C.A. No. 02833

NOVA SCOTIA COURT OF APPEAL

Chipman, Roscoe and Pugsley, JJ.A.

BETWEEN:	)	
	)	
CITY OF HALFAX	)	Mary Ellen Donovan
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
DARCEL CARVERY and	)	D.A. (Rollie) Thompson
SOCIAL ASSISTANCE APPEAL	)	for the Respondent
BOARD	)	
	)	
Respondents	)	
	)	
	)	Appeal Heard:
	)	June 10, 1993
	)	
	)	
	)	Judgment Delivered:
	)	June 28, 1993

THE COURT: The appeal is allowed without costs to any party and the decision and order of the chambers judge is set aside as per reasons for judgment of Chipman, J.A.; Roscoe and Pugsley, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the City of Halifax from a decision in the Supreme Court in chambers granting an order in the nature of **certiorari** quashing a decision of the Social Assistance Appeal Board for the City (Appeal Board), which affirmed a decision of the Director of the Social Services Committee of the City (the Director) declining the respondent's request for emergency assistance.

The respondent, a single mother, had been in receipt of social assistance from the City for some months prior to November 14, 1991. The obligation to provide such assistance springs from the **Social Assistance Act**, R.S.N.S. 1989, c. 432, the Municipal Assistance Regulations passed pursuant thereto and the Municipal Social Services Policy of the City, authorized by the Regulations and approved by the Minister of Community Services. The principal provisions are:

> The **Act**, s. 9(1):
>
> "9(1) Subject to this **Act** and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit."
>
> The **Act**, s. 4(d):
>
> "4(d) 'Person in need' means a person who, by reason of adverse conditions, requires assistance in the form of money, goods, or services;
>
> The Regulation sections 2(1), (d), (i), (j) and 2(2):
>
> "2(1) The Social Services Director of the Committee shall
>
> (a) provide applications for assistance in the form prescribed or approved by the Minister;

. . .

(c) determine the immediate and continuing eligibility of each applicant;

(d) provide assistance in accordance with the provisions of the Act, these regulations and the municipal social services policy;

. . .

(i) require an applicant to provide the information required to determine his eligibility for assistance;

(j) ensure that the applicant has no other reasonable source of income which can be used for his financial needs;

. . .

2(2) The Social Services Director may grant assistance in an emergency situation without complying with the requirements of clauses (a) to (l) inclusive of subsection (1)."

The Municipal Social Services Policy 1.1.4:

"1.1.4 The person requesting assistance of the City of Halifax is responsible to establish they are a person in need. A person in need is a single person or a household head with dependents who has used reasonable means to secure income from employment and/or spousal or parental support, and/or any other insurance, or transfer payment program; and has through no fault of their own, failed to obtain such income . . ."

In my opinion, the correct approach to s. 9 of the **Act** is that taken by Hallett, J. (as he then was) in **Woodard** v. **Social Assistance Appeal Board** (1983), 64 N.S.R. (2d) 249 where he said at p. 439 in speaking of s. 23 of the **Act**, the predecessor to s. 9:

". . . The wording is rather awkward but the essence of the section imposes an obligation on the municipal unit to furnish assistance to persons in need as they determine it; that is, the municipal unit, through its social services committee, decides to whom and at what level assistance will be provided. However, it does not mean that one can sweep the words 'subject to this Act and the regulations' under the rug. They must be given a

meaning."

By letter dated November 14, 1991, from a social worker of the appellant, the respondent was notified that she was no longer eligible to receive social assistance, in view of Policy 1.1.4, as she had failed to follow up on maintenance as a source of income. The notice continued by saying "you must set a new Family Court date and appear in court before you will be considered eligible". Accordingly, the respondent was thus informed that she would not be receiving the assistance payment which would otherwise be made on December 1, 1991.

