hired and retained.

[8] To that end on March 17, 2010, Mrs. Boudreau applied for an increase of approximately $846 per month. On March 19, 2010 the Department of Community Services denied her application for increased funding; that letter from Laura Upton, Care Coordinator, read in part:

> As you know the Direct Family Support program bases its respite amount on $10 per hour. Unfortunately Services for Persons with Disabilities (SPD) staff have not been authorized to increase this hourly amount at this time. In regards to the possibility of increasing your monthly amount, in order that you can use the additional funding to pay extra per hour, SPD has not been authorized to allow any increases which result in payments exceeding $2200 per month. As Brian's current respite allowance already exceeds $2200 per month no increase may be authorized at this time.

[9] Notably, the Department Community Services also took the position that although the maximum amount available for ordinary respite care is $2200 per month, Brian Boudreau's case was "grandfathered" [an "understood practice" at the Department according to its counsel at the hearing] by virtue of its having been in the system prior to the $2200 maximum amount being set, and consequently Mrs. Boudreau was receiving $3120 in total per month for Brian's care from the

Services for Persons with Disability program as monitored by the Direct Family Support program.

[10] Mrs. Boudreau appealed that decision to casework supervisor Peter Lerette. It is unclear whether the appeal was commenced pursuant to s. 19 of the *Social Assistance Act*, RSNS 1989, c. 432 [hereafter "*SAA*"] which adopts the procedures for appeals of the *Employment Support and Income Assistance Act*, SNS 2000, c. 27 [hereafter "*ESIAA*"] [sections 12 and 13] or pursuant to s. 12 of *ESIAA*. I note the title of Mr. Lerette's Decision Form is "Administrative Review Report Employment Support Income Assistance". This ambiguity regarding which legislation governs is central to the dispute herein.

[11] On May 5, 2010, Mr. Lerette, as Administrative Reviewer at stage one of the appeal process, upheld the original denial of additional funding. He referenced s. 4 of the SAA Municipal Assistance Regulations as the statutory basis for his decision. In his decision he stated:

> DFS policy 5.4.3 states that… "Funding approvals must be within the DFS program resources and within DFS program funding levels". On November 20, 2009 a directive was received from the Director of the Services for Persons with Disabilities program limiting DFS program approval levels for respite funding to

$2200 per month. This amount is less than the amount being requested in this appeal and therefore the original denial was upheld”

[12] The DFS policy 5.4 (respite approval levels) reads:

5.4.1 respite funding is determined through the assessment of the individual’s and family’s circumstances; as a result, the authorization for funding varies **but shall not normally exceed $2200 per month. Refer to 6.3 of this section for exceptional circumstances for funding over $2200**.

5.4.2 **funding for respite is based on the assessed level of support for the individual and the family’s unmet needs**. It is intended to give the family scheduled breaks from caregiving and does not allow for 24 hour support.

5.4.3 all requests must have supporting documents which validate the request. Funding approvals must be within available DFS program resources and with DFS program funding levels.

[13] DFS policy 6.3 reads:

6.3 Exceptional Circumstances for Respite Funding over $2200.00

6.3.1 It is recognized that in certain situations the **assessed unmet needs** of the family in the DFS Program may determine that **additional support funding is required on an ongoing basis to enable the family unit to remain intact**. [my emphasis]

6.3.2 The following criteria will be considered when assessing, identifying and approving instances of exceptional circumstances where respite funding above $2200.00 per month is necessary:

- an individual has extraordinary support needs to the extent that they are reliant on others for all aspects of their support;

- an individual has extreme behaviours that result in high levels of stress within the family unit;

- there is no appropriate day program for an adult individual due to behaviour or health related issues;

- a single care giver has sole responsibility for supporting the family member with a disability; and

- in those cases where there may be end of life issues for either the individual or the care giver.

