SUPREME COURT OF NOVA SCOTIA

Citation: *N.V. v. Nova Scotia (Community Services),* 2018 NSSC 5

Date: 2018-01-22
Docket: Hfx No. 458665
Registry: Halifax

Between:

N.V.

Applicant

v.

Minister of Community Services and
the Assistance Appeal Board

Respondents

Restriction on Publication: [Regarding the identity of the Applicant]

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	August 1, 2017, in Halifax, Nova Scotia
Final Written Submissions:	December 1, 2017
Counsel:	Claire McNeil and Sara Gillett, for the Applicant Ryan Brothers for the Minister of Community Services Adriana L. Meloni for the Assistance Appeal Board (not participating)

By the Court:

Introduction

[1] This Court is being asked to review the reasonableness of the Appeal Board's decision.

[2] After a review of the law, this court is satisfied that the Appeal Board's interpretation was not a reasonable one. I wish to emphasize that I am not criticizing the Appeal Board, which conscientiously examined the facts and law. In my view, the relevant legislation suffers from some drafting weaknesses, and not being the subject of previous interpretation by a court, the Appeal Board had a difficult task presented to it.

Background

[3] Ms. V applied for social assistance pursuant to the *Nova Scotia Employment Support and Income Assistance Act* ("ESIAA"). Her application was rejected by a Department of Community Services ("DCS") caseworker, because she did not provide proof that she is a *citizen of Canada*. She is a citizen of Russia, not Canada, and was resident in Nova Scotia. An administrative review of the caseworker's decision concluded that "proof of citizenship" contained in the Employment Support and Income Assistance Act Regulations ("ESIAA Regs."), means "proof of *Canadian* citizenship". Ms. V says that, on its face, the regulation only requires "proof of citizenship", and that she should be eligible for assistance having provided proof of her Russian citizenship; and that in any event, "proof of citizenship" is not an *eligibilit*y requirement for assistance, but rather only *information* that must be provided. The Assistance Appeal Board disagreed, and found her ineligible for assistance.

[4] Under our Constitution, "citizenship" is constitutionally a matter in the exclusive jurisdiction of the federal government. The definition of "citizenship" may change over time, if the federal government so chooses. At present, Section 2(1) of the federal *Citizenship Act*, RSC 1985, c. C-29, as amended, states that "citizenship": "means Canadian citizenship". Sections 4 and 5 set out, who is a "citizen", and who is entitled to a "grant of citizenship". It is understandable therefore that the Nova Scotia legislation does not contain an express definition of "citizenship" in the relevant Act or regulations. Moreover, it is reasonable in all the

circumstances to conclude that "citizenship" in the regulation, can only mean "Canadian citizenship".

[5] The court concludes that, in its opinion, the Legislature also intended, by its reference to "citizenship", to include therewith persons and circumstances of "near – citizenship"-i.e. those who are legally entitled to remain in Canada, such as Permanent Residents, Temporary Resident Permit Holders, and refugee claimants, though the immigration status of others could also qualify depending on their circumstances. Ms. V's status as a person "legally entitled to remain in Canada" while awaiting the outcome of her Pre-Removal Risk Assessment, qualifies her for what I have termed for convenience as "near citizenship".

[6] The Appeal Board's reference to dictionary definitions for "citizen" and "citizenship" distracted it from the proper enquiry-in the federal legislative sphere, what are considered to be the defining attributes of "citizenship", including immigration status that I have referred to as "near citizenship"?

[7] The motion for relief pursuant to judicial review is allowed.

The decisions under review

Initially on review of her rejection for assistance, the Minister, pursuant to Section 11(4) of the *ESIAA*, determined that the reasons for rejection of her appeal included:

> Ms. V's deportation order has simply been stayed while she is in the Pre-Removal Risk Assessment process. While this allows her to remain in Canada until this matter has been resolved, her current status in Canada is a Foreign National with a pending deportation order. She has no approval to stay in the country for any other purpose. The eligibility criteria for the ESIAA program includes proof of citizenship, proof of residency, and social insurance number, in addition to other information (regulation 5(1)(a) vi,ix,x and (b). Ms. V is not a Canadian citizen and does not have residency status in Canada. She is not legally permitted to work or study in Canada, and as such is not able to participate in the mandatory employability assessment under ESIAA. Based on the foregoing criteria, she is not eligible for ESIAA. Should her immigration status change to allow her to stay in Canada on a permanent basis, she can re-apply for benefits. In the interim, it is recommended that she contact the federal government to explore programs and services that support foreign nationals who are appealing their removal from the country. The Department decision is upheld.
>
> August 26, 2016 – Administrator Reviewer- Anthony Salter.

[8] On further appeal, the Assistance Appeal Board ("the Appeal Board") concluded that:

> The board has concluded the appellant Ms. V has not met the eligibility requirements for income assistance under the terms of the ESIA Act and regulations, specifically a failure to produce a mandatory proof of citizenship as specified at regulation s. 5(1)(a)(ix). The department position is consistent with and supported by the Act and Regulations. The issue is found in the negative, that is, the appellant is *ineligible* for income assistance – the appeal is denied – Frederick Graham. November 17, 2016.

[9] This is latter decision is the one the court is reviewing.

[10] In order to appreciate the legal issues presented by this case, one must examine the provisions in dispute within their legislative context.

Legislative context

A. The *ESIAA* (*Employment Support and Income Assistance Act*, c. 27, SNS 2000, as amended- effective date August 1, 2001, per s. 29 of the *Act*)

[11] At the beginning of the *Act*, we find the following:

> An *Act* to Encourage the Attainment of Independence and Self-sufficiency through Employment Support and Income Assistance
>
> Whereas independence and self-sufficiency, including economic security through opportunities for employment, are fundamental to an acceptable quality of life in Nova Scotia;
>
> And Whereas individuals, government and the private sector share responsibility for economic security;
>
> And Whereas some Nova Scotia and's require help to develop skills and abilities that will enable them to participate as fully and the economy and in their communities so far as it is reasonable for them to do;
>
> And Whereas the government of Nova Scotia recognizes that the provision of assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Nova Scotians;
>
> And Whereas it is necessary that income assistance be combined with other forms of assistance *to provide effectively for Nova Scotians in need*;
>
> And Whereas employment support and income assistance must be effective, efficient, integrated, coordinated and financially and administratively accountable.

These sections most immediately relevant are:

This *Act* may be cited as the *Employment Support and Income Assistance Act*.

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.

In this *Act*,

"Assistance" means the provision of money, goods or services to a person in need for

basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,

special needs,

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.

…

7(1) Subject to this *Act* and the Regulations, the Minister shall furnish assistance to all persons in need.

(2) persons assisting the Minister in the administration of this *Act* shall

receive applications for assistance; and

in accordance with this Act and the regulations,

determine whether the applicant is eligible to receive assistance,

determine the amount of financial assistance the applicant is eligible to receive,

determine the other forms of assistance available that would benefit the applicant,

advise the applicant of the amount of financial assistance that will be provided, the other forms of assistance that will be available for the applicant and the conditions to be met to ensure the continuation of the assistance provided,

advise the applicant that the applicant has the right to appeal determinations made pursuant to this *Act*, and

from time to time review the assistance provided to a recipient, and in particular whether any conditions imposed have been met, and promptly advise the recipient of any changes in eligibility and of the right to appeal the change.