On November 28, 1991, the respondent advised the social worker that she could not attend the Family Court hearing dates as she was scheduled to be in another court. The social worker advised that if she could establish this, she would be provided with assistance pending any new hearing date obtained in Family Court. No confirmation of conflicting appearances was provided in response to this invitation. On December 4, 1991, the social services worker learned from the respondent's landlord that she was living with the man who was said to be the father of her child. The respondent confirmed to her that this was so. As a consequence, the respondent was advised that she and this man could apply for assistance as a couple. This was never done and later the respondent denied residing with the man in question.

On December 6, 1991, the respondent appealed against the Director's decision refusing social assistance. Such appeal was governed by the Social Assistance Appeal Regulations passed pursuant to the **Act.**

On December 6, 1991, the appellant also applied to the Director for

emergency assistance pursuant to Regulation 2(2) set out above.

The Director refused this application except with respect to aid for the respondent's child in the form of food, diapers and prescription drugs. Moreover, as found by the Board, the respondent was offered a food voucher which was declined on the ground that the man that she had said was living with her would simply eat the food.

On December 10, 1991 the respondent appealed the refusal by the Director to grant emergency social assistance. This was heard and dismissed by the Appeal Board on December 12, 1991.

The appeal relating to the discontinuance of assistance as notified in the letter of November 14, 1991, was allowed by the Appeal Board, differently constituted, on December 18, 1991. As a consequence, the respondent was paid full social assistance for the month of December, 1991, including payment for the period from December 1 to December 18. Accordingly, the subject matter of the unsuccessful appeal against the refusal of emergency assistance ceased to be in issue between the parties.

Nevertheless, on February 12, 1992, the respondent commenced these proceedings against the appellant by originating notice (application inter partes) claiming:

(I) an order in the nature of **certiorari** to quash the decision of the Appeal Board dated December 12, 1991 which upheld the decision of the Director to refuse emergency social assistance pending appeal; and

(II) a declaration that the respondent was entitled to emergency social assistance from the appellant from December 1, 1991 to December 20, 1991 as a person whose regular municipal assistance was terminated for non-financial reasons, who had an

appeal of that termination decision pending and had no other immediate source of income.

The application was heard in due course by the chambers judge who, by an oral decision, subsequently confirmed in writing, dealt with a number of issues;

(I) He held that while the issue before him was now moot, the respondent, having received full assistance for the period at issue December 1 to December 20, the issue raised was of a recurring nature, although of brief duration. The point in issue, if it was ever to be tested, almost certainly had to be tested in a case that was moot, or it would otherwise likely evade review by the court. The issue, he held, was a live one in the sense that not only was it unresolved, but it would be a continuing issue.

(II) He reviewed the legislative scheme under which the respondent claimed entitlement to social assistance from the appellant, making reference to **Woodard v. Social Assistance Appeal Board, supra,** and **MacInnes v. Halifax City Social Services Planning Department, Director** (1990), 70 D.L.R. (4th) 296.

(III) He observed that the decision of the Appeal Board dated December 12, 1991 failed to comply with s. 32(2) of the Social Assistance Appeal Regulations:

> "32(2) The decision of an appeal matter shall state the findings of facts and the sections of the Act and the Regulations relied on in reaching the decision."

A consent order had therefore been made on March 26, 1992 which **inter alia** granted an order in the nature of **mandamus** directing the Appeal Board to comply with s. 32(2) of the Social Assistance Appeal Regulations and provide the parties and the court with further written reasons for the decision of December 12, 1991 within a reasonable period of time. Such further written reasons were to be adequate and to include the

findings of facts and the sections of the **Social Assistance Act**, the Municipal Assistance Regulations and the City of Halifax Municipal Social Services Policy relied on in reaching the decision. The order further provided that prior to the preparation of the reasons, the parties were entitled to provide further written briefs on the issues to the Appeal Board. The order also provided that the proceedings be adjourned, to be returned to the court after the written reasons were provided. These reasons were in due course produced, bearing date November 5, 1992.

