IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Myttenar* v. *Social Services (The Director of),* 2005 YKSC 73

Date: 20051220
Docket No.: S.C. No. 04–B0092
Registry: Whitehorse

Between:

CLIFFORD MYTTENAR

Petitioner

And

THE DIRECTOR OF SOCIAL SERVICES

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Sheri Hogeboom — Counsel for the Petitioner
Zeb Brown — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] Clifford Myttenar resides in Haines Junction and is a recipient of social assistance from the Yukon Government. A number of years ago, he injured his back and qualified for the Territorial Supplemental Allowance ("TSA") under the Yukon *Social Assistance Regulations*, Y.C.O. 1972/228 (the "*Regulations*"). He then had a heart attack in May 2003, following which his doctor recommended a special low fat, low salt diet. He applied under the *Regulations* for a special food allowance to cover the increased costs of the new diet. An independent nutritionist determined that the cost of the special diet would be $254.69

per month. The Director of Social Services awarded $28 per month for the special food allowance (the maximum amount under the applicable policy) plus $175 per month as the basic food allowance (for all single persons in need living in Haines Junction) and held that Mr. Myttenar should cover the shortfall ($51.69) out of his TSA. Mr. Myttenar unsuccessfully appealed that decision to the Social Assistance Appeal Committee and the Social Assistance Appeal Board. He now applies for judicial review of the latter's decision.

ISSUES

[2] There are five issues on this application:

1. Is the TSA a separate and distinct item of basic maintenance under Schedule A of the *Regulations*?
2. Did the Director err by taking the TSA into account in deciding how much Mr. Myttenar should receive as a special food allowance?
3. Are ss. 29 (5.1), (5.2) and (5.3) of the *Regulations ultra vires* the *Social Assistance Act*, R.S.Y. 2002, c. 205 (the "*Act*"), insofar as they purport to limit the grounds of appeal and the nature of the relief which an appeal body may order when an appeal is successful?
4. If the Appeal Board's decision is quashed and a new decision is made on the special food allowance, should it be retroactive?
5. If the Appeal Board re-hears this matter, what standard of review should it apply?

ANALYSIS

Issue 1: Is the TSA a separate and distinct item of basic maintenance under Schedule A of the *Regulations*?

[3] Counsel for the Director submitted that Mr. Myttenar claims the TSA is a benefit that should be paid "regardless of need" and that such a claim conflicts with the basic premise of the *Social Assistance Act* that assistance should only be provided to a person in need. However, I did not understand Mr. Myttenar to have made such a claim. Rather, he seemed to acknowledge, through his counsel, that the TSA is only available when both "need" and "actual income deficit" have been established under the *Regulations,* as a consequence of the applicant being "permanently and totally unemployable by reason of age, chronic disease or illness, physical or mental impairment or any other form of incapacity". The TSA is specifically set out in Schedule A of the *Regulations* at Part I. For the sake of completeness, I will set out the entire provision (with my emphasis added):

> "I. Territorial Supplementary Allowance
>
> 1. (a) Any person who is:
>
> (i) nineteen years of age or over but who has not yet reached the age of eligibility for Old Age Security and ***who has been certified in writing by a duly qualified medical practitioner to be permanently and totally unemployable by reason of age, chronic disease or illness, physical or mental impairment or any other form of incapacity*** which permanently excludes him/her from the labour force; or
>
> (ii) a person in receipt of Old Age Security or who has reached the age of eligibility for Old Age Security;
>
> ***shall be deemed to be a permanent exclusion from the labour force*** and eligible to apply for an allowance on the basis of the components set out in this Schedule, ***provided need has been established*** in accordance with the provisions of the Social Assistance Regulations and this Schedule, ***and the amount of actual income deficit established***, including the allowance outlined in this Part of Schedule A less any non-exempted income of the applicant and spouse;

(b) (Revoked by O.I.C. 1995/55)

2. (a) The following ***flat rate allowance is hereby established as an item of basic maintenance and special need*** for a person ***who is deemed*** to be a permanent labour force exclusion pursuant to this part:

$125.00 per person per month
(Amended by O.I.C. 1995/55)

(b) (Revoked by O.I.C. 1995/55)

(c) Where a married couple are both in receipt of the guaranteed income supplement, one person only will be eligible to receive the increased amount as listed in paragraph (a).

