Social Assistance, Overpayment Recovery, and the Rule of Law

Brad J. Wallace

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/jlsp

Citation Information
https://digitalcommons.osgoode.yorku.ca/jlsp/vol20/iss1/5

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.
RÉSUMÉ
La notion de la primauté du droit exige que, à tout le moins, l'état exerce ses pouvoirs selon des règles juridiques reconnues et des procédures établies. En prenant des règles et des procédures explicitement prescrites pour usage contre des bénéficiaires actuels et en les appliquant contre d'anciens bénéficiaires – ce faisant, agissant sans aucun pouvoir juridique – certains administrateurs du programme Ontario au travail privilégient l'efficacité administrative et la commodité de la chose aux dépens de la primauté du droit. En d'autres mots, ils établissent les règles au fur et à mesure qu'ils avancent. La Loi de 1997 sur le programme Ontario au travail prévoit qu'en cas de paiement excédentaire à un bénéficiaire, le bureau local d’Ontario au travail peut recouvrer ce montant en utilisant n'importe lequel de trois moyens autorisés explicitement, y compris un « recouvrement administratif », en vertu de l'article 21. Malgré tout, Ontario au travail a adopté la position que si l'administrateur donne le préavis voulu à un ancien bénéficiaire en vertu de l'article 21 de la Loi, et qu'il ou elle n'interjette aucun appel dans les délais impartis, ou que l'appel est rejeté, l'administrateur est en droit de recouvrer le paiement excédentaire en en déposant avis auprès du Tribunal et en appliquant l'avis comme s'il s'agissait d'une ordonnance exécutoire de la Cour de l'Ontario. Cependant, un ancien bénéficiaire qui recevrait un tel avis ne dispose d'aucun droit d'appel. L'article 21 a toujours été considéré comme niant au Tribunal de l'aide sociale quelque compétence que ce soit en matière d'appels interjetés par d'anciens bénéficiaires contre des décisions selon lesquelles des paiements excédentaires leur auraient été versés après qu'ils aient cessé de percevoir des prestations. Par ailleurs, la Loi de 1997 sur le programme Ontario au travail prévoit déjà les modes de recouvrements de paiements excédentaires d'anciens bénéficiaires : par des poursuites civiles et en utilisant la panoplie habituelle de voies de recours dont disposent les créanciers. Cet article examine la position de Ontario au travail concernant les modes administratifs de recouvrements de paiements excédentaires d'anciens bénéficiaires à la lumière de précédents faisant autorité et de la notion de la primauté du droit.

* Brad Wallace is a staff lawyer with the Community Legal Clinic – Brant, Haldimand, Norfolk practising primarily in the areas of social assistance, disability pensions and tenant protection law. The writer is indebted to the exemplary research materials provided to Ontario's legal clinics by the staff of the Clinic Resource Office of Legal Aid Ontario.
Where the law is itself ruled over and lacks sovereign authority, I see destruction at hand for such a place. But where it is despot over the rulers and the rulers are slaves of the law, there I foresee safety and all good things which the gods have given to cities.

—Plato

The rule of law, at minimum, requires that state power be exercised in accordance with known legal rules and established procedures. By taking rules and procedures explicitly prescribed for use against current recipients and applying them to former recipients—thereby acting without legal authority—certain Ontario Works administrators are favouring administrative efficiency and convenience over the rule of law, effectively making the rules up as they go. The *Ontario Works Act, 1997* provides that, where a recipient incurs an overpayment, the local OW office may recover that amount by any of three explicitly authorized means, including "administrative recovery" under section 21. Ontario works takes the position that if the administrator gives a former recipient proper notice under section 21 of the Act and he or she either fails to appeal it in time or loses on appeal, the administrator may recover the overpayment by filing its notice with the court and enforcing it as a judgment. But a former recipient subject to such notice has no real right to appeal. Section 21 has been consistently interpreted as denying the Social Benefits Tribunal any jurisdiction over appeals brought by former recipients about overpayments assessed against them after they stopped receiving benefits. In addition, the OWA already prescribes the means by which overpayments are to be recovered from former recipients: by way of civil proceedings and the usual array of creditors' remedies. This paper will examine the OW position on administrative overpayment-recovery from former recipients in light of the controlling authorities and the rule of law.