…

20 The Minister may prescribe any forms required for the effective administration of this Act.

21 (1) the Governor- in- Council may make regulations

respecting the manner in which an application for assistance is to be made;

…

(c) prescribing standards for assistance to be granted to persons in need;

…

(j) prescribing the material to be provided by an applicant or recipient for the purpose of confirming eligibility and means to verify the information so provided;

…

(l) respecting eligibility for assistance or for any program or service provided pursuant to this *Act*;

…

(s) defining any word or expression used in this *Act* and not defined herein;

…

(u) respecting any other matter or thing that is necessary to effectively carry out the intent and purpose of this *Act*.

B. *The Regulations (ESIAA Regs)*

[12] The Regulations contain the following headings and disputed section:

Assistance-General

Money payments of assistance

3-Payments of assistance in the form of money shall be made by cheque or electronic bank transfer in favour of the person named in the requisition for the payment.

Application for assistance

4-An applicant shall submit an application in the form prescribed by the Minister to a case worker and shall attach to the application any document required pursuant to Section 5.

Additional information required

5 (1) In order to determine the eligibility of an applicant or the ongoing eligibility of the 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 case worker, 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:

(a) Where applicable,

…

(ix) proof of citizenship,

(x) proof of residency,

…

(b) [The relevant social insurance number(s)]

(c) [the relevant Nova Scotia health card number(s)]

(d) [the relevant income tax assessment(s)]

(e) an authorization for the release, obtaining or verifying of information about the applicant or recipient and spouse, dependent child and student family member of the applicant or recipient including information or documents

(i) specified in this Section and Sections 4 and 7,

(ii) respecting expenses,

(iii) respecting chargeable income,

(iv) respecting liquid assets,

(v) respecting the confirmation of a student family member's residency and enrolment in postsecondary education;

(vi) respecting the confirmation of living with another person in a relationship of interdependence functioning as an economic and domestic unit.

(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.

C. *The Policy*

[13] DCS policy extant at the relevant times (Policy 5.1.3-7 and 5.11.1) appears at pgs. 82 – 86 of the Record – see also DCS counsel's letter to the court August 15, 2017. The policy provides further guidelines to those interpreting and administering the *Employment Support and Income Assistance Act* and Regulations.

Policy 5.1.3 – Required Documentation – includes:

> In order to determine initial and ongoing eligibility or to verify information, an applicant/recipient and spouse must provide the following at the time of application or any other time while in receipt of assistance.
>
> The following information will be maintained on file:
>
> …
>
> 7-Required documentation as determined by the applicant/recipient's and spouse of the applicant/recipient's circumstances/situation (for immigrants and non-Canadians this includes documentation from Citizenship and Immigration Canada), if applicable;]
>
> Policy 5.11.1- Immigrants and Non-Canadians
>
> An applicant and/or the spouse of applicant who is verified as a permanent resident, a refugee claimant, or a Temporary Resident Permit (TRP) holder may be eligible for ESIAA provided all other sources of assistance have been exhausted.
>
> A TRP is a document that authorizes a person who is inadmissible or does not meet the requirements of the Immigration and Refugee Protection Act or Regulations either as a Temporary Resident or as a Permanent Resident to enter or remain in Canada. A TRP is not the same as a Temporary Resident Visa (student, work or visitor permit).
>
> An applicant or spouse who is in Canada due to a study, work, or visitor permit are most often not eligible for assistance based on the program entry requirements established by Citizenship and Immigration Canada (CIC).
>
> 5.11.2 Policy – Applicants determined at intake to be a Permanent Resident
>
> Immigrants under the Economic Class categories are admitted to Canada from selection criteria under *the Immigration and Refugee Protection Act*. Employment Support and Income Assistance can be provided when all other sources have been exhausted.

[The following policy statements appear sequentially with the elaborations, which I have omitted]

5.11.3 Policy – Applicants determined at intake to be a Family Class Immigrant
5.11.4 Policy – Applicants determined at intake to be a Resettled Refugee
5.11.5 Policy – Applicants determined at intake to be a Refugee Claimant
5.11.6 Policy – Employment Support Services and Immigrants and Refugees
5.11.7 Policy - Medical Expenses and Immigrants and Refugees

The Standard of Review

[14] Ms. V's appeal to the Assistance Appeal Board was denied. On judicial review at this court, her central argument is that the Appeal Board erred in in its interpretation of "proof of citizenship" contained in Section 5(1)(a)(ix) of the Regulations made pursuant to Section 21 of the *Employment Support and Income Assistance Act* ["ESIAA"].

[15] This court must consider whether the Appeal Board's interpretation is reasonable – i.e. "factually and legally, occupies the range of possible outcomes" per Fichaud J.A. in *Jivalian v. Nova Scotia (Department of Community Services)*, 2013 NSCA 2, at para. 15, leave to appeal refused [2013] SCCA No. 83. More recently, our Court of Appeal has interpreted the ESIAA - *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82. Though Ms. V's case was argued August 1, 2017, the court sought further submissions from counsel after the November 8, 2017, issuance of *Sparks*, thus the parties' positions reflect both pre and post-*Sparks* elements.

[16] Ms. V's argument is that she is entitled to assistance without proof that she is a Canadian citizen (or near-citizen – whether or not that category is limited to those listed in ESIAA policy: "an applicant and/or the spouse of applicant who is verified as a Permanent Resident, a refugee claimant, or Temporary Resident Permit holder"). She would say, in addition to being a "person in need", mere physical presence in Nova Scotia is sufficient.

[17] While Ms. V has satisfied the court that the Appeal Board's interpretation is unreasonable, I agree with the Appeal Board that "proof of citizenship" is an eligibility requirement, where proof is required by the Minister.

[18] However, I conclude that the Appeal Board unreasonably interpreted "proof of citizenship" as being strictly "proof of Canadian *citizenship*", rather than including persons who have near-citizenship status and are therefore "legally entitled to remain in Canada". Ms. V and her daughter were "legally entitled to remain in Canada" temporarily, and had sufficient connection to Nova Scotia (i.e. "proof of residency") at the time of her application. Therefore, she was eligible for assistance.

The Regulation in issue

[19] Section 5 reads:

> (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 an application, or in the case of a recipient is requested at any time during which the recipient is in receipt of assistance:
>
> (a) where applicable,
>
> (i) proof of age,
>
> (ii) proof of death,
>
> (iii) proof of marriage,
>
> (iv) proof of divorce,
>
> (v) proof of cohabitation,
>
> (vi) proof of ability to participate in employment services,
>
> (vii) proof of hospitalization,
>
> (viii) proof of parentage,
>
> (ix) *proof of citizenship*,
>
> (x) *proof of residency*,
>
> (xi) proof of income, or
>
> (xii) proof of assets.
>
> (b) *the Social Insurance Number* of the applicant or recipient and of the spouse of the applicant or recipient and a dependent child of the applicant or recipient;
>
> (c) the *Nova Scotia Health card number* of the applicant or recipient and of the spouse of the applicant or recipient and dependent child of the applicant or recipient;
>
> (d) income tax assessment form of the applicant or recipient and of the spouse of the applicant or recipient; and
>
> (e) an authorization for the release, obtaining or verifying of information about the applicant or recipient and spouse, dependent child and student family member of the applicant or recipient including information or documents

(i) specified in this Section and Sections 4 and 7,

(ii) respecting expenses,

(iii) respecting chargeable income,

(iv) respecting liquid assets,

(v) respecting the confirmation of a student family member's residency and enrolment in postsecondary education,

(vi) respecting the confirmation of living with another person in a relationship of interdependence functioning as an economic and domestic unit.