(Section 2 replaced by O.I.C.s 1980/205 and 1980/260, and amended by O.I.C. 1995/55)"

[4] As I read this provision, applicants must first establish their "need" by providing the written certification of a medical doctor that they are permanently and totally unemployable for one of the reasons stated. Second, applicants must establish the actual amount of their "income deficit". Presumably, this is done by using the "budget deficit" method referred to in s. 8(1) of the *Regulations*, and defined in s. 2 to mean the amount by which the total cost of necessary assistance exceeds an applicant's financial resources. Third, under paragraph 1(a) of Part I, Schedule A, the TSA itself is included in the determination of the amount of an applicant's actual income deficit.

[5] Thus, it is clear that the TSA is not a benefit that is paid "regardless of need". On the contrary, establishing need is a condition precedent to receiving it.

[6] The Director's counsel further submitted that the stated intention of the TSA is that "it be applied to basic maintenance and special need", that is, to the listed categories of benefits under Schedules A and B of the *Regulations.* However, strictly speaking, this is not what the *Regulations* say. Rather, paragraph 2(a) of Part I, Schedule A, says that the TSA is a "flat rate allowance [which] is hereby established as *an item of* basic maintenance and

special need …" (emphasis added). The difference may be subtle, but it is important, as I will attempt to illustrate.

[7] I do not doubt that the intent of enacting the TSA provision was that it be used for the types of "basic maintenance" expenses enumerated in Schedule A, as well as the types of "supplementary" expenses set out in Schedule B. However, I am advised by the Director's counsel that the TSA is administered in a significantly different fashion than any other social assistance benefits. Ordinarily, recipients of social assistance must apply each and every month for the specific benefits they seek. They may also be required to provide whatever additional information the Director asks for in order to justify the payment of those benefits (see ss. 5(1), 6(1) and 12 of the *Regulations*), including proof of payment for benefits previously received. However, I am told that in the case of the TSA, once an applicant has established their need and their income deficit, they receive the flat rate amount of $125 per month on an ongoing basis, without the need to re-apply each time *and* without the need to account for how the money is spent. Indeed, the only requirement for continuing eligibility for the TSA, which was alluded to by counsel, is that the recipient provide a periodic update from a medical doctor confirming their unemployable status.

[8] The fact that the TSA is treated differently than other benefits is logically consistent with its apparent purpose, which is to provide an ongoing benefit to persons who are likely to be both unemployable and in need for the rest of their lives. Other recipients of social assistance are presumed to be employable and in more dynamic situations and are not expected to remain in need for indefinite periods of time. While it makes sense to require such recipients to continue to update their financial situation from month to month, it would be of little or no use in the case of a TSA recipient.

[9] In addition, s. 4(5) and paras. 1(a) and 2(a) of Part I, Schedule A of the *Regulations* all speak of a TSA recipient as a person "*deemed to be"* permanently excluded from the labour force. Consistent with that notion, the Director's counsel submitted that a TSA recipient is "deemed to require at least $125 per month in connection with the condition which caused his permanent exclusion from the workforce". I agree. The recipient is deemed to require the money from month to month, without having to re-establish his need or budget deficit and without having to account for how the money is spent. That is why the allowance is paid at a "flat rate".

[10] Thus, while TSA recipients would most likely spend the allowance on the types of benefits set out in Schedules A and B, the *Regulations* do not require them to do so, nor are they held accountable for how they spend that money.

[11] Further, the *Regulations* do not limit a TSA recipient from receiving the other benefits potentially available under Schedules A and B. Indeed, s. 4(5) of the *Regulations* states that such persons "shall be entitled to apply for assistance in accordance with the scale of allowances set out in Schedule A" (Note: Schedule B is also incorporated by reference in Schedule A, at Part J, entitled "Supplementary Needs"). There is no requirement in the *Regulations* that the TSA be considered when calculating the amount of those other benefits. If the Director was to routinely reduce the amount of those additional benefits on the assumption that a recipient can pay for part of them out of the TSA, then that would have the effect of reducing the TSA whenever that person has additional specific needs. In Mr. Myttenar's context, the Director's decision had the effect of reducing his TSA, which he previously received because of his back injury, because he now requires a special diet. Whereas, any other TSA recipient who does not require a special diet is entitled to spend

the full amount of the TSA on whatever they choose. Thus, the Director's decision effectively discriminates against Mr. Myttenar because of his special needs.

[12] It is also instructive that the TSA is a "supplementary" allowance. "Supplementary" is defined in the Concise Oxford Dictionary, 8th Edition, as "additional". Thus, the very title of the benefit indicates that it was intended to be over and above the other items of basic maintenance and special needs.