I. INTRODUCTION

The opening provisions of the Canadian constitution speak of "a free and democratic society" founded upon principles that recognize "the supremacy of God and the rule of law". It may go without saying that the rule of law (or "Rule of Law") means strikingly different things to different people, depending on their point of view. For some, the term captures the role of the judiciary in the development of the law, and thus in the process of social and political change; some view that role with great respect, others with even greater suspicion. For yet others, the rule of law describes the supremacy of duly enacted laws, which all members of society, whatever their position,
are equally bound to obey. Still others denounce the term as little more than code for the growing influence of lawyers and judges and the "judicialization of politics" in our society. Their enthusiasm for the rule of law is decidedly lower case. The "rule of law" may be one of many political and legal concepts, like democracy, equality, and justice, made increasingly banal through overuse. But if the term has any definite meaning, as the writer insists it does, the rule of law must include the requirement that public authority be exercised only "within the confines of established procedures, and known legal rules creating reasonable expectations on the part of those subject to the law".4

Whoever we are, however frustrating or administratively inconvenient it may be from time to time, in a free and civilized society, all must be subject to the same prescribed body of rules and regulations. The law must never be applied capriciously or take us by surprise. When someone receives a benefit to which he or she is not lawfully entitled, we reasonably expect the government to act decisively, but "within the confines of known legal rules", to recover what should not have been given. If a person receiving social assistance receives more than his or her entitlement—or receives assistance when not entitled to it at all—we expect the government to use all legal means in order to get that money back. Though the recipient has benefited from the overpayment, our commitment to the rule of law requires the government to recover that money by means of the "established procedures" and not, in any sense, to make the rules up as it goes.

In Ontario, non-disability-related social assistance is provided under the Ontario Works Act5 (OWA) and regulations. The legislation provides that, where a recipient receives an amount greater than his or her entitlement6 (an "overpayment"), the local Ontario Works (OW) office may recover that amount by any of three explicitly authorized means. First, if the overpaid person is still receiving assistance, OW may reduce the amount of the person's benefits until the overpayment is fully recovered.7 Second, if the overpaid person was still a "recipient" when he or she first received notice of the overpayment but is no longer receiving assistance, OW may file the overpayment notice with the appropriate court and enforce it as a judgment by way of garnishment or other debt-collection remedies.8 This approach will be referred to throughout as "administrative overpayment recovery". Third, if the overpayment was not discovered—and consequently no notice of it was given—until after the person stopped receiving assistance, OW may seek to recover the overpayment by suing the former recipient in civil court.9 These are the three means by which OW is explicitly authorized to recover overpayments.

6. Ibid. s. 19(1).
7. Ibid. s. 20.
8. Ibid. s. 21.
9. Ibid. s. 22.
What is happening, however, involves OW's use of a fourth option, an option without any apparent basis in the established procedures or known legal rules. After OW has terminated benefits and assessed an overpayment, it then purports to place the former recipient on notice under section 21 of the Act. As a result, a former recipient may be sent an overpayment notice, which can then be filed with the court and enforced as a judgment. The OW position is that, if the local administrator gives the former recipient a notice under section 21 and he or she either fails to appeal the decision in time or loses on appeal to the Social Benefits Tribunal (SBT), OW may proceed to recover the overpayment administratively by filing its notice with the court and enforcing it as any other judgment debt.

But the OW position is highly debatable for at least four reasons. First, administrative recovery is a remedy enforceable only against present, not former, "recipients" under the Act. Had the Ontario Legislature intended to enable OW to recover overpayments from former, as well as present, recipients by such means, it could have expressly done so. But, by default or by design, it did not. Therefore, under the Act, only a "recipient"—"a person to whom basic financial assistance is provided"—may incur an overpayment, only a "recipient" may be given a valid notice of overpayment, and only a "recipient" is subject to administrative recovery. Second, it is arguable that the minister has never prescribed the "information concerning the decision" mandated under section 21 of the Act. Third, the OW position is built upon the premise that a former recipient has a supposed right to appeal the overpayment notice to the SBT. There is no such right. In fact, in a line of decisions dating back twenty years, the Social Assistance Review Board (SARB) and Divisional Court under the former legislation and the SBT under the present Act have consistently held that the tribunal lacked jurisdiction to hear overpayment appeals by former recipients. Finally, the Act already prescribes the means by which overpayments are to be recovered from former recipients, e.g. by civil proceedings and the usual array of creditor's remedies. So long as the limitation period for recovering the debt has not expired, OW remains free and, in my submission, obliged to pursue overpayment recovery from former recipients by way of civil action. Since only a "recipient" can incur an overpayment, receive notice of and appeal from same, and since recovery through litigation is not restricted to present "recipients" under the Act, OW's only appropriate remedy is by way of the civil courts.