(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.

The decision of the Appeal Board

[20] The Board included in its reasons:

The listing of informational documents in the foregoing regulation [*5(1)(a) ESIAA Regs*] that may be required "in order to determine the eligibility of an applicant" *represent mandatory ("shall") submissions where applicable…. The appellant has framed the criteria in question as "immigration status" rather than a direct "citizen status"*. The Board will seek definitions of "citizen" and "citizenship" from Webster's Ninth New Collegiate Dictionary as follows:

Citizen

1- an inhabitant of a city or town; especially one entitled to the rights and privileges of a free man,

2 -a member of a state; a native or naturalized person who owes allegiance to a government and is entitled to protection from it.

3-a civilian as distinguished from a specialized servant of the state.

Citizenship

1- the status of being a citizen,

2- membership in a community (as a college); the quality of an individual's response to membership in a community.

So, we see that a citizen is a member of a state or a native or naturalized person and citizenship is the status of being a citizen. [*Ms. V] is a citizen of Russia and she is not a native or naturalized person of Canada at this point in time*. *The question next arises whether "proof of citizenship" means citizenship of Canada…. If the legislation construction did not intend Canadian citizenship as*

> *an eligibility determinant there would not have been a need to reference citizenship at all as it would not matter – eligibility would not be considered in light of one citizenship. [Ms. V] has not been able to provide proof of citizenship as contemplated at regulation s.5(1)(a)(ix). Regulation Section 5(2) mandates a refusal or discontinuance of assistance* when information specified in Section 5(1) is denied.
>
> …
>
> The board has concluded that the appellant [Ms. V] has not met the eligibility requirements for income assistance under the terms of the Employment Support and Income Assistance Act and Regulations, specifically *a failure to produce a mandatory proof of citizenship as specified at Regulation s. 5(1)(a)(ix)* … The appellant is ineligible for income assistance. The appeal is denied.
>
> [italics added]

Position of the parties

Ms. V

[21] She says the Board's interpretation is not reasonable. The Board's interpretation is not within a range of possible outcomes because it is not intelligible, justifiable and transparent, and furthermore, specifically:

1. The statute's purpose is to provide assistance to all "persons in need" – see Sections 2, 3(g) and 7;
2. There is no reference to citizenship as an eligibility criterion within the statute;
3. The eligibility criterion argued as citizenship is contained in the regulations, not the statute;
4. Regulations by their nature cannot restrict the provisions of the enabling legislation (ESIAA);
5. Reference to citizenship appears nowhere else except in s. 5 of the regulations;
6. The headings in the regulations are a valid indicator of the Legislature's intent in creating them [i.e. there is no reference in s. 5 to "eligibility" requirements – the heading reference is to "*additional information* required"];
7. "Eligibility" requirements are *expressly* considered in ss. 10-13 of the regulations [under the heading "Eligibility"], suggesting

that therefore Section 5 thereof is not a collection of "eligibility" requirements;

8. There is a danger that if the regulations are interpreted as effectively "eligibility" criteria, then the Legislature could undermine the intention of the *Act* by merely passing regulations;

9. Social welfare legislation, such as under review at Bar, should be very broadly interpreted in favour of those it intends to assist or the mischiefs it intends to address- *Morine v. L&J Parker Eqt. Inc*., 2001 NSCA 53;

10. The legislation should be interpreted keeping in mind Charter values – Section 15 equality rights are in play here – *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 – citizenship is an analogous ground;

11. Even if our international treaty obligations are not implemented as domestic law, they are still an important touchstone in informing courts what the intention of legislatures were in enacting remedial social welfare legislation;

12. Social Assistance authorites' *policies* should be completely of no relevance as they are not "law" [*Sparks v. Nova Scotia (Assistance Appeal Board)*, 2016 NSSC 201 at paras. 88 - 91- decision under appeal before the Court of Appeal - heard June 1, 2017 – reserved decision] and paras. 30 - 31 in *Jivalian*, *per Fichaud J.A.*]. [1]

13. Even accepting that the DCS argument has some merit, what does "proof of citizenship" mean? The Appeal Board determined it meant proof of *Canadian* citizenship, and DCS counsel went on to indicate that Social Assistance authorities have been instructed to include "near-Canadian citizenship" as sufficient eligibility, a matter of policy. Moreover, how can the Minister instruct their staff to follow a policy of an expanded definition of Canadian "citizenship", yet argue that the proper

[1] In *Sparks*, the Court of Appeal overturned the result. Although it confirmed the "reasonableness" standard of review (para. 12), it did not pronounce upon the status of ESIAA "policy", and therefore Justice Fichaud's earlier comments in *Jivalian* remain binding.

interpretation of "citizenship" in the Regulations strictly *means* Canadian citizenship?

14. It is important to circumscribe the regulations here because Section 5(1)(a)(ix) reaches beyond what was intended by Section 21 of the *Act* which authorizes the Governor-in-Council to make regulations for specified matters, not expressly including "eligibility" –*Ogilvie v. Nova Scotia*, 2004 NSSC 102, and *Way v. Covert*, 1987 NSCA 99;

15. In supplementary written argument Ms. V argues that the *Sparks* decision is relevant in this case regarding three issues:

    i. Standard of review – (it is a "reasonableness" standard);

    ii. Principles of statutory interpretation - (there is contextual ambiguity surrounding Section 5(1)(a)(ix) ESIAA Regs., and a liberal interpretation is therefore appropriate for the *Act* and Regulations; moreover, because a purposive examination of the legislation does not remove the ambiguity, consequently the Charter of Rights, and Canada's International Obligations should be used as interpretive aids). All of these touchstones support Ms. V's argument that she has been unreasonably denied eligibility for social assistance;

    iii. ESIAA policies are not law, and cannot fetter the decision-maker's exercise of their discretion, although arguably they may be used by administrative staff in providing guidelines to assist them in the exercise of their functions- *Jivalian*, paras. 23 and 31.

[22] Ms. V requests an order quashing the decision of the Assistance Appeal Board. She also requests an order directing the DCS to assess Ms. V's eligibility for assistance on behalf of her and her daughter retroactively to the date of the decision denying her assistance in accordance with the *Act* and Regulations, as well as costs of this proceeding.