[14] The November 20, 2009 Directive from Lorna Macpherson, Director, Services for Persons with Disabilities entitled: "Re-Direct Family Support program procedural guide update: respite levels approvals" reads as follows:

> This memorandum provides an amendment to the November 5, 2009 correspondence in order to clarify that the $2200 monthly maximum limit for the direct family support (DFS) program relates to respite funding only. Please replace the memorandum dated November 5, 2009 with this version.
>
> **The Respite Approval Levels outlined in section 5.3 of the DFS Program Procedural Guide have been updated as of November 5, 2009**. The updated version of the Direct Family Support Program Procedural Guide is available on the shared I drive in the Direct Family Support folder.

> The updates are as follows [my paraphrasing]:
>
> [For amounts over $2200 per month, the level of funding is noted to be: "removed – there is no program funding available beyond $2200 per month for respite"].

[15] Mrs. Boudreau, with the assistance of counsel from the Dalhousie Legal Aid Service, appealed the matter to the Assistance Appeal Board (hereafter the "Board"). The Appeal Notice contained in the April 16, 2010, letter of Jessica Upshaw argued that:

> "It is our position that Brian meets all the criteria of exceptional circumstances [see 6.3.1 and 6.3.2 set out in the exceptional circumstances for respite funding DFS policy document] and his request for increased funding should be reviewed. While the "directive" states that funding to DFS program clients will not exceed $2200, Brian is already receiving funding in excess of $2200 in the amount of $3120."
>
> Regardless of whether DFS policy is enabled by the Social Assistance Act or is not enabled at all, it seems there are three possibilities in which an individual may be eligible for increased funding:
>
> 1. The policy directs decisions made; therefore a client is entitled to increased funding under "exceptional circumstances". Specifically 6.3.1 and 6.3.2 of the DFS [policy].
>
> 2. A client is eligible for an increase under the ESIA, specifically under special needs provisions sections 24 – 27.

> 3. If the DFS is enabled by the Social Assistance Act the Minister is obligated to provide assistance to persons under section 9 of the Act, which is similar to section 7 of the ESIA ["Minister shall furnish assistance to all persons in need]".

[16] Throughout the appeal process, Brian Boudreau relied upon either the *SAA* or *ESIAA* as the legislative basis upon which he was entitled to additional respite funding.

[17] After the hearing on September 8, 2010, Peter O'Brien, acting as the Assistance Appeal Board, allowed the appeal on September 13, 2010. The Decision Form is entitled: "Appeal Decision – *Employment Support and Income Assistance Act.*"

[18] The written Decision reads in part:

> **ARGUMENTS OF THE APPELLANT**
>
> The appellant stated that **it was becoming difficult to attract and retain personal care workers because the salary that she was able to provide was no longer competitive.** She indicated that she had lost seven workers in the past year and this had been very disruptive for her son Brian. Statistics were provided that showed that the average personal care worker in Halifax received $14 per hour plus benefits while she could only offer $12 per hour to full time and $10 per hour to part time workers. **To continue to attract quality workers**, the appellant is requesting an additional $846 per month to bring the wage of full care workers to $15 per hour and those of [p]art time workers to $12 per hour.

ARGUMENTS OF THE DEPARTMENT

The department stated that policy 5.4.3 and a Policy Directive from th[e] Director of Services for Disabilities program limited the amount of assistance to a total of $2,200 per month. They stated that the appellant was already receiving in excess of that amount because they had been grand fathered before the policy or directive had been implemented. **They did concur with the appellant that 170 hours a month ful [sic] full time care workers and 118 hours a month for part time workers was appropriate. They also agreed that the turnover rate of seven in the past year was accurate.**

FINDINGS OF FACT

The average wage for personal care workers in Halifax is $14 per hour plus benefits. It was agreed that the numbers of hours of care was appropriate. The appellant is currently receiving $3120 per month. The full-time hours worked were approximately 170 per month and that of part-time workers were 118 per month. **There were seven staff turnovers in the last year**. The department permitted wage for personal care workers has not increased in nearly a decade.