This paper will examine the OW position on "administrative" overpayment recovery from former recipients in light of the controlling authorities concerning the rule of law. Whatever one's orientation to or definition of the rule of law, at minimum it must include the requirement that state power be exercised only in accordance with known legal rules and established procedures. The government of a free and democratic society follows its own rules and, in doing so, claims both the legal and moral authority to regulate its citizens' interactions with each other and itself. No one expects either present or former OW recipients to receive more assistance than their entitlement

10. See definition of recipient in OWA, s. 2.
under the rules. However large or small the amount, an overpayment is an overpay-
ment and, if left un-recovered, can be a form of unjust enrichment. But those
responsible for remedying injustices must not do so by legally unauthorized or (what
may be worse) legally improvised means. By applying rules and procedures explicitly
prescribed for use against "recipients" to former recipients—i.e. by acting without
specific legal authority—certain OW administrators are, in effect, improvising on the
rules, rather than following them. When governments consider themselves free to
improvise on the rules, when in Plato’s words, “the law is itself ruled over and lacks
sovereign authority”, destruction may not necessarily follow, but in the ears of many,
our constitutional commitment to the rule of law may develop a decidedly hollow ring.

II. THE MINIMUM REQUIREMENT OF THE RULE OF LAW
When Orwell wrote “Politics and the English Language” in 1946, he was writing about
the decline of modern political discourse, and political writing in particular. On the
growing meaningless of political language, he observed,

The words democracy, socialism, freedom, patriotic, realistic, justice, have each of them
several different meanings which cannot be reconciled with one another. In the case
of a word like democracy, not only is there no agreed definition but the attempt to
make one is resisted from all sides. It is almost universally felt that when we call a
country democratic we are praising it: consequently the defenders of every kind of
regime claim that it is a democracy, and fear that they might have to stop using the
word if it were tied down to any one meaning.11

Although he never mentioned it, one suspects that, if asked, Orwell would have
included the “rule of law” in his list of increasingly meaningless political terms. This
is not to say, of course, that the “rule of law” has no meaning, only that it is liable to
be (and has been) marshalled in support of myriad contradictory political proposi-
tions and, to that extent, has arguably become “the will-o’-the-wisp of constitutional
history”.12

However, the rule of law does not mean whatever one wants it to mean. It is a definite
political concept with definite features and definite requirements. Depending on the
priorities of the speaker, some elements of the rule of law may be emphasized over
others. But whatever else the rule of law may require, at minimum it requires that
governmental authority be exercised only in accordance with known legal rules and
established procedures.13

11. George Orwell, “Politics and the English Language” in Inside the Whale and Other Essays (Mark-
Morality: Readings in Legal Philosophy (Toronto: University of Toronto Press, 1996), 309–35 at
310 [“Democracy and the Rule of Law”]. See also Hutchinson and Monahan, ed., The Rule of
Law: Ideal or Ideology (Toronto: Carswell, 1987) at ix.
The rule of law as procedural compliance was central to the Supreme Court of Canada's oft-cited decision in *Roncarelli v. Duplessis*. At issue was whether the "discretion" of the Quebec Liquor Commission to revoke liquor licences included a right to revoke them for any reason at all, including the political views and activities of licence holders. Holding that it most assuredly did not, Justice Rand wrote that, in public regulation of this kind,

there is no such thing as absolute and untrammeled "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.

His Lordship spoke further to the minimum requirement of the rule of law when he wrote,

That, in the presence of expanding administrative regulation of economic activities ... an administration according to law is to be superceded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure.