[13] For these reasons, my view is that the TSA is a *separate* item of basic maintenance and special need for those persons in the unique position of being permanently unemployable. I would not go so far as to describe the TSA as equivalent as a "disability benefit", as urged by the petitioner's counsel, since not all such recipients are necessarily disabled. Some may simply be unemployable by reason of age. However, I do agree that the TSA is a separate benefit provided to those persons with particular presumed needs arising from their permanent exclusion from the workforce.

[14] The Director's counsel further argued that there is an onus on TSA recipients applying for a special food allowance to demonstrate that the TSA is already being fully spent on goods and services unrelated to their dietary needs and that they will therefore suffer a shortfall if they are required to spend part of the TSA on food. I disagree. If that was the intention of the Legislature, then I would expect the *Regulations* would have expressly said so. Further, it would be inconsistent to find that there is an onus on a TSA recipient in that situation, when such recipients are not otherwise called to account for how they spend the allowance in the routine case.

[15] The Director's counsel also argued that interpreting the TSA as a freestanding and independent benefit would erode the discretion of the Director in determining whether to grant a special food allowance. He noted that in Item A.2., Schedule A, the special food

allowance “may … be granted” and the word “may” under s. 5(3) of the *Interpretation Act*, R.S.Y. 2002, c.125, shall be read as “permissive and empowering”. The flaw in this argument is that the Director is not required in every case to provide a special food allowance to an applicant who is also a TSA recipient. First of all, such an applicant must still provide the “recommendation of a physician” which is satisfactory to the Director. Implicitly, the Director may be provided with a medical recommendation which he or she finds lacking and which fails to justify the allowance. Further, even where the Director chooses to provide a special food allowance, he or she still maintains discretion over the quantum.

[16] Finally, the Director’s counsel argued that where the TSA has been provided to “cover” things such as the special diet, the recipient cannot “qualify twice” for the same benefit. However, one cannot say the TSA was provided for that or any such *specific* purpose. The *Regulations* do not require applicants for the TSA to identify the particular purpose or purposes behind their application. Rather, they are only required to provide medical certification of their unemployability and their income deficit. Consequently, it is impossible to say whether a TSA recipient who also receives a special food allowance is being paid “twice” for the same thing.

Issue 2: Did the Director err by taking the TSA into account in deciding how much Mr. Myttenar should receive as a special food allowance?

[17] The Director was not entitled to assume that Mr. Myttenar would or could spend part of his TSA on his special diet. Rather, the Director has no way of knowing, nor is he entitled to enquire into, how Mr. Myttenar spends his TSA.

[18] Also, the fact that an applicant is receiving one category of benefits is generally irrelevant in determining the applicant’s need for another category of benefits. For example, the Director should not take into account the receipt of an incidental allowance for personal

care and household maintenance in deciding whether to grant an allowance for fuel and utilities, as the former is irrelevant to the latter. More specifically, Mr. Myttenar's receipt of the TSA could not have had any relevance to his application for the special food allowance, since it remains unknown what he spent the TSA on.

[19] Therefore, as the TSA is a separate and distinct item of basic maintenance and special need under Schedule A, it was an irrelevant factor in the Director's decision and it should not have been taken into account by the Director in determining the extent to which Mr. Myttenar was entitled to a special food allowance. Consequently, the Director committed an error of law by failing to exercise his discretionary power "judicially", and his decision must be set aside: *Canada (Attorney General)* v. *Purcell*, [1996] 1 F.C. 644, at paragraph 11.

[20] Of course, this judicial review application is from the decision of the Appeal Board and not from the decision of the Director. Both counsel submitted that the standard of review in this circumstance is one of "correctness": *Villani* v. *Canada (Attorney General)*, 2001 FCA 248.

[21] The standard of "correctness" arises from the pragmatic and functional approach to determining the standard of review on an appeal or an application for judicial review. The primacy of this approach was dealt with in *Dr. Q* v. *College of Physicians and Surgeons of British Columbia*, 2003 SCC 19. There, McLachlin C.J. speaking for the Supreme Court of Canada, said at para. 25 that the review of the decisions of an administrative decision-maker must begin by applying the pragmatic and functional approach. She continued at para. 26 that under this approach, the standard of review is determined by considering four contextual factors, which may overlap:

1. presence or absence of a privative clause or a statutory right of appeal, that is, the statutory mechanism of review;
2. the expertise of the administrative decision-maker relative to that of the reviewing body on the issue in question;
3. the purposes of the legislation; and
4. the nature of the question initially decided and whether it involves law, fact or mixed law and fact.