Department of Community Services

[23] The Minister's position may be summarized as follows:

1. They rely on the reasoning in *Nova Scotia (DCS) v. McIntyre*, 2012 NSCA 106 – which notes that the Act is not only to provide assistance, but to also to ensure people become economically self-sufficient;
2. The court must look at every provision in the *Act* and Regulations, including headings [see the Nova Scotia *Interpretation Act*, regarding this] that could touch upon eligibility of individuals for assistance – i.e. headings for Sections 4, 5, 14 Regs.; and in the *Act* ss. 3 (g) regarding "person in need"… "as determined by the Regulations" and Section 21 (a), (j), and (l) – which are the authority to request proof of eligibility for items such as "citizenship". They rely upon the reasoning in *Clyke v. Nova Scotia (Minister of Community Services)*, 2004 NSSC 89, per Hood J.
3. The facts in *Sparks*, are distinguishable. On appeal Mr. Sparks accepted his disentitlement to assistance. The court ruled his wife and children also fall within the definition of "recipient" and therefore remained entitled to assistance. Here, Ms. V's daughter was not, and is not, entitled to assistance because she was 12 years old at the relevant times. Section 14(2) of the ESIAA Regulations prohibits separate eligibility for individuals under 19 years of age if "residing in their parents' or parent's home";
4. The applicant's position is unreasonable because the only requirements for assistance would be that you are present in the province of Nova Scotia and meet the financial limits requirement;
5. There is no ambiguity in the legislation here – one has to attempt the interpretive process first before deciding that the legislation is ambiguous – in this case as long as the Appeal Board interpreted the legislation in a manner that is reasonable, it can be upheld and reference to Charter values and Canada's international obligations, is not required as it is premature;

6. Charter values have a very limited role in legislation and there is a real danger of subjective interpretations by courts being introduced – *R. v. Clarke*, 2014 SCC 28, at para. 13 – even if there is ambiguity, it is suggested the interpretation applied by the Appeal Board was consistent with the spirit of the Charter of Rights;

   International human rights laws are not binding on the board or this Court, if they have not been implemented and incorporated into Canadian law, though in proper cases they may be used as interpretive aids;

7. Regarding ESIAA policy – Justice Fichaud, in the *Jivalian* decision, at para. 31, makes it clear that:

> 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.*
>
> [Italics added]

   However, it is suggested that the administrative staff, and more importantly the Appeal Board can still use ESIAA policy in its interpretation of the Regulations as they pertain to ancillary matters in an effort to ensure consistency in the treatment of applicants/recipients.

   The Minister may be relying upon s. 20 ESIAA (“Minister may prescribe any forms required…” -as seen on pg. 43, tab 3 of the Record) and Justice Fichaud’s reference in *Jivalian,* at para. 13 to an obiter dicta statement by the court in *Nova Scotia (Department of Community Services) v. McIntyre*, 2012 NSCA 106 (at para. 23):

> *The Board's interpretation and application of the* [ESIAA], 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 the *Canadian Human Rights Commission*, and *Alberta Teachers' Association*.

9. Counsel notes that if, in order to get assistance you have to be 19 years of age, resident in Nova Scotia and your expenses must outstrip your income to be eligible – it makes sense that you should also be a Canadian citizen, or have near- Canadian citizen status per ESIAA Policy;
10. There was no evidence that Ms. V was a Canadian citizen or near – Canadian citizen, in the decision being appealed, before the Appeal Board;
11. The spirit and intent of the *Act* and Regulations have been respected by the Appeal Board decision, and it is a reasonable outcome and interpretation.

[24] The Minister is not seeking costs.

[25] Counsel distinguishes the cases *Way v. Covert*, and *Ogilvie*, on their facts – it notes in this case the factor in dispute is intrinsic to the applicant whereas in those cases there was income from the brother and there was a deeming provision regarding income that was not in the parties' hands.

[26] Counsel distinguishes the reasoning of Spencer J., in *Federal Anti-Poverty Group of BC v. British Columbia (Minister of Social Services)*, [1996] BCJ No. 2088 (SC), because it involved two persons with the same immigration status, but who were treated differently on the basis of how long they had been in Canada.

Analysis – my review of the reasonableness of the Appeal Board decision

[27] I am fortunate to have the very recent guidance from our Court of Appeal in the *Sparks* case. As I see it, I should ask myself the following questions:

1. Was the Board's decision making process justified, transparent and intelligible?
2. Did the decision fall within the range of acceptable outcomes?

(a) Is Section 5(1)(a) (ix) of the ESIAA Regs. ambiguous? This requires a contextual and purposive analysis.

(b) The contextual analysis requires an examination of the specific words under review within the context of their immediate provisions - Section 5 ESIAA Regs and relevant definitions or other necessarily implicated sections; next it is appropriate to examine the impugned provision in the context of the entire *Act*/Regs.

(c) Next, the purposive analysis is an attempt to discern the Legislature's intent – here the *Interpretation Act*, RSNS 1989, c. 235, as amended, is applicable (particularly, Sections 9, 11 and 12);

(d) If the meaning of the provision remains ambiguous after that analysis, in that there are left more than one plausible meaning consistent with the legislation's intention, then resort to other interpretive aids is appropriate. Ambiguous legislation should be interpreted in a manner that best reflects the implicated Charter values, and should be interpreted "in a manner that is consistent with Canada's (more specifically Nova Scotia's) international human rights obligations.", bearing in mind as well that "ambiguous social welfare legislation" should be interpreted in a manner that benefits the claimants- Paras. 49- 51 and 53, in *Sparks*, per MacDonald CJNS.

[28] This approach is a specific reflection of a general principle. As Chief Justice MacDonald stated at para. 31 in *Sparks* :

> All that said, at the end of the day, we should interpret legislation in a manner that is both reasonable and just. Ruth Sullivan, in *Sullivan on the Construction of Statutes*, supra, explains at section 2.9:
>
> 'At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate**. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text;(b) its efficacy,**

> **that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with the accepted legal norms; it is reasonable and just.'**
>
> [Emphasis in original]

[29] Next, I will turn to the application of this analysis to the circumstances of this case.

1-Was the Board's decision-making process, justified, transparent and intelligible?

[30] The Board provided Ms. V with a fundamentally fair process, and rendered a decision which is intelligible. This criterion is satisfied.

2-Did the Board's decision fall within a range of reasonable outcomes?

(a) Is Section 5(1)(a)(ix) of the ESIAA Regs. ambiguous?

[31] Ms. V argues there is "only one plausible meaning consistent with the legislation's intent… [and it] is that the provision imposes an obligation to provide information, not conditions of eligibility [such as Canadian citizenship]" [2]

[32] She would say that having provided proof of her status as a Russian citizen, she has complied. She should have been considered eligible for assistance, and received it.

[33] Ms. V says that, if the court concludes that the provision is ambiguous, then she can rely upon Charter values and the international law obligations of Canada, for an interpretation that proof of Canadian citizenship is not a requirement of *eligibility* under the *Act* and Regulations.

[34] The Minister correctly notes that more specifically, the court must engage in the contextual and purposive analyses, and conclude thereafter that the provision remains ambiguous, *before* resort can be had to other interpretive aids, such as the Charter of Rights and Canada's international law obligations: paras. 12-14, *R. v. Clarke*, 2014 SCC 28.