A few years after the *Roncarelli* decision, Yale law professor Lon Fuller published his seminal work, *The Morality of Law*, in which he described the rule of law as incorporating eight essential requirements, each of them centred more on procedural compliance than commitment to any particular substantive ideal. Fuller's eight requirements of legality can be summarized in the following terms: First, the law must apply equally to everyone (general application). Second, rules must, in fact, be made (promulgation). Third, the law cannot purport to change the legal consequences of actions taken in the past (non-retroactivity). Fourth, the rules must be comprehensible to those required to follow them (clarity). Fifth, no law or part of the law may contradict any other (consistency). Sixth, the law may not require the impossible (e.g. impossibly short timelines, etc.). Seventh, the law cannot change so frequently that it ceases to command public allegiance (constancy of law through time). Finally and most importantly for our purposes, "congruence between official action and declared rule" is necessary (state action within the confines of known legal rules).

If any of these elements is missing, if the rules require the impossible, if they change too frequently, if they are kept secret, or if agents of the state fail or refuse to be governed by them, the result will not be law, nor rooted in the rule of law.

---

In the *Quebec Secession Reference* three decades later, Chief Justice Lamer wrote that the principles of “constitutionalism and the rule of law lie at the root of our system of government”.18 Citing the *Manitoba Language Rights Reference*,19 Lamer C.J.C. outlined the essential elements of the rule of law, observing,

first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained ... that “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.” ... A third aspect of the rule of law is ... that “the exercise of all public power must find its ultimate source in a legal rule.” Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance [emphasis added].20

It is the third element of Chief Justice Lamer’s definition—“that the exercise of all public power must find its ultimate source in a legal rule”—that concerns us the most for the purposes of what follows.

Of course, the rule of law must involve more than blind adherence to explicit legal rules. As Fuller and others point out, a strictly procedural account of the rule of law—simply following the established rules, whatever their substantive content or objectives—is “compatible with much iniquity”.21 Indeed, the legal systems of the pre—Civil War United States, Nazi Germany, and the former Soviet Union were “rife with procedural regularity”.22 Southern slaves who managed to escape into free states were ordered returned to their masters by federal judges pursuant to the explicit requirements of federal law.23 Many blind, deaf, alcoholic, epileptic, and “congenitally feeble-minded” Germans were sterilized by court order under duly enacted Nazi legislation.24 Though presumed guilty until proven innocent, Soviet citizens were afforded the benefit of legal counsel and judicial determinations according to the requirements of established procedures and known legal rules.25

21. Fuller, supra note 17 at 154.
25. Article 57 of the 1918 *Constitution of the USSR* provided that “(1) Respect for the individual and protection of the rights and freedoms of citizens are the duty of all state bodies, public organizations, and officials; (2) Citizens of the USSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and
More recent scholarship on the subject distinguishes between "narrow" and "broad" views of the rule of law, the narrow view requiring little more than that the state follow its own rules, the broad view comprehending an ideal of substantive justice broader than mere procedural compliance. For the broader view, Jonathan Rose cites Joseph Raz's observation that "the traditional view of legal and political theory overemphasized the rule of law, that it was only one virtue of the legal system and should not be confused or connected with democracy, individual rights, justice and equality." Raz argued that there were other, more important social values not served by the rule of law, which may occasionally give way to such values. For Raz, the rule of law was not "the Rule of Good Law". Raz viewed the rule of law in essentially negative terms, i.e. "adherence [to established procedures and known legal rules] minimized the danger of the law's creation of arbitrary power, but compliance only created good by avoiding evil." In other words, rule adherence can be a means to laudable ends, but should never be mistaken for an end in itself.

Even its harshest critics acknowledge a distinction between "thick" (substantive) and "thin" (procedural) notions of the rule of law. Denouncing the rule of law as a "clear check [on the] expansion of a rigorous democracy", Hutchinson and Monohan acknowledge that

[the "thin" version of the Rule of Law amounts to a constitutional principle of legality. ... Its critical logo is "a government of laws, not men"; its operative axioms are the generality of official rules and the faithful adherence by government to those declared standards of conduct. ...]

The "thick" version of the Rule of Law incorporates the thinner one as merely one dimension of a liberal theory of justice. ... The modern defence of this "thick" version posits the necessary connection between procedural and substantive justice. The Rule of Law demands that positive law embody a particular vision of social justice, structured around the moral rights and duties which citizens have against each other and the state as a whole.