(IV) The chambers judge then reviewed the further reasons. He quoted the Board's conclusion as follows:

> "The applicant herein was denied assistance because she had failed to pursue all other avenues of support, in particular she did not pursue in the Family Court her claim for maintenance against Kevin Oliver, the father of her child. Also, there was evidence to the effect that the applicant was residing with Mr. Oliver. The evidence of Robert Britton and Sharon Murray was accepted on these matters.
>
> The Board does not agree that there is anything in the City of Halifax policies requiring the granting of 'emergency' assistance. The Act and regulations are silent as to any requirement of emergency assistance pending appeal. Furthermore, Standard Procedures and Information are administrative directives and cannot form the basis of a duty in law to provide emergency assistance (see Bordon v. City of Halifax (unreported, Gruchy, J., 12 September 1991)).
>
> As a result, the applicant was not able to establish that she was a 'person in need' within the meaning of policy 1.1.4. Therefore, we find that, pursuant to Standard Procedure 1.1.9.2 Mr. Britton considered whether to grant emergency assistance pending appeal, and that his decision to deny such assistance was a reasonable one."

(V) The chambers judge then confessed to some continuing uncertainty as

to what the Board found the issue to be, but rather than resolve the application on the basis that the Board still failed to comply with Regulation 32(2), he considered the Board's decision on the basis of two possible interpretations.

(a) On the basis that the Board had affirmed the Director's decision as being a reasonable one, he concluded that as the hearing before the Board was de novo, the Board must independently make a determination based on the evidence before it, some of which may or may not have been before the Director. The Board's decision must be an independent assessment and not a confirmatory one. As to the legislative basis for emergency assistance, he referred to the Board's conclusion that the City Municipal Social Assistance Policies do not require the granting of emergency assistance. However, he went on to say that he was not persuaded that this was an issue or even discussed by the Board at the hearing of December 12, 1991. By referring to the Board's original statement that the Director may consider paying emergency assistance pending an appeal, the Board appeared to have embarked upon a new consideration after its original decision giving rise to the order in the nature of **mandamus**. It was improper for the Board to do this. This question, in his view, was not the basis of the original decision and could not be so considered in this **certiorari** application.

(b) The chambers judge then stated the next probable issue to be whether or not the respondent established she was a "person in need" so as to entitle her to emergency assistance. This, he acknowledged, was the core issue in dispute between the parties. He referred to the definition of a "person in need" in the **Act** and the requirement of the **Act** placing upon social services committees and directors to provide assistance to all

persons in need as defined by such committees. The **Act** does not speak in terms of regular or emergency social assistance but simply states the obligation to provide assistance to those in need. "Need" is defined by M.S.A. Policy Statement 1.1.4 quoted above. He concluded:

> "There is little difficulty in assessing Ms. Carvery as a person in need on any interpretation of these provisions of the **Act** or Policy, as she was so assessed by the Director or his staff prior to December 1991. The effect of his decision and that of the Board, was that she ceased to be a person in need specifically because she 'had not pursued all other avenues of support'. There was no suggestion that she was in receipt of other funds or had other support available to her during the period from December 1 to December 18."

(VI) The chambers judge then took issue with the merits of the appellant's decision to discontinue social assistance, referred to Regulations 2(1)(a, d and j), as well as 2(2) and concluded that Regulation 2(2) impliedly contemplates the existence of factors other than those enumerated in Regulation 2(1) as relevant to the proper exercise of the Director's decision making authority. The Director's discretion with respect to the granting of assistance was not entirely unfettered (**Roncarelli v. Duplessis**, [1959] S.C.R. 121 at 140). He concluded that the legality of the Director's discretion in the circumstances must therefore be measured against the purpose of the statute conferring the discretion which purpose was found in s. 9(1) of the **Act** to be to "furnish assistance to all persons in need". He concluded that the reason for the existence of Regulation 2(2) and the discretion authorized by it was to allow the purpose of alleviating need to be fulfilled in circumstances where strict compliance of Regulation 2(1) could not be secured. While the pending appeal of the denial of the respondent of regular assistance and her palpable need might have been relevant factors, they appeared he said, to be overshadowed by the technical requirements

of Regulation 2(1). He concluded:

> "Both the Director and the Board appear to have proceeded on the basis that Ms. Carvery was not entitled to emergency assistance merely because she had failed to demonstrate in accordance with Regulation 2(1)(j) that she had no other reasonable source of income. In my opinion the clear failure of the Board to consider other factors as mandated in the legislative scheme that might entitle Ms. Carvery to emergency assistance constitutes an improper exercise of discretion. The failure of the Board to appropriately exercise their discretion is an error on the face of the record properly and amenable to **certiorari.**"

(VII) In the result, an order was granted in the nature of **certiorari** (a) quashing the decision of the Appeal Board, but (b) denying the declaration that the appellant was entitled to emergency social assistance from December 1 to December 18, 1991 as it was unnecessary, and would have no practical financial effect in the circumstances; and, (c) granting costs to the respondent of $1,200.

The appellant did not in its notice of appeal raise the issue of mootness and on the argument confirmed that this issue was not being pressed. This should not deter this Court from setting aside as moot a decision which ought to be set aside for that reason. However, in view of the approach I take to this case, it is not necessary to canvass that issue.

There are thus two issues before this Court.

(1) Whether the appellant was correct in its assertion that there is no legislative basis for the provision of emergency social assistance pending appeal.

(2) Whether the chambers judge was correct in holding that the Appeal Board had committed an error of law on the face of the record.

<u>First Issue</u>

The appellant submitted that there was no legislative basis for emergency assistance pending an appeal. It was pointed out that no specific Municipal Social Services Policy of the City was in effect providing for this. It was contended that **s. 2(2)** of the Regulations affords no basis for such assistance as it was *ultra vires* in purporting to confer a discretion upon the Director. It was contended that the predominant purpose of the Regulations was to provide the legislative framework for cost sharing of assistance expenditures. Thus it was submitted that Regulation 2(2) was simply enacted for the purpose of permitting cost sharing with emergency assistance type expenditures.

I reject this contention. **Section 18** of the **Act** provides, in part,

> "18. The Governor in Council may make regulations
>
> (a) prescribing standards for assistance to be granted by social services committees to persons in need;
>
> (b) prescribing the terms and conditions upon which municipal units will be reimbursed by the Province for assistance expenditures made by them, prescribing assistance expenditures in respect of which such reimbursement will be made and providing for the calculation of the amount of such reimbursement; "

Even if the dominant purpose of the Regulations is to determine the conditions of provincial reimbursement to the municipalities, there is no doubt that the Governor in Council was also authorized to make regulations dealing with the standards for assistance to be granted. One of those standards is the discretion conferred by Regulation

2(2) upon the Director. As Hallett J. said in **Woodard**, one cannot sweep the words "subject to this Act and the Regulations" under the rug. They must be given a meaning. In my opinion, Regulation 2(2) was *intra vires* and by its terms confers a discretion on the Director which would permit emergency social assistance pending appeals.

Second Issue

In **Woodard v. Social Assistance Appeal Board, supra,** Hallett, J. considered the scope of judicial review of a decision of an appeal board under this statutory scheme. He concluded that the board was a statutory tribunal, not having the protection of a privative clause. He continued (p. 438).

> ". . . Therefore its decision is reviewable both for jurisdictional error and error in law on the face of the record . . . The board considered the director's decision communicated to Mr. Woodard in the June 2, 1983 letter. That decision involved the interpretation of Policy 1.2.10. The Appeal Board hears appeals. Therefore it must decide questions of interpretation of the Policy Directives under which the Social Services Director acted in any particular case. It is incorrect to say, as argued by counsel for the City, that the Board can be wrong in its interpretation. A misinterpretation of Policy Directives constitutes an error in law. . ."

Accordingly, Hallett, J. concluded that if an error of law appears in the face of the record, any decision based on such an erroneous interpretation of the legislative scheme may be quashed by the court.

On November 14, 1991 the issue of the respondent's entitlement to further assistance arose. The appellant stopped making further assistance payments on December 1, 1991 and the respondent appealed. The purpose of the appeal, which was ultimately resolved in the respondent's favour, was to determine whether or not she was entitled to the

assistance. When this question was resolved in the affirmative, all of the assistance payable over the period at issue was forthwith paid to her.