Contextual analysis

[2] Paras. 6 and 7, November 24, 2017 brief

i) the immediate context

[35] Under the heading, "Assistance – General", we find subheadings: [3]

"Money payments of assistance"- Section 3

"Application for assistance" – Section 4

"Additional information required" – Sections 5, 6,7 and 8

"Providing documentation" – Section 9

[36] Under the heading "Eligibility", we find subheadings:

"Not eligible for assistance" – Sections 10, 11, 12, and 13

"Eligibility for assistance" – Section 14

"Caseworker can change amount of assistance" – Section 15

"Dependent child" – Section 16

[37] Under the heading, "Employment", we find subheadings: "Employability assessment"; "Employment plan"; "Medical examination"; "Refusal to accept employment"; "Quitting a job"; "Obligation to commence proceedings".

[38] Section 4 requires an applicant to "submit an application *in the form prescribed by the Minister* to a case worker and *shall attach to the application any documents required pursuant to Section 5*". There is no form prescribed by, or evident in, the Regulations. The form which is used, was in evidence before the Appeal Board. [4]

[39] From the form, one sees that Ms. V appears not appear to have claimed a permanent or temporary Canadian Social Insurance Number (SIN), and Nova Scotia Health card number at that time. [5]

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[3] I do appreciate that headers or headings do not "form part of the enactment" but are for convenience only – s. 12 of the *Interpretation Act*

[4] Employment Support and Income Assistance Program Application-completed June 17, 2016, and the declaration signed June 24, 2016 by Ms. V -see Record of the Assistance Appeal Board, pgs. 42 – 48 at Tabs 3 and 4.

[5] Ms. V was formally notified on or about June 3, 2016 regarding her making an application for Pre-Removal Risk Assessment. By June 20, 2016, she had made an application for Pre-Removal Risk Assessment –pp.14-15 Record. She was advised August 30, 2016 that the caseworker's decision to refuse her claim for eligibility for assistance was being upheld on Ministerial review-p.17 Record. She later received a temporary SIN and temporary work permit – see pages 73 – 74 and 196-198 of the Record. The work permit issued October 18, 2016 notes that it "does not confer temporary resident status". Her temporary SIN, issued October 27, 2016, as well as her temporary work permit, were to expire April 30, 2017. Ms. V was denied assistance in June 2016 because she purportedly did not comply with subsection 5(2), which reads in part, "where an applicant… refuses to provide the information or the

[40] She argues that she did comply by providing proof of her Russian citizenship. At the Appeal Board hearing, she alternatively argued that her immigration status should effectively make her eligible under the Section 5 ESIAA Regs. criteria (i.e. temporary SIN and work permit). [6]

[41] Section 5(1) reads in part:

> In order *to determine the eligibility* of an applicant…, *or to verify information obtained from an applicant… in respect of their eligibility*… to receive assistance, the applicant… shall provide the following information to a caseworker, in the case of an applicant at the time of application… :
>
> *Where applicable,*
>
> …
>
> (ix) proof of citizenship,
>
> …"

[42] It is not in dispute that Ms. V was under obligation, to provide to the caseworker, "proof of citizenship".

[43] However, the position of the Minister is clear. The reference in section 5 to "proof of citizenship", is intended to mean "proof of *Canadian* citizenship", *and* that Canadian citizenship is a pre-condition, or eligibility requirement, in order to receive assistance under the ESIAA.

[44] A review of the wording of the provision in the immediate context of the Regulations, leads one to conclude that Section 5 (1)(a)(ix) of the Regulations is arguably ambiguous.

[45] I turn next to a contextual examination of the entire legislative scheme – the ESIAA and Regulations, to determine if Section 5(1)(a)(ix) remains arguably ambiguous.

ii) The broader legislative context

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authorization specified in subsection (1), the applicant shall be refused assistance…" I note she sought to rely before the Appeal Board of the receipt of her SIN and work permit in the intervening period between refusal and appeal – pg. 200, Record. However, due to the strict interpretation used by the Appeal Board vis-à-vis, Section 5(1)(a)(ix) of the ESIAA Regs., it did not need to address the changes, beyond Ms. V's Section 9 Regs. argument – pg. 208, Record.

[6] See tab 1, pages 38 – 39 and 154-55 of the Record

[46] The ESIAA defines a "person in need". Entitlement thereunder primarily involves a financially based calculation that addresses, a shortage of the resources of a person on the one hand, and the applicant's "basic needs, special needs and employment services as prescribed in the regulations" on the other.

[47] Notably, Section 7, obligates the Minister to provide "assistance to *all* persons in need", and assigns the responsibility for that assessment to caseworkers, who are mandated to receive applications for assistance "and in accordance with this Act and the regulations,

i) determine whether the applicant is *eligible* to receive assistance,
ii) determine the amount of financial assistance the applicant is eligible to receive,

…".

[48] Who will be a "person in need" is therefore necessarily also qualified by the Regulations.

[49] Chief Justice MacDonald noted in *Sparks*:

> 39 By way of further background, the *Employment Support and Income Assistance Act* was introduced as Bill No. 62 in the Legislature on October 26th, 2000. It can be said to be a piece of watershed legislation. It replaced the *Family Benefits Act* and most provisions of the *Social Assistance Act*. *Notwithstanding its lofty title, the legislation contains a mere 29 sections. The substantive mechanisms are not contained within the legislation; rather, they emerge in the regulations and to a lesser extent the policies.*
>
> 40 When the Bill was introduced in the Legislature, it was subject to much criticism. Of considerable complaint and worry was the absence of draft regulations. A hoist motion to suspend the reading of the Bill for six months (to permit time for the regulations to be tabled and to then allow time for examination and debate) was made, but defeated by the majority government. The chief complaints were obfuscation due to the absence of the regulations; pandering to anti-welfare sentiments; and a lack of attention paid to affected communities (including women, single mothers, African Nova Scotians, and off-Reserve Aboriginal people) and rural populations where job prospects were dim.
>
> [Italics added]

[50] Section 5(1)(a) requires the provision of documentation ("proof of…") - not mere information. This is suggestive of there being a relationship between the

content of the documentation and eligibility. The wording of Sections 8 and 9 support this interpretation.

[51] The items contained in Section 5,

> (a) All relate to the status of the applicant – age/date of birth, date of death; parentage; marital (marriage, divorce); connection to Nova Scotia (residency) and Canada (citizenship); employment (ability to participate in employment services, hospitalization); financial (income, or assets);
>
> (b) and (c) are both government-issued identification documents ,which themselves have known significant prerequisites before they can be obtained; (Social Insurance Number, Nova Scotia Health Card)
>
> (d) The "Income Tax Assessment Form" of the applicant provides confirmation of their taxable income status; whereas
>
> (e) addresses authorizations or releases, to obtain or verify relevant personal and financial information provided by the applicant.

[52] I note here that Section 5(1)(a) is subject to the wording "where applicable". This suggests that provision of proof of those matters is necessary depending on the individual circumstances in each case, whereas *subsections 5(1)(b),(c), and (d)* do not have similar wording. This suggests that *provision of the documents in the latter three subsections are presumptively mandatory in all cases, for one to be considered as an eligible applicant*. Without those, one will be presumptively considered ineligible.