But the minimum—i.e. the necessary, if not sufficient—requirement of the rule of law is that state power be exercised only in accordance with "intelligible rules binding
on citizens, governmental officials, and judges alike". By no means does this minimum requirement, in any way, exhaust whatever else the rule of law may comprehend from whatever point of view. But in a free society committed to even the thinnest concept of the rule of law, government actors are called upon to enforce the law, not make it up as they go. By purporting to apply the administrative overpayment-recovery procedures—which apply only to current “recipients”—to former recipients, OW delivery agents may be doing just that.

III. IMPROVISING ON THE RULES

While the circumstances at issue here are by no means as outrageous as those in *Roncarelli v. Duplessis*, the central issue—administrative actors acting without express authority and, arguably, making up the rules as they go—remains the same. In fact, Premier Duplessis arguably had a sounder legal basis for his actions than do certain OW offices in purporting to apply the OWAs administrative recovery provisions to former recipients. At very least, in Duplessis’ case, the enabling legislation clearly afforded the Quebec Liquor Commission the right to revoke licences “at its discretion”. In this case, the *Ontario Works Act* provides local delivery agents with no such “discretion” and, to that extent, no such excuse. The legislation says what it means, and means what it says.

The OWAs authorize overpayment recovery by enforcing notices of overpayment through remedies available to successful parties in civil actions (e.g. garnishment of income, seizure and sale of real and personal property, etc.). Specifically, section 21 of the *Act* provides that:

(1) The administrator may give a recipient notice in writing of a decision determining that an overpayment exists and, if the administrator does, the notice shall set out the amount of the overpayment and the prescribed information concerning the decision.

(2) A decision determining that an overpayment exists shall be final and enforceable against the recipient as if it were an order of the Ontario Court (General Division) if:
   (a) notice of it has been given under subsection (1);
   (b) the time for commencing an appeal to the Tribunal has expired; and
   (c) no appeal has been commenced.

(3) If the decision is appealed and an overpayment is determined, the decision of the Tribunal shall be final and enforceable against the recipient as if it were an order of the Ontario Court (General Division).

Based on the above, some OW administrators assert that, so long as they have given an overpayment notice under section 21 and the recipient has failed to appeal in time or lost on appeal, OW is free to enforce the overpayment notice as an Order of the Court. As will be shown, however, that position is highly debatable for several reasons. First, the operative provisions of the *Act* and Regulations do not apply to former recipients. Second, the “prescribed information” under section 21 has never, in fact,
been prescribed by Regulation. Third, former recipients have no right of appeal to the SBT. Finally, the Act already provides procedures for the recovery of overpayments from former recipients.

The OW position stands on a tripod of arguments, assumptions, and wishful thinking. The first leg of the tripod is the assumption that section 21 applies to former as well as present OW recipients. As will be shown, it clearly doesn’t. The second leg is the argument that former recipients have a statutory right of appeal from overpayments assessed against them after they stopped receiving assistance. There is no such right of appeal, and decades of SARB and SBT decisions unanimously confirm this point. The third leg of the tripod involves the proposition that either the existing notice requirements under the Act and regulations are sufficient for all purposes (including overpayments assessed against former recipients), or that their absence is legally irrelevant. If the notice requirements set out elsewhere in the legislation were intended for application to section 21 notices, one wonders why the legislature would have enacted them for specific application to parts of the OWA bearing no conceivable relation to overpayment recovery. In other words, why would the legislature prescribe notice requirements specifically for the purposes of one provision of the Act (i.e. section 24) when—according to the OW position—it meant for those requirements to apply to another as well (i.e. section 21)?

The answer is simple: The legislature intended no such thing, and interpreting the clear language of the existing legislation as though it did has no basis in any known legal rule. It is wishful thinking on the part of a public actor clinging to its least expensive—but no less legally groundless—method of recovery. As for the supposed “irrelevance” of notice requirements required to be “prescribed” under the Act but left unmade, the mind goes blank. A statute of the Ontario Legislature mandates certain notice requirements to be prescribed by a regulation that, for whatever reason, is never promulgated, and those who benefit from its absence call it “irrelevant”. If the rules themselves are unclear or, as in this case, remain unmade, government actors can hardly abide by them, and the minimum requirement of the rule of law—government abiding by its own rules—becomes gobbledygook. The language of section 21 of the Act is mandatory, not permissive. It requires that, where the administrator gives an overpayment notice under section 21, “the notice shall set out the amount of the overpayment and the prescribed information concerning the decision” [emphasis added]. The “prescribed information” has never been prescribed by any regulation promulgated under the Act. The legal rights and obligations of overpaid former recipients are so vastly different from those of current recipients—that former recipients having no right of appeal from overpayments assessed against them after they stopped receiving benefits—that the kind of notice provided to current recipients cannot be applied to former recipients in any meaningful way. Indeed, doing so would arguably amount to misinformation, leading some former recipients to believe they

---

33. OWA, s. 21.
have a right of appeal when, in fact, they clearly do not. How this difference might be considered "irrelevant" in and of itself boggles the mind.