DECISION

The appeal is granted.

REASONS

> While the directive and policy do not support this decision, there is no regulation in the Act to provide support for either. Instead regulations 24 to 27 provide a guide to the overall intention of the Act which allows for variance from policy and directive when it is in the overall best interest of the client. [Emphasis added]

[19] The Decision Form ends with a notation that: “authority and decision orders are based on Assistance Appeal Regulations – section 8-13" [made under s. 21 of *ESIAA*].

The Request for Judicial Review

[20] The Department of Community Services (the “Department”) has filed a request for Judicial Review and seeks a review by this Court on the following grounds:

1. The Assistance Appeal Board erred by not indicating in the written decision what legislative authority is relied upon. In the alternative, the provisions cited by the Appeal Board are not correct or applicable to the decision under appeal.

2. The Assistance Appeal Board erred by not properly stating and deciding on the decision under appeal. The decision under appeal was the appropriate amount of

> respite funding, but the word “respite” never even appears in the written decision. The appropriateness of the hourly wage paid by the respondent was not the decision made by the Department of Community Services, but was the focus of the Appeal Board decision.

[21] The Department, requests an Order in the nature of *certiorari* quashing the decision of the Board and returning the matter to be re-heard before a differently constituted appeal board.

Legislative and Administrative Background

[22] This case requires the application of the principles of statutory interpretation. Our Court of Appeal recently commented on these principles and their application in *Coates v. Capital District Health Authority* 2011 NSCA 4 at para. 36 per Oland, JA. I will now go on to apply these principles to the legislation and regulations at issue in the case at Bar.

[23] Under the *Social Assistance Act* (hereafter "*SAA*"), each municipal unit constitutes a social services district and each unit must have a social services committee.

[24] Section 9 of the *SAA* reads in part:

> Subject to this Act and the regulations the social services committee **shall furnish assistance to all persons in need**, as defined by the social services committee, who reside in the municipal unit.

[25] Under the *Municipal Assistance Regulations* made pursuant to s. 18 of the *SAA* "assistance" is defined in s. 1[e]:

> **Means the provision of money, goods or services to a person in need, including**
>
> 1. Items of **basic requirement**: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,
>
> 2. Items of special requirement: furniture, living allowances, moving allowances, **special transportation**, training allowances, special school requirements, special employment requirements, funeral and burial expenses and **comforts allowances**. **The Director may approve other items of special requirement he deems essential to the well-being of the recipient,**
>
> 3. Healthcare Services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not

> covered under the hospital insurance plan or under the medical services insurance plan,
>
> 4. Care in homes for special care,
>
> 5. Social services, including family counselling, homemakers, **home care** and home nursing services,
>
> 6. Rehabilitation services.

[26] I pause here to note that the bolded items contained in the definition of "assistance" in the regulations made under s. 18 *SAA* correspond neatly to the "payment descriptions" referred to on the March 29, 2010 cheque stub received by Brian Boudreau. I infer that these references to "in home support" and "respite" funding reflect the Department's view that they are collectively described as "home care" in the Regulations for this to be so.

[27] Notably in s. 4(d) of the *SAA* "person in need" is defined as:

> **means a person who requires financial assistance to provide for the person** in a home for special care or a **community-based option**. [my emphasis]

[28] It is not disputed that Brian Boudreau, if not living at home with his mother, would have no option but to live in a publicly managed and funded full time care

facility. Therefore he is eligible under s. 4(d) of the *SAA* as being a "person in need" .... living in "a community based option."

[29] It is not disputed that Brian Boudreau is a "person in need" under that definition nor that he could be entitled to "assistance" as defined by the Municipal Assistance Regulations.

[30] What is in issue in the case at Bar is whether Brian Boudreau is **also** a "recipient" pursuant to s. 2(z), and eligible for assistance pursuant to s. 14 of the *ESIAA* Regulations made under s. 21 of the *ESIAA*.