[53] It is, therefore, of interest to examine what are the preconditions to receipt of a Canadian Social Insurance Number, and the Nova Scotia Health card?

(a) The preconditions to receipt of the Nova Scotia Health card.

[54] The Nova Scotia Health Card number is required before one can access "insured services" free of charge.

[55] Section 3 of the *Health Services and Insurance Act*, RSNS 1989, c. 197, as amended, governs the provision of "insured services" to "all residents of the

Province". By Section 2(l) " 'resident' or 'resident of the Province' means a resident of the Province as defined in the regulations".

[56] Pursuant to Section 17 of the *Act*, Section 1(m) of the *Hospital Insurance Regulations*, defines "resident":

> **means a person who is *legally entitled to remain in Canada and who makes his home and is ordinarily present in Nova Scotia, but does not include a tourist, a transient, or a visitor to Nova Scotia***; for the purposes of the Act and these regulations a person who is a resident of Nova Scotia and who moves from Nova Scotia to acquire residence in another part of Canada, herein called the "new province", shall be deemed to continue to be a resident of Nova Scotia during normal travelling time and any waiting period, not exceeding three months, which may be necessary in order to qualify for benefits under the hospital insurance legislation of the new province if the new province is a participating province, as defined in subsection (2) of Regulation 7, or shall be deemed to continue to be a resident of Nova Scotia for a period of three months from the date of his departure from Nova Scotia if the new province is not a participating province,
> Clause l(m) replaced: N.S. Reg. 12/60; relettered subclause l(m)(i): O.I.C. 83-1099, N.S. Reg. 212/83.
> Subclause 1(m)(ii) added: O.I.C. 83-1099, N.S. Reg. 212/83; spent: November 1, 1984.

[57] Of interest as well is the following Section:

> Insured services - general
> 2 (1) Subject to the Health Services and *Insurance Act* and these regulations,
>
> (a) a resident is entitled to receive in-patient and out-patient services that are medically required by him, without charge as insured services, commencing on the first day of the third month immediately following the month in which he becomes a resident of Nova Scotia;
>
> (b) *a* new Canadian is entitled to receive in-patient and out-patient services that are medically required by him, without charge as insured services, commencing on the day he becomes a resident of Nova Scotia.
>
> (2) In clause (b) of subsection (1) *"new Canadian" means a resident who moves to Nova Scotia from a place outside Canada, and is legally entitled to remain in Canada.*
> Section 2 replaced: O.I.C. 72-783, N.S. Reg. 89/72.

[58] Pursuant to Section 13 of the *Act*, the Hospital and Medical Services Program for International Students Employed as Teaching or Research Assistants Regulations, provide as follows:

> O.I.C. 97-258 (April 29, 1997), N.S. Reg. 92/98

The Governor in Council on the recommendation of the Minister of Health dated April 9, 1997, pursuant to Section 13 of Chapter 197 of the Revised Statutes of Nova Scotia, 1989, as amended, the Health Services and Insurance Act, is pleased to assign to the Minister of Health the function of establishing a program of payment of health services for international students who have a student authorization issued by the federal department of Citizenship and Immigration Canada and who are employed as teaching or research assistants at any university in Nova Scotia in the manner attached to and forming part of the report and recommendation as Schedule "A".

Schedule "A"

International students who have a student authorization issued by the federal department of Citizenship and Immigration Canada, are living in Nova Scotia, and who are working as either teaching or research assistants at any university in Nova Scotia and the dependents of such persons may receive health services provided in Nova Scotia under the Health Services and Insurance Act on the following terms and conditions:

(1) coverage will be effective the first of day of the seventh month after the student's arrival in Nova Scotia retroactive to the day of arrival provided that such person presents to the M.S.I. Plan a certificate signed by the Dean of the university faculty in which the student is employed indicating that the student is employed as a teaching or research assistant and the period of time for which the student is employed;

(2) such coverage will be valid only for health services received in Nova Scotia and to the extent such services would have been insured under the Health Services and Insurance Act had they been received by a resident;

(3) dependents of such students, living in Nova Scotia, are to be granted coverage on the same basis once the person upon whom they are dependent has proven the student's entitlement in accordance with clause (1);

(4) coverage for any such student and the student's dependents is to terminate immediately after a thirty day absence from Nova Scotia by the student; and

(5) once coverage has been terminated, pursuant to clause (4), the person is to be treated as never having qualified for health services coverage as herein provided and must comply with clause (1) before coverage will be extended to the student or the student's dependents.

[Italics added]

[59] Pursuant to Section 17 of the *Act*, the *Hospital and Medical Services Program for Persons on Student Visas Regulations* provide as follows:

OIC 78 – 296, NS Reg. 67/78

> The Governor in Council on the report and recommendation of the Minister of Health dated the 6th day of March, 1978, is pleased to approve of the said Minister establishing a *program for the payment of hospital services for persons in Nova Scotia on student visas* with conditions outlined in Schedule "A" attached to and forming part of the said report and recommendation, and pursuant to Section 11 of the Statutes of Nova Scotia, 1973, Chapter 8, [Section 17 of the Revised Statutes of Nova Scotia, 1989, Chapter 197] the Health Services and Insurance Act, to assign to the Health Services and Insurance Commission the function and the power to establish a program of payment of medical services to persons in the Province on student visas with the conditions as outlined in the said Schedule "A", attached to and forming part of the said report and recommendation.
>
> Schedule "A"
>
> 1. Coverage effective the first day of thirteenth month after the student's arrival in Nova Scotia; providing the student has not been absent from Nova Scotia for more than thirty-one days during that period.
> 2. Such coverage valid only for health services received in Nova Scotia.
> 3. Dependants of students to be granted coverage on the same basis once the student has gained entitlement.
> 4. Coverage to terminate immediately upon the student's departure from Nova Scotia.
>
> [Italics added]

[60] Pursuant to Section 17 of the *Act*, Section 2 of the *MSI Regulations* reads:

> OIC 69 – 276,NS Reg 41/69, as amended up to OIC 2001 – 327 (July 5, 2001), NS Reg 87/2001
>
> 2 (1) Subject to the Health Services and *Insurance Act* and these regulations
>
> (a) a resident is insured for the payment of the cost of insured services commencing on the first day of the third month immediately following the month in which he becomes a resident of Nova Scotia;
>
> (b) a new Canadian is insured for the payment of the cost of insured services that are medically required by him, commencing on the day he becomes a resident of Nova Scotia.
>
> (2) In clause (b) of subsection (1) "*new Canadian" means a resident who moves to Nova Scotia from a place outside Canada and is legally entitled to remain in Canada.*
> Section 2 replaced: O.I.C. 72-783, N.S. Reg. 7/72.

[61] In summary, absent the special provisions regarding students, eligibility for "insured services" free of charge is available to "a *resident"* [i.e. "one who, makes

his home and is ordinarily present in Nova Scotia, but does not include a tourist, transient or visitor to Nova Scotia;"… and "is legally entitled to remain in Canada"].