In what follows, I will address each leg of the OW position in turn. By the end, it should be clear that section 21 of the Act has no meaningful application to former recipients, former recipients have no right to appeal overpayments assessed against them after they stopped receiving benefits, and that the "prescribed information" for the purposes of a section 21 notice has not yet been prescribed. In light of these conclusions, the OW position on administrative overpayment recovery from former recipients is highly debatable, if not utterly untenable.

1. No Application to Former Recipients

Some OW offices take the position that former recipients fall within the ambit of the administrative recovery procedures set out in section 21 of the Act. On this point, the argument is simple: section 21 makes absolutely no reference to "former recipients" and speaks only to overpayment recovery from a "recipient", i.e. "a person to whom basic financial assistance is provided".34

If the legislature had intended for section 21 to apply to former recipients as well as current ones, it could have enacted explicit provisions to that effect. But section 21 of the OWA makes no explicit references to "former recipients" whatsoever. The Tenant Protection Act, 1997 (TPA), enacted the same year as the OWA, explicitly extends certain rights and remedies to "former tenants", enforceable by application to the Ontario Rental Housing Tribunal (ORHT).35 In fact, under section 32(1) of the TPA, "A tenant or former tenant" may apply to the ORHT for an Order determining, among other things, that the landlord has failed to properly maintain the property, the landlord has illegally entered the unit, or the landlord threatened, harassed, coerced, or interfered with the tenant. Likewise, other provisions of the OWA explicitly refer to "former applicants and recipients" and to "past or present eligibility".36 So it is not as though the legislature did not have the rights and obligations for former recipients in mind when the OWA was being drafted. Indeed, by the very wording of section 21, the Social Benefits Tribunal, under both the OWA and Ontario Disability Support Program Act (ODSPA),37 has consistently held that only a "recipient" may incur an overpay-

34. Ibid. s. 2.
35. Tenant Protection Act, 1997, S.O. 1997, c. 24, as am. [TPA].
36. OWA s. 40(1) provides that "[e]ach delivery agent shall provide to the Director information relevant to its administration of this Act that is requested by the Director, including information about present and former applicants and recipients under this Act, the Ontario Disability Support Program Act, 1997, the Family Benefits Act or the General Welfare Assistance Act"; OWA s. 58(2) states, "An eligibility review officer may investigate a person's past or present eligibility for payments under this Act, the Ontario Disability Support Program Act, 1997, the General Welfare Assistance Act, the Family Benefits Act and the Vocational Rehabilitation Services Act and for that purpose has the prescribed powers including the authority to apply for and act under a search warrant."
ment, only a “recipient” is subject to administrative recovery, and only a “recipient” may be given written notice of an overpayment decision. If the legislature had intended for the term recipient to include a former recipient, it could have legislated to that effect. It chose not to.

An OW “recipient” is someone to whom assistance is provided. The question whether legislation drafted in the present tense may be interpreted to include past circumstances is specifically addressed under section 4 of the Ontario Interpretation Act, which provides that “[t]he law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning” [emphasis added].

Granted, the Interpretation Act arguably cuts both ways insofar as the law must be considered as “always speaking”. Ontario Works could argue that language in the present tense is only a convention of legislative drafting and, therefore, provides no necessary basis for conclusions about the temporal operation of the law. But not the SARB or the SBT or the Divisional Court has ever adopted that view, and there are no legal or other grounds to believe that they ever would.

2. No Right of Appeal

Former OW recipients have no right of appeal from overpayment decisions rendered after they stopped receiving benefits. Therefore, if OW can recover overpayments from former recipients “administratively” under section 21, the allegedly overpaid former recipient has no recourse from the decision—an interpretation resulting in manifest injustice, if not absurdity.