Dr. Q also requires courts to apply the pragmatic and functional approach in its entirety, and not to rely on one of these factors in isolation to determine the standard of review: see para. 40.

Statutory Mechanism of Review:

[22] In this case, there is no privative clause in the legislation purporting to prohibit an applicant or recipient from applying to this Court for judicial review. Nor is there any statutory right of appeal to a superior court. When a statute is silent on the question of review, this factor is neutral and does not imply a high standard of scrutiny: *Dr.* Q, cited above at para. 27.

Relative Expertise:

[23] The members of the Appeal Board are not required by the legislation to have expertise in legal matters (s. 9 of the *Act*). On the other hand, this Court is presumed to be expert in the law and therefore has more expertise relative to the Appeal Board to decide whether an error in law has been committed.

Purpose of the Legislation:

[24] The purpose of the *Act* is to set out a framework for the provision of social assistance benefits to people in need in the Yukon. The purpose of the *Regulations* is to provide a

methodology for determining when a person is in need and the amount to be awarded. More specifically, because the Appeal Board's mandate may include selecting from a range of administrative responses, some of which engage policy issues, this suggests that it be given a higher degree of deference: *Dr. Q,* cited above at para. 31.

Nature of the Problem:

[25] Because the question is one of law, specifically whether an error in law has been committed, greater judicial scrutiny is required. An issue of pure law favours a more searching standard of review, particularly where the decision will be one of general importance or great precedential value: *Chieu* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para. 23.

[26] Therefore, considering all these factors, I agree that little or no deference is called for and "correctness" is the appropriate standard of review: *Dr. Q,* cited above at para. 35.

[27] The Appeal Board determined "that the Director has not misinterpreted the *Social Assistance Act* or *Regulations* in this case". More specifically, the Board found that the Director was correct in taking the TSA into account in determining the amount of Mr. Myttenar's special food allowance. As I have found that the Director erred in law by doing so, then the decision of the Board upholding that of the Director is also incorrect and constitutes an error in law.

[28] The Appeal Board also stated in its decision that Part I, 1(a), Schedule A:

> "explains that [the TSA] is to be used to meet any shortfalls between the actual costs to the applicant and the amount received from the items of basic maintenance listed in Schedule A."

With respect, I disagree. I previously quoted Part I, 1(a) earlier in these Reasons and nowhere does that provision say that the TSA is to be used to "meet any shortfalls". Thus,

the Board is also incorrect on this point and has committed a further error in law by misinterpreting Part I, 1(a).

[29] Consequently, I hereby quash the Board's decision and return this matter to the Board for a further hearing.

[30] Counsel jointly submitted that, in the event I found that the Director erred, I should remit the matter *to the Director* to make a new decision on Mr. Myttenar's special food allowance. However, this Petition was framed as an application for judicial review, since the first item of relief sought is an order for *certiorari* quashing the decision of the Appeal Board. Further, I am not sitting as an appeal court in this circumstance, as the legislation does not specifically authorize appeals by applicants or recipients to this Court. Rather, it seems to me that my jurisdiction is limited to deciding whether the Appeal Board erred in making its decision. Having decided that it did, I am limited to sending the matter back to the Appeal Board to re-hear the matter. However, I will provide such consequential directions as are appropriate later in these reasons.

Issue 3: Are ss. 29(5.1), (5.2) and (5.3) of the *Regulations ultra vires* the *Social Assistance Act*, insofar as they purport to limit the grounds of appeal and the nature of the relief which an appeal body may order when an appeal is successful?

[31] Section 11(1) of the *Social Assistance Act* states that "any decision" respecting the provision of social assistance may be appealed. Sections 11(2) and (3) go on to provide that the first level of appeal is to the appeal committee and the second level is to the Appeal Board (I will refer to both here as "the appeal bodies"). There is no further reference in the *Act* as to the scope or grounds for such appeals:

> **"Appeals**
> 11(1) Any applicant for or recipient of assistance under this Act may appeal ***any decision*** made by a social welfare

> officer or the director with respect to their eligibility to receive assistance or the amount of assistance paid to them.
>
> (2) Each appeal made under subsection (1) shall be made in the first instance to the appeal committee for the area in which the person resides.
>
> (3) Any applicant for or recipient of assistance or the director may appeal any finding of an appeal committee to the appeal board.
>
> (4) Every person making an appeal before an appeal committee pursuant to subsection (2) or the appeal board pursuant to subsection (3) shall be entitled to appear in person and may be represented by an agent or by counsel."
>
> (emphasis added)

[32] Paragraph 8(l) of the *Act* provides that the Commissioner in Executive Council may make regulations:

> "prescribing how appeals shall be dealt with pursuant to section 11";

Given that s. 11(1) allows "any decision" on social assistance to be appealed, I conclude that paragraph 8(l) was not intended to restrict the scope of appeals authorized by the *Act*, by the use of the words "how appeals shall be dealt with".