[62] Therefore, that the Nova Scotia Health card must be provided to be eligible for assistance, also tends to support an interpretation of "proof of citizenship" as referencing "Canadian citizenship", including near-Canadian citizenship as a condition of eligibility for assistance.

[63] To similar effect are the requirements for eligibility to receive permanently or temporarily valid Canadian Social Insurance Numbers.

[64] Generally stated, only Canadian citizens, Permanent Residents or Temporary Residents are entitled to have these numbers in order to work in Canada, or receive benefits and services from federal government programs. Permanent and Temporary residents must provide, respectively, an original "Permanent Resident Card", or work permit/study permit issued by Immigration, Refugees and Citizenship Canada. Depending on the circumstances, some SIN numbers are assigned temporary status and begin with the number 9 - which signifies that they "must present a valid proof of authorization to work in Canada to your employer. Your SIN record must always be updated to reflect the most recent expiry date". [7]

[65] If one has both a valid Nova Scotia Health card, and a valid SIN, by necessary implication, one is "legally entitled to remain in Canada" and "one who makes his home and is ordinarily present in Nova Scotia…"

[66] If the mandatory documents, required by Section 5(1)(b) and (c) of the ESIAA Regulations, themselves require that an applicant is a Canadian "citizen" or is "legally entitled to remain in Canada", according to the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, and Regulations or the *Citizenship Act*, RSC 1985, c. C-29 and Regulations[8], then the reference to "proof of citizenship" in Section 5(1)(a)(ix) of the ESIAA Regulations may be interpreted as "proof of

[7] See for example page 74 of the Record

[8] In the reviewer's August 26, 2016, decision, he noted that: [Ms. V's] "current status in Canada is a Foreign National with a pending deportation order". 'Foreign National' is defined in the [Citizenship] *Act* as "means a person who is not a Canadian citizen, or a permanent resident, and includes a stateless person". Notably, the Government of Canada – Guide 5523 – Applying for Pre-Removal Risk Assessment (see p. 194 of the Record) states: "If your application is accepted, you will be able to stay in Canada. You will be notified if you are eligible for permanent residence".

Canadian citizenship"- and in my view necessarily including "near – Canadian citizenship" status, which arises through being "legally entitled to remain in Canada".

[67] I will briefly return to an argument made by Ms. V. She suggested that because "eligibility" requirements are expressly considered under that heading in Sections 10 – 13 of the Regulations, therefore the requirements in Section 5 of the Regulations could not be "eligibility" requirements. I note that Sections 10-13 are all related to the circumstances of "ineligibility". They provide persons are *ineligible* in circumstances where:

> 10- separation from spouse for the purpose of enabling the applicant to qualify for assistance
>
> 11-"chargeable income" is equal to or greater than the applicant's expenses
>
> 12-there is another feasible source of income or applicable assets available sufficient to provide for basic needs, special needs or employment services that are being applied for
>
> 13-the applicant is engaged in a strike or who is locked out by an employer.

[68] According to Ms. V's argument, there are therefore no expressly stated "eligibility" requirements other than:

> One must be physically present at the time of the application in the Province per Section 14(3) Regs.;
>
> 19 years of age or older per Section 14(1) Regs; and
>
> a "person in need" (per ss. 3(g) and 7 ESIAA).

[69] The answer to whether Ms. V's position is reasonable, can be addressed by the purposive analysis which follows.

[70] In my view, after conducting the contextual analysis required, there is no remaining ambiguity surrounding the meaning of "proof of citizenship". Section 5 (1)(a)(ix) of the ESIAA Regs. means "proof of Canadian citizenship", which necessarily includes near-Canadian citizenship status of "being lawfully entitled to remain in Canada". Moreover, it is a *condition* of eligibility for assistance under the Act and Regulations just as is "proof of residency", which is properly interpreted as "proof of residency in Nova Scotia".

[71] Nevertheless, I will briefly engage the purposive analysis.

Purposive analysis

[72] Section 9(5) of the Nova Scotia *Interpretation Act*, also supports this interpretation. Section 11 of the *Interpretation Act*, requires that, the preamble of any Act "shall be read as part of an enactment to assist in explaining its purpose and object."

[73] The mischief to be remedied, is to provide assistance to Nova Scotians *in need*, as indicated the Preamble:

> …the Government of Nova Scotia recognizes that the provision of assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Nova Scotians.

[74] The consequences of the interpretation relied on by the Appeal Board, which used a strict interpretation of "proof of citizenship" as "proof of *Canadian* citizenship", but without allowance for near – Canadian citizenship, are to exclude persons in need who have a sufficient connection to Nova Scotia, and Canada, and in my opinion, who were intended to be included as eligible under the ESIAA and its Regulations.

[75] Should not a *person in need*, resident in Nova Scotia *at the time of the application*, and otherwise eligible for assistance, "who makes his home and is ordinarily present in Nova Scotia…" and is "legally entitled to remain in Canada", be entitled to the "assistance" available under the ESIAA and its Regulations, if they are entitled to receive "insured medical services" free of charge? [9]

[76] As reiterated by Chief Justice MacDonald in *Sparks*, "In *Clyke v. Nova Scotia (Minister of Community Services)*, 2005 NSCA 3, this court acknowledged the Act's dual-purpose:

> 28 The ESIA Act's purpose is not just to provide financial assistance to persons in need. It assists persons in need to the point of self-sufficiency. It obligates the Minister to provide employment services to help persons in need to achieve self-sufficiency. The ESIA Act contemplates that, at the point of self-sufficiency, the individual no longer needs assistance. I refer to the following provisions:

[9] I recognize that ESIAA also seeks to promote self-sufficiency/employment, and if Ms. V is unable to work because of her immigration status, that may preclude her from taking part in an employability assessment per Section 17 ESIAA Regs. However, not all eligible applicants are able to work in any event. Moreover, Ms. V's inability to work was expected to be limited to the period pending her stay of the deportation.

(a) The title is now "Employment Services and Income Assistance Act" instead of "*Family Benefits Act*". This acknowledges the importance of the employment services.

(b) The ESIA Act preamble states:

WHEREAS independence and self-sufficiency, including economic security through opportunities for employment, are fundamental to an acceptable quality of life in Nova Scotia;

AND WHEREAS individuals, government and the private sector share responsibility for economic security;

AND WHEREAS some Nova Scotians require help to develop skills and abilities that will enable them to participate as fully in the economy and in their communities so far as it is reasonable for them to do;

AND WHEREAS the Government of Nova Scotia recognizes that the provision of assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Nova Scotians;

AND WHEREAS it is necessary that income assistance be combined with other forms of assistance to provide effectively for Nova Scotians in need;

AND WHEREAS employment support and income assistance must be effective, efficient, integrated, co-ordinated and financially and administratively accountable;

The preamble integrates financial assistance and employment services with a goal of independence and self-sufficiency.

(c) The statutory purpose is:

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.

Again, the goal is independence and self-sufficiency.

(d) Section 3(a) includes in "assistance" "employment services" in addition to financial assistance for basic needs. Section 3(c) defines "employment services" as:

... services and programs to assist recipients in enhancing their employability and quality of life, including programs provided by other departments, agencies or governments in partnership with the Minister;

Section 7(1) requires the Minister, subject to the Regulations, to furnish "assistance to all persons in need". The "assistance" includes "employment services", meaning programs which will enhance the employability of recipients.