The right to and prerequisites for an appeal from an administrator’s decision are set out in sections 24 and 26 of the OWA. Although section 26(1) does not expressly

---

38. See SBT-0108-06448 (10 June 2002) per J. Morrison (OWA); SBT-0112-09782 (3 October 2002) per A. Higdon (ODSPA); SBT-0009-09620 (5 November 2001) per N. Schoen (OWA); SBT-0007-07545 (5 April 2001) per Margerrison (OWA); SBT-0003-02188 (24 June 2001) per Hummelen (ODSPA); SBT-0110-08190 (23 January 2002) per P. Doran (OWA); SBT-0105-04398 (8 March 2002) per McClure (OWA).

39. R.S.O. 1990, c. 1.11, as am. [Interpretation Act].

40. André Côté, The Interpretation of Legislation in Canada, 3d. ed. (Scarborough: Carswell, 2002), at 73.

41. See Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworth’s Canada, 1994) at 93: “[T]he jurisdiction to avoid absurdity can be invoked in virtually every case. It may be relied on to help resolve any type of problem, from ambiguity or vagueness, to overlapping provisions, to the temporal operation of legislation. The court’s jurisdiction to avoid absurdity parallels and complements its jurisdiction to promote legislative purpose. Whereas purposive analysis justifies the preference for interpretations that lead to good consequences, which are presumed to be intended, avoiding absurdity justifies the rejection of interpretations that lead to bad consequences, which are presumed to be unintended.”
restrict who may appeal to the SBT, section 24 requires an “applicant or recipient” to be given a notice advising that he or she may request an internal review of the impugned decision. The other requirements of a valid section 24 notice were set out in section 67 of the Act’s General Regulation,42 which provides that:

(1) A notice under section 24 of the Act shall be in writing and shall be delivered to the applicant or recipient personally or by prepaid regular mail to the individual’s last known address.

(2) The notice shall include
   (a) the decision and its effective date;
   (b) reasons for the decision;
   (c) a statement that the applicant or recipient must request an internal review if he or she wishes to appeal the decision to the Tribunal;
   (d) the time within which the internal review may be requested; and
   (e) the time within which the applicant or recipient may file an appeal to the Tribunal.

There is nothing in the legislation preventing persons other than “applicants or recipients” from requesting an internal review, but the rules on the time for completing an internal review are triggered only if the request is made by an “applicant or recipient”.43 Further, only an “applicant or recipient” may appeal a decision of the administrator “within the prescribed period after an internal review”.44 There is no mention of “former recipients”.

In an unbroken line of decisions dating back to 1982, the SBT under the OWA, and the SARB and Divisional Court under the previous legislation, have consistently held that the statutory review tribunal in each case had no jurisdiction to review an overpayment decision made against a former recipient.

(1) SARB Jurisdiction over Former Recipients
The OWA’s precursor in the Family Benefits Act45 (FBA) authorized only two overpayment recovery methods. Section 17 of the FBA authorized the director to recover any sum paid to “a recipient” in excess of his or her entitlement “by reducing or suspending any allowance payable to the recipient or by proceedings to recover such sum as a debt due to the Crown in any court of competent jurisdiction [emphases added]”.46 Like the OWA, this provision made no reference to its potential application to “former

42. O. Reg. 231/04 [General Regulation].
43. OWA, s. 27(1).
44. Ibid. s. 28(1).
46. FBA, s. 17.
recipients". Unlike the present legislation, the FBA made no provision for the kind of administrative recovery method authorized under section 21 of the OWA.

In *Re Reichstein and the Director of the Family Benefits Branch* (1982), the appellant advised Family Benefits on 27 June 1980 that she wished to "withdraw" her participation in the program. Thereafter, the director purported to cancel her allowance effective 20 June 1980 on the basis that she was not living as a single person and, consequently, assessed an overpayment of $5,500 against her. The appellant appealed to the SARB, which affirmed both the director's cancellation of her allowance and the decision establishing the overpayment. The appellant then appealed to the Divisional Court, which allowed her appeal with respect to SARB's confirmation of the overpayment and issued the following brief endorsement to that effect:

If the Director believed that there had been an overpayment to the appellant, he was entitled to recover it from her by reason of Section 17 of the FBA. As she had declined to receive further benefits, the Director could only recover the overpayment by proceedings in Court. That being so, he ought not to have given notice of the overpayment and his intention to recover it under [the operative provisions] of the Act. … The appellant should not have been informed that she was entitled to a hearing with respect to the Director's decision, because it was not a decision to suspend or cancel a benefit. … The Board has no function to perform in connection with a decision to recover an overpayment unless there is to be a cancellation or suspension, in whole or in part, of a benefit that is to be paid.