[31] In contrast to the *SAA*, *ESIAA* has a specific section that sets out the purpose of the Act:

> **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.

ESIAA also defines "assistance" and "person in need":

Interpretation

3 In this Act,

(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;

...

(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.

[32] The *ESIAA* Regulations also define “special need” in s. 2(ab) as:

Means a need for

(i) an item or service with respect to

(a) dental care

(b) optical care

(c) funeral arrangements

(d) special diet

(e) transportation, childcare

(f) implementation of an employment plan, or

(ii) Another item or **service that is in the opinion of a caseworker essential for an applicant, recipient**, spouse or dependent child, **but does not include an item or service** that is insured under provincial insured health services programs or **otherwise funded by government**. [emphasis mine]

[33] Notably sections 24 to 27 of the ESIAA Regulations are entitled “Special Needs” and deal with applications for “assistance for an item of special need.” These sections appear to contemplate, pursuant to the definition of “special need”, services that are “in the opinion of a caseworker essential for an applicant…”.

[34] Section 26 appears to place a funding limit on any “item of special need.” The allowable amount must be:

the lesser of the actual cost of the special need or the amount prescribed in Appendix “A”; or the allowed cost of the special need as approved by a supervisor.

[35] The second category appears to contemplate items of special need that are not referred to in Appendix "A". The items of special need in Appendix "A" are limited to:

> transportation, childcare, single vision glasses, bifocal glasses, dental costs, funeral costs and special diet.

[36] Since none of those Appendix "A" items of special need are applicable to Brian Boudreau's application for additional respite care funding, it is arguable that, to the extent that the *Act* and Regulations apply to his case, there is no fixed dollar limit to his "respite" care request, and it must fit into an "allowed cost of the special need as approved by a supervisor."

[37] Nevertheless, to be eligible as a "special need", the respite care must also fit that definition under s. 2(ab)(ii) ESIAA Regulations which requires that it be:

> ... **service that is in the opinion of a caseworker essential for an applicant, recipient** ... **but does not include an item** ... **otherwise funded by government.**

[38] The Department in the case at Bar argues ESIAA is not applicable to Brian Boudreau and he is not a "recipient" of funding thereunder because:

(i) his circumstances do not suit the purpose of ESIAA which is to "facilitate [for persons in financial need] their movement toward independence and self-sufficiency"

(ii) the nature of the "special need" categories suggest his circumstances were not intended to be covered by ESIAA;

(iii) the "not eligible for assistance" and "eligibility for assistance" sections of ESIAA Regulations [ss. 10 to 14] also support their position.

(iv) that s. 12 of the Regulations and the definition of "special need" both suggest that **if** he is in receipt of assistance under the *SAA*, then he is ineligible under ESIAA for assistance of any kind or amount.

[39] As a matter of statutory interpretation, I am inclined to agree that Brian Boudreau is not a "recipient" of "assistance" pursuant to the ESIAA or its Regulations. Therefore he must be receiving his "assistance" pursuant to the *SAA*.

Standard of review

[40] In a remarkably similar decision, Murphy, J. canvassed this issue – *Department of Community Services v. Emily McKinnon*, 2011 NSSC 12 at paras. 8 - 13.

[41] He concluded that the standard of review in that case should be correctness. I find his analysis to be applicable to the case at Bar, and conclude that the standard of review in this case is also correctness.

[42] Moreover, both parties agree that the standard of review is correctness.

The implications of finding that Brian Boudreau is receiving "assistance" under only the *SAA*

[43] The SPD program, and the DFS program are both administrative creations which are not specifically linked to any particular piece of legislation. As a consequence, applicants for additional funding, such as Brian Boudreau, cannot be certain which legislation is the source of their funding, and under which legislation they are therefore arguing for additional funding.