29 The enactment of the ESIA Act introduced a ministerial statutory duty to provide employment services which would assist persons in need to become employable. The ESIA Act, Section 2, added a statutory goal that persons in need

> achieve "movement toward economic independence and self-sufficiency". The ESIA Act contemplates that, when the individual passes the goal line of economic independence and self-sufficiency, the financial assistance will cease. This inheres in the terms "independence" and "self-sufficiency.

[77] These references suggest that the legislation is only directed at "Nova Scotians".

[78] More specifically, I suggest that in that context, "Nova Scotians" is intended to be a reference to "one who makes his home, and is ordinarily present in Nova Scotia…" [10] and is a citizen of Canada, or has near-Canadian citizenship status.

[79] "Person in need" is defined as "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".

[80] It makes eminent sense that the Legislature should intend to furnish assistance to "all [Nova Scotians]" in need (per Section 7, ESIAA), and that to be eligible one must be "resident" here, and necessarily "legally entitled to remain in Canada". [11]

Summary

[81] The intention of the Legislature, by requiring "proof of citizenship", was to ensure that an applicant is a *Canadian* "citizen". If an applicant for assistance is not a Canadian citizen, or near – Canadian citizen (as I should interpret the legislation in a manner most favourable to a claimant)[12], then they are not eligible to receive assistance in Nova Scotia, even if they could conceivably qualify as "one who makes his home and is ordinarily present in Nova Scotia", because they are not "legally entitled to remain in Canada".

---

[10] Which is sometimes more specifically particularized, as for example by the length of residence required here, in the various statutes and regulations of Nova Scotia

[11] Parenthetically, I note that, I came to this conclusion independently from the content of the ESIAA policies to which I have referred, however those policies are consistent with my interpretation.

[12] *Sparks*, per MacDonald CJNS at paras. 52-53, citing with approval Justice McTavish's statements regarding the denial of health benefits for refugee children: "In *Baker*, the Supreme Court recognized the interests and needs of children, including non-citizen children, are important factors that must be given substantial weight, as they are central humanitarian and compassionate values in Canadian society".

[82] In my view, this is an appropriate interpretation. It is "reasonable and just" because it can be justified in terms of its;

a) plausibility – that is, its compliance with legislative text;
b) efficacy – that is, its promotion of legislative intent; and
c) acceptability, that is, the outcome complies with the accepted legal norms.

Conclusion

[83] The decision of the Appeal Board, and specifically its interpretation of the relevant sections of the Regulations, was *not* within a range of reasonable outcomes. This court need not therefore defer to its interpretation, that "proof of citizenship" strictly means "proof of Canadian citizenship". By necessary implication, "near – Canadian citizenship" must be included therein. While I am satisfied that "proof of citizenship" was an eligibility requirement for assistance under the ESIAA Regulations in Nova Scotia at the relevant times of application by Ms. V, I conclude that the Board erred in not reasonably interpreting "proof of [Canadian] citizenship" to include "near- Canadian citizenship".

[84] At the time of her application, it appears that Ms. V was still legally entitled to remain in Canada. In the Administrative Review Report (pp. 1-3 of the Record) dated August 26, 2016, Administrator Reviewer, Anthony Salter, concluded:

> Ms. [V's] deportation order has simply been stayed while she is in the Pre-Removal Risk Assessment process. *While this allows her to remain in Canada until this matter has been resolved*, her current status in Canada is a Foreign National with a pending deportation order. She has no approval to stay in the country for any other purpose.… Ms. [V] is not a Canadian citizen and does not have residency status in Canada. She is not legally permitted to work or study in Canada, and as such is not able to participate in the mandatory employability assessment under ESIAA. *Should her immigration status change to allow her to stay in Canada on a permanent basis, she can reapply for benefits*. In the interim, it is recommended that she contact the Federal Government to explore programs and services that support Foreign Nationals who are appealing their removal from the country.

[85] By a letter dated August 10, 2016, Ms. V had been advised by Assistant Service Delivery Manager, Tammy Hamilton (pg. 57 of the Record):

> Ms. [V] has been determined to be ineligible at this time… as she is not a citizen of Canada and not a resident of Nova Scotia. The information provided indicates she is working with the Canadian Border Services on an application for a Pre-

> Removal Risk Assessment (PPRA) and the information indicates the deportation order has been temporarily stayed pending the outcome of the PRRA application. *If her application is accepted and she becomes a protected person or a refugee, she may be eligible for assistance.*

[86] In my opinion, Ms. V's status, at the time of her application, being in the Pre-Removal Risk Assessment process, which "allows her to remain in Canada until this matter has been resolved", can only be interpreted as her "being legally entitled to remain in Canada", and by extension, a person whose immigration status qualifies her as having, perhaps temporary, but valid near-Canadian citizenship.

[87] Before the Assistance Appeal Board, Ms. V was permitted to, and did, file an affidavit sworn November 8, 2016. This affidavit deals with her connection to Canada, as well as to Nova Scotia. Therein, she swore that:

> Para. 3-"I came from Russia to Toronto Ontario in 2010 on a student visa … brought my young daughter…"
>
> Paras. 9 to 23 - "Sometime in November 2011 I applied for refugee status in Canada… Sometime in February 2012 I received a work permit… In 2013 my application for refugee status in Canada was rejected. My work permit did not expire until January 25, 2015, so I remained in Canada and continued to work… I stopped working in May 2014 and my partner began financially supporting me and my daughter… [later in 2014] my partner and I married and moved to Halifax Nova Scotia in August 2015... I separated from my husband on June 1, 2016… The night I left my husband, the police took us to a womans' shelter… I have no income source for rent, food, winter clothes, or any expense. I rely purely on the kindness of those around me. I require income assistance to shelter and feed myself and my child".

[88] At the time of her application in June 2016, Ms. V had resided in Nova Scotia since August 2015. At the appeal hearing, the Minister accepted that Ms. V "is resident" in Nova Scotia (pg. 203, Record).

[89] According to the interpretation that the Board should have used in assessing her appeal, she had complied with the requirement under Section 5(1)(a)(ix) of the ESIAA Regs. She provided proof that she was at that time "legally entitled to remain in Canada", and also is "one who makes her home, and is ordinarily present in Nova Scotia, but [is not] a tourist, a transient or a visitor to Nova Scotia".

[90] Therefore, the application for a remedy pursuant to the court's judicial review is granted.

Remedy

[91] The order of the Assistance Appeal Board is quashed. I direct that the Minister assess Ms. V's eligibility for assistance on behalf of her and her daughter, retroactively from the date of the decision denying her assistance, in accordance with the *Act* and Regulations, until such time as she was no longer "legally entitled to remain in Canada", or otherwise ineligible.

Costs

[92] In my view, this litigation has hallmarks of a "test case", and in view of the reasonable manner with which the Minister approached the judicial review, I find it is in the interests of justice to allow each party to bear its own costs. I direct counsel for the Minister to prepare an order to reflect my decision.

Rosinski, J.