[33] Section 29 of the initial version of the *Social Assistance Regulations* in 1972, set out the "Appeal Procedure". In particular, s. 29(5) set out the powers of the appeal bodies, which included the authority to vary and make any order that the Director may make under the *Act* or the *Regulations*:

> "29(5) The appeal [bodies] may, by written order,
>
> (a) dismiss the appeal; or
>
> (b) ***order that the assistance be revoked or discontinued***; or
>
> (c) allow the appeal; or

(d) ***direct that assistance*** of an amount stated in the order ***be paid*** to the appellant; or

(e) ***vary the order made by*** the officer or ***the Director***; or

(f) ***make any other order*** an officer or ***the Director may make*** under the Ordinance or Regulations and the officer or the Director shall forthwith carry out such order."

(emphasis added)

Nowhere in the initial version of s. 29 is there any provision purporting to limit the grounds of appeal.

[34] However, the *Regulations* prescribing how appeals were to be "dealt with" were amended in 1995. In particular, the powers of the appeal bodies under s. 29(5) were restricted to either dismissing appeals or allowing them. Further, under s. 29(5.1) only one ground of appeal is allowed – whether the Director applied the *Act* or the *Regulations* incorrectly "by misinterpreting or misapplying the law". Also, under s. 29(5.2) the appeal bodies could no longer exercise a discretion given to the Director under the legislation. Subject to that proviso, if an appeal is successful, then the appeal body must either direct what amount of assistance is to be paid, if it is a fixed amount, or if it is a matter of discretion, remit the matter back to the Director with instructions on what error he or she made. The amendments read as follows:

"s. 29(5) The appeal committee may, by written order,

(a) dismiss the appeal; or

(b) allow the appeal.

(5.1) The only ground on which the appeal committee may allow an appeal is that the Director or an officer has applied the Act or Regulations incorrectly by misinterpreting or misapplying the law.

(5.2) The appeal committee may not exercise a discretion that the Act or the Regulations give to the Director or an officer.

> (5.3) If the appeal committee allows the appeal then the committee must either
>
> (a) direct in accordance with the Act and Regulations what assistance is to be paid, if the matter is one on which the Act or Regulations fix the amount; or
>
> (b) remit the matter to the Director with instructions on what error the Director or officer made, if the matter is one on which the granting of assistance or the amount of assistance is in the discretion of the Director or an officer.

[35] Interestingly, s. 29(4) remained unchanged by the 1995 amendments. That section requires the appeal bodies to "hear any evidence" adduced by the party at the hearing:

> "29(4) On the hearing of the appeal the appeal committee ***shall hear any evidence adduced*** by or on behalf of, and representations made by or on behalf of, the person appealing and by the officer or the Director."
>
> (emphasis added)

[36] In *Carvery* v. *Halifax (City)*, [1993] N.S.J. No. 249, the Nova Scotia Court of Appeal examined a provision in the Nova Scotia *Social Assistance Appeal Regulations* which provided that "the decision of an appeal matter shall be made on the basis of evidence presented at the hearing". The Court had no difficulty determining that the requirement the appeal be based on evidence presented meant that the appeal hearing would be a new, or *de novo*, hearing. Chipman J.A., speaking for the Court, said at para. 32:

> "The nature of a hearing de novo is well understood. It takes on the form of an entirely new trial or hearing on any issues raised in the appeal. The burden of showing error rests with the appellant."

[37] The requirement in s. 29(4) of the Yukon *Regulations* that the appeal bodies "shall hear" any evidence adduced, similarly leads me to conclude that, in effect, the appeal body conducts a hearing *de novo*. Having said that, the 1995 amendments to the *Regulations* could give rise to a paradox. If an appeal body hears evidence, which could include fresh evidence not previously made known to the Director, it could go on to make certain findings

of fact. These findings may be inconsistent with the findings of fact previously made by the Director. Further, the new findings of fact might support, or even dictate, a different decision on the provision of social assistance. However, the appeal body could not allow an appeal on those grounds, since they do not technically constitute a misinterpretation or misapplication of the law, which is the *only* acceptable ground of appeal. Therefore, the appeal body could not provide *any* remedy and would be limited to dismissing the appeal. The absurdity of that result is obvious.