[44] Added to this lack of clarity is the overlap between the *SAA* and *ESIAA* insofar as the *SAA* adopts the appeal provisions of the *ESIAA*; even where appeals are based on the *SAA* provisions, the process (including the title of appeal documents) refers to *ESIAA* and not the *SAA*. Has this confusion undermined the validity of the Board's decision in this case as argued by the Department?

[45] First, I must understand the reasons of Mr. O'Brien. I find his reasons may really only be read in one way, [expanded by my bracketed comments], and that is, as follows:

> [After noting that he is granting the appeal by Boudreau] **while the** [Nov. 20, 2009] **Directive and Policy** [DFS 5.4.3] **do not support this decision** [i.e. to grant the appeal and allow the requested additional $846 per month], **there is no Regulation in the** [*ESIAA*] **to provide support for it either. Instead** [*ESIAA*] **Regulations 24 to 27 provide a guide to the overall intentions of the** [*ESIAA*] **which allows for variance** [for a "special need" as defined in s. 2 (ab) which service "is in the opinion of a caseworker essential for the applicant, recipient, spouse or dependent child" and the cost is "the allowed cost of the special need as approved by a supervisor" under s. 26 *ESIAA* Regulations] **from** [DFS] **policy and Directive, where it is in the overall best interest of the client.**

[46] At this point I should remind myself about the parameters of judicial review. I start with the Majority decision in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190:

> Issue 1: Review of the Adjudicator's Statutory Interpretation Determination
>
> A. Judicial Review
>
> 27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative

bodies and endow them with broad powers. **Courts**, while exercising their constitutional functions of judicial review, **must be sensitive** not only to the need to uphold the rule of law, but **also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures**.

28 **By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority.** The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. **By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter.** This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in 2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice, V-1, at p. V-12). **In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is**

assured because determining the applicable standard of review is accomplished by establishing legislative intent.

....

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. **There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness.** It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

....

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful,

> courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> [per Bastarache and LeBel, JJ]

[47] As noted earlier, regarding my review of the statutory interpretation conclusions reached by the Board, I agree with Justice Murphy in *MacKinnon*, *supra*, at para. 13, that correctness is the proper standard of review for me to use.

[48] The Board had to be correct in its citation, and interpretation of the relevant law in this case, otherwise this Court is entitled to intervene and order appropriate relief.

(i) The sufficiency of reasons given by the Assistance Appeal Board

[49] I recognize as well, that the Department challenges the reasons given by the Board as insufficient to meet the minimum acceptable requirements. The Department characterized this issue (though it is strictly speaking a breach of the duty of fairness) as if it is an error of law by the Board, to which a correctness standard applies – (see para. 7 of Department's brief) citing *Future Inns Canada Inc. v. Labour Relations Bd. (N.S.)* (1997), 160 NSR (2d) 241, [1997] NSJ No. 103 (QL) (CA).

[50] Although “failure to give reasons” was the reason that the Court quashed the decision of the Labour Relations Board, the standard of review was not expressly stated by the Court. Justice Chipman did note however, that failure to provide reasons: “Makes its decision a patently unreasonable decision which will be set aside... There is an implied duty to give reasons. Breach of this duty is a breach of the rules of neutral justice” - at paras. 52 - 54.

[51] I note that *Future Inns* was decided before cases like *R. v. Sheppard*, [2002] 1 SCR 86 which reformulated the duty to give reasons by judges (in criminal cases); and *Baker v. Canada (Min. of Citizenship and Immigration)*, [1999] 2 SCR 817 where it was noted at para. 43:

> 43 .... it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required...

[52] In the context of labour arbitration grievances, our Court of Appeal has more recently observed, per Fichaud, JA in *NSTU v. N.S. Community College*, 2006 NSCA 22 [2006] N.S.J. No. 64 (CA): “sufficiency of reasons is a matter of procedural fairness that does not trigger a deferential standard of review:

Provincial Dental Board v. Creager at paras. 24 - 26 and cases there cited." [at para. 41.]