In the meantime, however, and pending appeal, what was the respondent's position? A thorough review of the legislative scheme reveals that the only entitlement of the respondent to assistance during this period pending review of her position is to be found in Regulation 2(2) of the Social Assistance Regulations. This Regulation conferred a discretion on the Director. Merely because need was claimed by the respondent is not proof that she was in fact in need. That was the very issue being resolved by the speedy appeal process that was evolving.

The chambers judge concluded that both the Director and the Appeal Board appeared to have proceeded on the basis that the respondent was not entitled to emergency assistance merely because she failed to demonstrate, in accordance with Regulation 2(1)(j), that she had no other reasonable source of income. He concluded that there was a clear failure of the Appeal Board to consider "other factors" as mandated in the legislative scheme. Those other factors appear to be the pending appeal, "palpable need" of the respondent and the purpose of the Act which is as stated in s. 9(1) and (2) "furnish assistance to all persons in need".

The respondent submitted that there was at least a duty on the Director to provide emergency assistance pending an appeal in the narrow set of circumstances prevailing here, viz; (a) that the regular social assistance was terminated for "non financial" reasons, (b) that an appeal against the decision was pending, and (c) that the respondent had no other immediate source of income pending the appeal.

It would seem that these were the "other factors" that the chambers judge considered were contemplated by Regulation 2(2) which required consideration by the Director.

Having reviewed the scheme which "imposes the obligation on the municipal unit to provide assistance to persons in need as they determine it" I am unable to read into the discretion conferred on the Director by Regulation 2(2) a requirement that any particular factor or factors be considered. The framers of the **Act**, the Regulations and the policy saw fit not to impose any criteria for the exercise of this discretion. In particular I cannot agree that there is any implied requirement that in the exercise of the discretion pursuant to Regulation 2(2), the considerations underlying "the requirements of clauses (a) to (i) inclusive of subsection (1)" must be ignored.

In emergency situations - and the circumstances existing during the pendency of an appeal could certainly constitute such - it was obviously considered desirable to vest a wide discretion in the Director to make a decision whether or not to bypass the framework of rules set out in Regulation 2(1). It would be undesirable and unworkable if courts could impose, in the circumstances of any given case, specific criteria that must be entertained by the Director. Somebody must exercise the overriding discretion; that somebody is the Director. His or her discretion is subject to appeal, but it must otherwise be unfettered in the sense that courts should not impose the guidelines. In the setting of the legislative scheme it is an unfettered discretion.

Of course no discretion conferred by law is unfettered in the sense that extraneous considerations can be entertained. In **Roncarelli, supra**, the Supreme Court of

Canada held that a discretion conferred by law could not be exercised for reasons totally irrelevant to the subject matter to which it related. Rand, J. put the situation well at p. 140:

> "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."

There is no suggestion in the record that the Director exercised his discretion in such an arbitrary or improper manner. Certainly I cannot draw that inference simply because the Director chose to provide assistance to the respondent's child and offered certain limited assistance to her in the form of a food voucher which she refused. Here the discretion need only be exercised within the framework of the legislative scheme as stated by Hallett, J. in the passage quoted above from **Woodard.** Thus the Director was not required to provide emergency assistance pending appeal. He may do so if, in his or her opinion, the apparent need, balanced against the other factors in the scheme such as the duty to use reasonable means to secure income, warranted.

To conclude, in effect, that because the respondent applied for emergency assistance pending appeal and had "palpable need" she was thus entitled by s. 9 of the **Act** to emergency assistance was to usurp the discretion of the Director and rewrite Regulation 2(2) by substituting for the word "may" therein the word "shall". Clearly, the intention of the scheme was not to require that any party appealing the denial of assistance was **ipso facto** entitled to emergency assistance pending appeal.

In view of this, did the Appeal Board in affirming the decision of the Director

commit an error of law on the face of the record? In resolving this, we must determine whether the Appeal Board considered the appropriate issues. Section 32(1) of the Social Assistance Appeal Regulations provides:

> "32(1) The decision of an appeal matter shall be made on the basis of evidence presented at the hearing."

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.