[38] Even worse, the appeal body may find that the Director made an error of fact in his or her initial decision. However, an error of fact is not a ground for appeal under s. 29(5.1). Rather, the only ground of appeal allowed by the *Regulations* is where the Director has "applied the *Act* or *Regulations* incorrectly *by* misinterpreting or misapplying the law" (emphasis added). Pursuant to this wording, it is theoretically possible that the Director may have made an error on a finding of fact, but it could nevertheless be argued that he or she correctly applied the law to that fact (as found), leaving the appellant without recourse. Again, the result is an absurdity.

[39] Thus, s. 29(5.1) restricts the breadth of appeals from "any decision" about social assistance to only those decisions which involve a misinterpretation or misapplication of the law by the Director.

[40] While s. 29(5.2) does not purport to restrict the *grounds* of appeal, its effect is to limit the remedies available to the appeal body upon a successful appeal, and thus to restrict the *scope* of appeals formerly allowed under the *Act*. Under the previous *Regulations*, the appeal body could make any order that the Director could make. Similarly, it could vary any order made by the Director and direct that any amount of assistance be paid. However, s. 29(5.2) now prohibits an appeal body from exercising a discretion otherwise given to the

Director under the legislation, thereby severely narrowing the available remedies and thus the scope of these appeals.

[41] Section 29(5.3) also limits the scope of appeals by again restricting the remedies available to the appeal body. Pursuant to this amendment, if an appeal is allowed and "the matter is one on which the *Act* or *Regulations* fix the amount", then the appeal body may order that fixed amount of assistance to be paid. However, if the matter is one which involves the discretion of the Director, then the appeal body cannot provide a remedy. Rather, it must remit the matter to the Director with instructions on what error he or she made.

[42] Thus, in both ss. 29(5.2) and (5.3), there is the potential for the absurd scenario that I mentioned earlier. Specifically, an appeal body may make findings of fact which are different from those made by the Director, and yet be unable to grant the appellant any relief. Worse, the appeal body may find that the Director made an error of fact, and still be unable to provide any relief.

[43] If the Legislature intended to give the Commissioner in Executive Council the power to decide which matters may be appealed, one would expect the *Act* would have said so. Rather than saying "any decision" in s. 11(1), the Legislature could have said that an applicant or recipient "may appeal those decisions prescribed by the regulations". Alternatively, it could have created in the *Act* the power to make regulations "prescribing the grounds and scope of appeals under section 11", or words to that effect.

[44] It is trite law that regulations are subordinate legislation and cannot amend the governing statute. In *Belanger* v. *Canada* (1916), 54 S.C.R. 265 (S.C.C.), Sir Charles Fitzpatrick C.J. was examining the Government of Canada's right to construct railway crossings on highways, and said at page 3:

> "Reference was made to the "Rules and Regulations" for the guidance of trackmasters and trackmen. ***But regulations cannot operate as amendments of the statute*** by virtue of which the crossing of a highway at rail level is permitted. ***A regulation may provide for something to be done consistent with the requirements of the statute, but it is not permitted, under guise of regulating*** the management and proper use and protection of Government Railways (sec. 46), ***to amend the statute*** which determines the conditions subject to which the railway may be carried across a highway at rail level."
>
> (emphasis added)

[45] In *Lexogest Inc.* v. *Manitoba (Attorney General)*, [1993] M.J. No. 54 (Q.L.), Helper J.A. said at p.23:

> "It is a principle of statutory interpretation that ***regulations may neither exceed nor be inconsistent with the statutory provisions under which they are made***. This principle has been commented upon and reaffirmed over the years."
>
> (emphasis added)

Helper J.A. then went on to quote Coyne J.A. in *R.* v. *Wold* (1956), 19 W.W.R. 75 (Man. C.A.) at p. 79, who said that "in the absence of express statutory power to do so, regulations cannot enlarge ***or abridge*** any statutory provision" (emphasis added). Finally, Helper J.A. quoted Denys C. Holland and John P. McGowan, in their text, *Delegated Legislation in Canada* (Carswell, 1989) as saying that:

> "… the courts should consider the variable extent to which regulations intrude upon the rights of the individual. As the encroachment becomes more severe, so should the courts' approach."

[46] In *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 99, E.A. Driedger said about subordinate legislation that “The intent of the statue transcends and governs the intent of the regulation.”