[53] In a case where there was no statutory duty to give reasons, Goudge, J.A. concluded in *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R. (3d) 210, that a correctness standard of review applies to the question of whether the duty to give reasons has been complied with:

> 22 Where an administrative tribunal has a legal obligation to give reasons for its decision as part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice of a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.

[54] I recognize that the jurisprudence allows for no reasons being given in appropriate cases - *Baker* , supra (which was an immigration case in which there was not a statutory duty to give reasons).

[55] There is a **statutory duty** to give reasons in the case at Bar – s. 13(4) *SAA* (which applies to the appeals under the *SAA* and *ESIAA*). If no reasons were given in that context, then that would be an error of law in my view. - eg. See *R v. Murrins* 2002 NSCA 12 [2002] NSJ No. 21 (CA) at para. 109 per Bateman. JA.

[56] Bearing in mind the decision in *NSTU v. N.S. Community College*, *supra*, where there was no statutory duty to give reasons, I conclude that where a statutory duty to give reasons exists, and reasons are given, the sufficiency of those reasons does not "trigger a deferential standard of review". A reviewing court must use a pragmatic and "functional" analysis in assessing whether it is satisfied that the reasons are sufficient to allow a meaningful review.

[57] Regarding the sufficiency of the reasons given in this case by the Board, I am satisfied that they are sufficient to allow me to assess the correctness of the Board's decision. As I pointed out earlier, they are in my view, capable of only one interpretation in all the circumstances here.

[58] I therefore reject the Department's argument insofar as it is based on the footing of legally "insufficient" reasons.

(ii) The Merits of the Judicial Review

[59] As I understood its position at the hearing, the Department accepts that since the November 20, 2009 Directive is not legislated, the Board was **not** bound by the maximum dollar amounts contained therein.

[60] However, the Department argues that the Board, after making its own findings of fact, did not correctly determine whether the Department was "in compliance with [the SAA] and the Regulations" – s. 13(2) *ESIAA*. The Department argues that since the SAA is the legislation under which Brian Boudreau receives "assistance", the Board erred in finding he received "assistance" under *ESIAA*.

[61] What then does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place. The SAA obligates the Department as administrator of the SPD and DFS programs to:

1. "furnish assistance" to Brian Boudreau; and

2. such “assistance” **means** all those items noted in s. 1(e) Municipal Assistance Regulations, which I interpret as including continuous care in his home, and travel outside his home, since if he were not living at home, the Department would be responsible for his care 24 hours per day for 7 days a week.

[62] How much “assistance” as defined in the Municipal Assistance Regulations, is the “care” obligation *vis-a-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the *SAA* and Regulations are met when the “assistance” reasonably meets the “need” in each specific case.

[63] On the facts undisputed in this case, Brian Boudreau’s reasonable “need” for “homecare” is 24 hours a day, 7 days a week (less the time his mother can reasonably attend to his care). The factual findings of the Board are not in dispute. Brian Boudreau’s “need” is for 118 and 170 hours of part time and full time PCW services.

[64] I might add here that I do not interpret “items of special requirement... The Director may approve other items of special requirement he deems essential to the

well-being of the recipient", to be intended to prevail over the more specific "home care" obligation in s.1 of the Municipal Assistance Regulations.

[65] The Board does appear to have been referring to the *ESIAA* and its Regulations as the basis for its decision. The Board, not having found a precise legislated basis for determining the amount of the "assistance" obligation in dollars imposed by the Act on the Department (since the Directive of November 20, 2000 is not legislated) turned to the Act [ESIAA] to assess the intention of the Act. Peter Lerette, in his stage one review of the initial denial of additional funding, referenced s. 4 Municipal Assistance Regulations as the statutory basis for his affirming the initial denial. That section, entitled "Standards of Assistance" uses a "budget deficit system" as its foundation. It is unclear how this section is relevant to Brian Boudreau's special needs, but I note "budget deficit" is defined only in s. 2(g) ESIAA Regulations - see also s. 30.