The correctness of the Director's decision was at issue and the question is whether the Board was to simply substitute its discretion for that of the Director or, in the traditional role of an appeal court, require the appellant to demonstrate that some improper principle was applied or that a patent injustice resulted.

The appeal procedure is designed to deliver the speedy resolutions of claims for assistance without the trappings of court procedure. It is administered presumably in the large by persons not formally trained in the law. Its object is to effect social justice in the context of the municipality's ability to deliver it. I would conclude that the Appeal Board is clothed with the same discretion as the Director, and if on the evidence and in the spirit of the legislative scheme it considers the appellant worthy of assistance in an emergency situation, it has the discretion to differ from the Director and grant the assistance.

A review of the Appeal Board's reasons as a whole convinces me that it reached an independent judgment, but one which did not differ from that of the Director in the result. In choosing the language that the decision of the Director was a reasonable

one, it was clearly expressing its agreement with it and not exercising an appeal court "hands off" type of review.

In its first reasons the Board stated at the outset that the issue was to determine if the Director "was correct" in its decision not to allow emergency assistance to the respondent.

In these first reasons the findings conclude:

> "The Board rules that based on the evidence presented today that the Director did give full consideration to the request for emergency assistance and that the decision to assist the child and not the mother was reasonable."
>
> (emphasis added)

In the further reasons, the Board set out the facts at length in 11 numbered paragraphs. These included that assistance was terminated by notice dated November 14, 1991 for the reason therein set out. It was stated that the respondent advised the social worker that she was unable to attend the Family Court dates as she was scheduled in another court, but that upon being told that if this could be established, she would receive assistance pending a new hearing date, the respondent failed to provide evidence of conflicting dates and indeed testified at the hearing that she was too stressed to attend the Family Court. The facts recited the appellant's confirmation to the social worker on December 4 that the father of her child was living with her and that on December 6 she refused a food voucher saying that this man would simply eat the food.

The Board then reviewed the principal provisions of the **Act** and Regulations and the Municipal Social Assistance Policy and made reference to the decision of Hallett, J. in **Woodard v. Lynch, supra.** The Board then reached the conclusions which I have

already set out as quoted by the chambers judge. In those conclusions, it was stated that the respondent was denied assistance because she failed to pursue other avenues of support. The evidence of the Director and the social worker was accepted on this matter. The Board emphasized that emergency assistance was not required to be given, that the applicant had not established that she was a person in need within the meaning of Policy 1.14 and that, therefore, the decision of the Director to deny assistance was a reasonable one. This conclusion was reached in the context of the extensive review of the evidence and findings of fact and amounted, in my view, to an independent exercise of the same discretion accorded to the Director under Regulation 2(2).

With respect, I cannot agree that the Board's supplementary conclusion that the Director was not required to provide emergency assistance should have been excluded from consideration. The very concern that the chambers judge had entertained at the outset was that the Board's reasons were simply not made clear. How then, when the Board restated them can it be said, by reference to the earlier unclear reasons, that this issue had not been considered by the Board? The earlier reasons revealed that the Board had in mind that the Director may consider paying emergency assistance pending appeal. In those earlier incomplete reasons, the Board went on to state that on the evidence presented, the Director had given full consideration to the request for emergency assistance and that his decision to assist the child and not the mother was reasonable. I must conclude therefore that the enlarged reasons provided pursuant to the consent order of **mandamus** must be considered in their entirety. I have concluded further that these reasons, along with the earlier ones, reveal no error of law. The Board was correct in concluding that the Director

had a discretion. The Board reviewed that discretion and agreed with it. The findings of fact made by the Board in the decision fully support that conclusion. The mere fact that prior to November 14, 1991 the appellant was providing assistance and the mere fact that another differently appointed appeal board on the evidence before it concluded that the respondent was entitled to assistance for the month of December cannot be relied on as demonstrating error by the Director in exercising his discretion or the Appeal Board in this particular review of that exercise of discretion.

I conclude that the Board did not commit an error of law. I would set aside the decision and order of the chambers judge, including the order that the appellant pay costs. I would award no costs on this appeal.

J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.