[47] The Director’s counsel argued that the term “appeal” in s. 11(1) of the *Act* has an indefinite meaning and that it is necessary in each case to look at the particular legislation creating the appeal right. However, to the extent that there is any ambiguity in the meaning of the word, I am prepared to find that the ambiguity should be resolved in favour of the applicant or recipient wishing to appeal: *Canada (Attorney General)* v. *Abrahams* [1983] 1 S.C.R. 2, at p.6 (Q.L.); *Finlay* v. *Canada (Minister of Finance)* [1993] 1 S.C.R. 1080, at paras. 49 and 50. Consequently, “appeal” should mean an opportunity for a full and complete review of the previous decision-maker subject to the standard of review, which I will discuss later in these reasons.

[48] In their text, *Principles of Administrative Law*, 4th ed. (Scarborough: Thomson Carswell, 2004), Jones and de Villars spoke about the appellate exercise of jurisdiction at p. 554:

> “… Difficult issues arise when considering whether the appellate body has the right to exercise a statutory discretion differently from the way chosen by the original statutory delegate. Occasionally, the legislation in question may specifically prevent the appellate body from doing so, but this would appear to be rare. In principle, the general rule should be the reverse: ***where an appeal is provided from the exercise of a statutory power which is discretionary in nature, the appellate body itself should be able to exercise the discretion granted by statute on the delegate from whom the appeal lies. This is particularly clear where the only matter capable of being appealed is discretionary in nature, …***”
>
> (Emphasis added)

[49] I find that all three of the amendments in ss. 29(5.1), (5.2) and (5.3) are *ultra vires* s. 11(1) the *Social Assistance Act* by purporting to limit appeals from “any decision” on

social assistance to only those decisions where the Director has misinterpreted or misapplied the law. Further, the provisions purport to limit the scope of the appeals contemplated under the *Act* by restricting the remedies available to the appeal bodies, to the extent that in many cases there will be no remedy whatsoever. An appeal without a remedy is tantamount to no appeal at all.

[50] As a result, I direct the Appeal Board, when it reconsiders this matter, to disregard ss. 29(5.1), (5.2) and (5.3) of the *Regulations*. Rather, consistent with the right of applicants and recipients to appeal "any decision" on assistance under s. 11(1) of the *Act*, the Appeal Board may consider any reasonable ground of appeal and if the appeal is successful, it may exercise the discretion granted to the Director in determining the appropriate remedy.

Issue 4: If the Appeal Board's decision is quashed and a new decision is made on the special food allowance, should it be retroactive?

[51] Counsel for the Director submitted that there should be no decision that contemplates the payment of the special food allowance, or indeed any benefits, retroactively. This is because s. 10(1) of the *Regulations* states that "… assistance shall commence … on the day when the need for assistance was established …". As I understand the argument, if this matter is remitted to the Appeal Board, then the "need" for the special food allowance will only be "established" if the Appeal Board decides that the allowance should be increased. On the other hand, the petitioner's counsel argues that the "need" under s. 10 of the *Regulations* was established on the day that Mr. Myttenar provided his medical report and income deficit to the Director, as required by Part I, 1(a), Schedule A. Further, if the Director had acted correctly, he would then have presumably increased the amount of the petitioner's special food allowance, without taking into account his TSA.

[52] I agree that the petitioner established his need on the day that the Director made his initial decision to provide the special food allowance. I understand that decision was made

on November 1, 2004, when the memorandum was sent from the social worker to Mr. Myttenar advising him that his TSA had been “accepted” and $28 per month was “approved” for his special diet. Obviously, the Director would not have awarded any amount for the petitioner’s special food allowance unless he had been satisfied that need had been established. Therefore, I direct that any future decision to award the petitioner any amount of special food allowance should be retroactive to November 1, 2004 (regardless of whether that decision is made by the Appeal Board or by the Director, upon having the matter remitted to him or her by the Board).

Issue 5: If the Appeal Board re-hears this matter, what standard of review should it apply?

[53] While counsel agreed that the standard of my review of the Appeal Board’s decision is one of correctness, that still leaves the question of what standard of review the Appeal Board should apply in reviewing the decisions of the Appeal Committee. Further, that same standard would presumably apply to the Appeal Committee’s review of the decisions of the Director, since the same provisions in the *Act* and the *Regulations* apply to both levels of appeal. Therefore, having decided to remit this matter to the Appeal Board, I must also give the Board some guidance on the standard of review it should employ upon re-hearing this matter. That will require further discussion of the four factors in the pragmatic and functional approach, but this time in the context of the statutory right of appeal to the appeal bodies under s. 11(1) of the *Social Assistance Act*.