[66] The Board stated that sections 24 - 27 of ESIAA allow "for variance from Policy and Directive when it is in the overall best interest of the client".

[67] The Board had to be referring to ss. 26(b) and 27(1) in combination with the definition of “special need” in s. 2 (ab) of ESIAA Regulations [i.e. “(ii) another item or service that is in the opinion of a caseworker essential for [the client]...”].

[68] My interpretation of the relevant legislation is that the Department has a clear obligation to provide “assistance” to Brian Boudreau. The controversy is: how great is that obligation; and did the Board err?

[69] In my view, whether under the ESIAA or the SAA (and their respective Regulations), Brian Boudreau’s “special need” is by definition **not a discretionary item**, which the “Director” [s. 1(e)(ii) Municipal Assistance Regulations] or a “caseworker” or “supervisor” **may** decide is “essential to the well being of the recipient” or that “the higher amount as documented **may** be included in the calculation of the applicant’s or recipient’s budget deficit “[ss. 2(ab)(ii) and s. 27(1) ESIAA Regulations].

[70] Even if I am wrong on this, and the “respite” decision by the Department is discretionary under the legislation, [either ESIAA or the SAA and Regulations.] the Director has, on the record, clearly accepted that:

1. Brian Boudreau requires constant supervision;

2. a reasonable amount of “assistance” is 118 and 170 part time and full time PCW hours respectively;

3. the $2,200 limit in the November 20, 2009 Directive (which cannot override the legislation and regulations) is already not applied because Boudreau is “grandfathered” [and perhaps the Department considers itself estopped from reducing his existing $3,120/month “assistance”?]; and

4. due to the lower than average existing $10 and $12 hourly rates, Anne Boudreau has been unable to retain/maintain PCWs to care for her son Brian.

[71] Once the Director accepts these facts, its obligation and what is “essential” [per s. 1(e)(ii) Municipal Assistance Regulations] are well defined in this case. Therefore, whether seen as an outright obligation to furnish “assistance”, or a discretionary decision as to whether the “assistance” is “essential”, the Department’s obligation clearly includes the additional funding requested for Brian Boudreau.

Conclusion

[72] The Board relied on the *ESIAA* and its Regulations (sections 24 - 27) in assessing whether the Department had complied with the relevant *Act* and Regulations. In doing so, the Board erred in law in its interpretation of s. 13(2) of *ESIAA*. The SAA and its Regulations govern funding of "home care" for Brian Boudreau. Notably, under neither the SAA, nor *ESIAA*, are there legislated dollar maximum amounts for such "assistance".

The Proper Remedy

[73] The Department seeks "an order quashing the decision of the Appeal Board... and remitting the matter back to be re-heard by a differently constituted Board". In its Notice for Judicial Review, the Department requested this Court to issue "an Order in the nature of *certiorari*...".

[74] The law regarding prerogative writs, such as *certiorari*, has evolved from its very technical origins. The authors of *Taking Remedies Seriously* (2009 Canadian Institute for the Administration of Justice - Justice Robert Sharpe and Kent Roach LLM) state:

> ... Even when applicants met the conditions for the availability of the various prerogative writs, the courts recognized an overriding discretion to refuse relief on various grounds. That dimension of the writ system of judicial review is captured well in summary form in the latest edition of *De Smith's judicial Review:*
>
> > The award of the prerogative writs usually lay within the discretion of the court. The court was entitled to refuse certiorari and mandamus to applicants if they had been guilty of unreasonable delay or misconduct or if an adequate alternative remedy existed, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty.
>
> ...
>
> We need not look further back than March 2009 to locate a present-day equivalent of the statement from De Smith. Rothstein J., in *Canada (Citizenship and Immigration) v. Khosa*, captures current Canadian law on the discretionary nature of judicial review well in stating:
>
> > The traditional common law discretion to refuse relief on judicial review concerns the parties' conduct, any undue delay and the existence of alternative remedies: *Immeubles Port Louis Ltée v. Lafontaine (Village)*[3]... As *Harelkin*[4] affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants "if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty." As in the case of interlocutory injunctions, courts exercising discretion to grant relief on judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties. This is [a] type of "balance and convenience" analysis.

[75] Although this discretion to refuse prerogative relief is associated with those situations where the applicant does not come to court "with clean hands", there is also a recognized discretion to refuse prerogative relief where the error made by

the decision maker "could not have affected the decision" - eg. *Patel v. Canada (Minister of Citizenship and Immigration)* [2002] FCJ 178 (CA).

[76] I find that the case at Bar is an exceptional case where, though a valid claim for *certiorari* otherwise exists because the Board referred to the incorrect legislation as the basis for its decision, I will decline to make an order in the nature of *certiorari*. Let me explain why.

[77] In its oral argument, counsel for the Department acknowledged, quite rightly, that the overlap between the SAA and ESIAA, combined with the unclear linkage between the SPD/DFS programs and those Acts, presents a very clouded picture of the legislative framework underlying the funding of the care requirements for Brian Boudreau.

[78] This potential for confusion is reinforced by s. 19 SAA importing the ESIAA and its Regulations insofar as appeals under the SAA are concerned. Even the forms for SAA appeals are entitled as being under ESIAA and make no reference to the SAA.

[79] Notably, both the SAA and ESIAA obligate the relevant authorities to “furnish assistance to all persons in need” - ss. 9(1) SAA; s. 7(1) ESIAA.

[80] The definitions of “person in need” [s. 4(d) SAA], “assistance” [s. 1(e) Regulations under SAA] and “person in need” [s. 3(g) ESIAA] and “assistance” [s. 3(a) ESIAA] and “special need” [s. 2(ab) Regulations under ESIAA] all suggest a distinctive similarity between these two sets of legislation which when combined with the circumstances in the case at Bar, create a very clouded picture of the legislative framework underlying the funding of the care requirements for Brian Boudreau.

[81] The case law has acknowledged this uncertain state of affairs - see *Nova Scotia (Community Services) v. MacKinnon* 2011 NSSC 12 at para. 27 per Murphy, J.

[82] I reiterate that the facts in the case at Bar were not in dispute.

[83] Therefore, had the Board purported to act under the jurisdiction of the SAA and Municipal Assistance Regulations, in my view, the Board would necessarily have come to the same conclusion given the distinctive similarity between these two Acts and their Regulations.

[84] Both Acts and their Regulations obligate the Department to furnish assistance to Brian Boudreau. On the accepted facts, the obligations of the Department pursuant to the SAA and Regulations are met when the “assistance” reasonably meets the “need” of Brian Boudreau.

[85] In the case at Bar, his mother, was unable to retain and maintain PCWs to care for him because the maximum hourly wage rates the Department permitted had not remained competitive since being set in 1998.

[86] Whether characterized as “essential’ to the well being of Brian Boudreau, or whether necessary to reasonably meet the “need” of Brian Boudreau, the decision of the Board in the case at Bar would necessarily have been the same under ESIAA or the SAA.

[87] If it had had reference to the SAA and its Regulations, the Board would necessarily have found, pursuant to s. 13(2) ESIAA, that the Department did not comply with the SAA and Regulations in making its decision to deny additional funding for Brian Boudreau. Mere reference by the Department to the November 20, 2009 Directive, did not amount to a reasoned decision to deny additional funding, without consideration of the SAA and its Regulations [the enabling legislation] as is required by law. Moreover, had the Department complied with

the law, it would necessarily have reached the same decision as did the Board on the undisputed facts herein.

[88] Therefore, I conclude it is appropriate and in the interests of justice, in this case to decline to issue an Order in the nature of *certiorari*, which I would otherwise be entitled to do.

J.