Statutory Mechanism of Review:

[54] As I have previously found, s. 11 of the *Act* creates a broad right of appeal, which suggests a more searching and less deferential standard of review: *Dr. Q.*, cited above at para. 27.

Relative Expertise:

[55] It is probably safe to assume that the Director is expected to have a significant amount of topical expertise about the provision of assistance benefits and the administration of the social assistance regime. Further, because the Director deals with the legislation on a regular basis, I would expect him or her to have more expertise relative to the Appeal Board on issues of both fact and law, simply because the Director has more familiarity with such issues. This suggests a greater degree of deference to the Director's decisions.

[56] On the other hand, the determinations of need on the basis of the budget deficit method would seem to be largely informational and arithmetic in substance. In other words, it does not necessarily require someone with the Director's expertise to determine whether an applicant is likely to have an income deficit on a month to month basis, or whether they need X or Y type of assistance.

[57] As for the appeal bodies, there is nothing in ss. 9, 10 or 11 of the *Act*, or the *Regulations*, (disregarding ss. 29(5.1) through (5.3) as they are *ultra vires* the *Act*), which indicates that members of either the Appeal Committee or the Appeal Board are expected to have any special knowledge or expertise. Further, since s. 11 of the *Act* allows for appeals from "any decision" on assistance, the members of both appeal bodies are presumably deemed to be capable of reviewing the kinds of questions of fact, questions of law and questions of mixed fact and law which are likely to arise in such appeals. Therefore, as was stated in *Dr. Q*, cited above at para. 28, the less expert the administrative decision-maker below, the less deference required by the reviewing body.

Purpose of the Legislation:

[58] I have already referred to the purpose of the legislation earlier in these reasons. The question to be decided under this factor is whether the legislation contemplates that the

decision-maker below would act in an adjudicative role, more or less like a court, in deciding between the competing interests of two parties. The more adjudicative the nature of the decision, the less the deference the reviewing body need employ. Conversely, the more the decision involves a selection from a range of choices, engages policy issues, or involves the balancing of various interests or considerations, the more the reviewing body should give deference to the decision-maker below.

[59] Given that the Director employs considerable discretion in administering the legislation, I would expect the Appeal Committee to be quite deferential in its review of the Director's decisions. However , as a result of having found ss. 29(5.1) to (5.3) *ultra vires* the *Act*, the appeal bodies will be able to grant remedies on successful appeals which include exercising any discretion which the Director may exercise, which suggests less deference. Further, when the Appeal Board is reviewing decisions of the Appeal Committee, because it is bound by the same provisions in the *Regulations* as for the appeal below, it should exercise the same level of deference. On balance, that level seems to be somewhere near the middle on the continuum of deference.

Nature of the Problem:

[60] When the decision being reviewed is one of pure fact, more deference is required by the reviewing body. Conversely, an issue of pure law militates in favour of a more searching and stringent review: *Dr. Q,* cited above at para. 34. Questions of mixed fact and law will call for more deference when the question is more *fact intensive*, and less deference when the question is more *law intensive*: *Dr. Q,* also at para. 34.

[61] I repeat that, as a result of finding ss. 29(5.1) to (5.3) of the *Regulations ultra vires*, the decisions of the Director and those of the appeal bodies may be considered as being essentially the same, since the latter will have the power to make any decision that the

Director could make. It is probably safe to assume that these kinds of decisions will involve a mixture of fact and law – the factual side being the review of the circumstances of need and the legal side being the application of the legislation, and primarily the *Regulations.* However, beyond that it is difficult to predict the extent to which these decisions will be fact intensive or law intensive. As a result, I find that this factor counsels neither for great deference, nor for exacting scrutiny.

[62] Balancing these four factors suggests a standard of deference somewhere in the middle between considerable deference and little or no deference. Consequently, the standard of review for the Appeal Board should be one of "reasonableness".

[63] Further, although I have not been asked to decide the point, since the Appeal Committee and the Appeal Board will continue to have the same powers on these appeals, and since there is essentially no difference between the two levels of appeal when employing the functional and pragmatic approach, the Appeal Committee should also apply the standard of reasonableness.

[64] It may be helpful here to note that in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J. speaking for the majority, at para. 63, quoted Iacobucci J. in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56, where he said this about the "reasonableness" standard of review:

> "… An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it."

[65] Later, in *Law Society of New Brunswick* v. *Ryan*, 2003 SCC 20, Iacobucci J. further commented upon the standard at paras. 55 and 56:

> "A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. …
>
> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision …"

[66] The parties have agreed to bear their own costs on this application.

GOWER J.