In this case, the Board should have declined to hear the appellant's appeal to it, because it should not have been brought to the Board.47

This decision led a long train of jurisprudence from the Court confirming the SARB's lack of jurisdiction to hear overpayment appeals from former recipients. The issue, in each case, was when the appellant first learned of the overpayment decision. If he or she was provided some kind of notice of the overpayment, even verbally, before he or she ceased receiving benefits, then it could assume jurisdiction over the appeal. If the appellant's first notice of the overpayment came at any time after he or she had ceased to be a "recipient" under the controlling legislation, the tribunal had no jurisdiction over the appeal in respect of the overpayment.

For instance, in *Re Kimball* (1985),48 the appellant's Family Benefits (FB) allowance had been cancelled in September 1981 because she was working full-time. After a subsequent investigation, the director determined that she had not been living as a single person for two years while receiving Family Benefits, and advised her that an overpayment of about $12,000 had been assessed. The appellant appealed the cancellation to SARB in September 1982, which found as a fact that the appellant had been residing with a "spouse" and not as a single person during the period in question.

47. *Re Reichstein and the Director of the Family Benefits Branch* (14 July 1982), Toronto, court file no. 683/81 (Div. Ct.).
However, SARB made no order, noting that the appellant was “not a person to whom an allowance was being paid at the date of her Notice of Request for Hearing to the [SARB]”, and therefore SARB had no jurisdiction to hear the appeal.\(^{49}\) On appeal, the Divisional Court decided that:

The Board was correct that it had no jurisdiction. When sections 17 and 13 of the Family Benefits Act are read with the reset of the Act, we agree with the decision of the Court in Reichstein ... that “the Board has no function to perform in connection with a decision to recover an overpayment unless there is to be a cancellation or suspension, in whole or in part, of a benefit that is to be paid.

The findings of the Board on the merits cannot stand in the absence of jurisdiction.\(^{50}\)

The Court’s reasons in Kimball indicate that SARB had no jurisdiction because, as in Reichstein, the appellant was not a “recipient” of benefits when she filed her appeal.

Likewise, in Taylor v. Director, Income Maintenance Branch (1990),\(^{51}\) the Divisional Court dismissed an appeal by an appellant whose Family Benefits allowance had been cancelled on the basis of excess income and against whom an overpayment had been assessed. The overpayment was assessed in 1984, following a review of earnings by the appellant’s spouse, and was being recovered through monthly deductions from ongoing benefits. The appellant’s allowance was cancelled in May 1988, when her spouse’s earnings exceeded her legal entitlement. The appellant’s spouse testified that he earned monthly income of $1,600, but that their medical costs were $300 per month and the appellant had anticipated significant dental costs. Appellant’s counsel argued that the director’s calculation failed to consider the couple’s extraordinary expenses. The SARB dismissed the appeal from the cancellation of benefits and held that it had no jurisdiction to hear the appeal on the overpayment, as the appellant had no ongoing entitlement to FB. The appellant appealed to the Divisional Court. In strikingly brief reasons, the Court held that “This Court considered the same point in [Re Reichstein]. We have come to the same conclusion.”\(^{52}\)

In Ontario (Ministry of Community and Social Services, Income Maintenance Branch) v. Vallecillo (1998),\(^{53}\) the Divisional Court gave obiter approval to SARB’s determination that a person’s right of appeal “crystallizes” at the date of the notice of decision on the overpayment. Here, the appellant was notified that the director intended to suspend her FB allowance for failure to provide information. She applied for General

\(^{49}\) SARB A-06-07-20 (21 March 1983; Hotte, Buck).

\(^{50}\) Supra note 48.

\(^{51}\) Taylor v. Director, Income Maintenance Branch and Ministry of Community and Social Services (20 November 1990) Windsor (Div. Ct.).

\(^{52}\) Ibid.

Welfare Assistance, but was told she could not receive it because the FB file was still open. In desperate straits, the appellant informed Family Benefits that she would be withdrawing from the program. The next business day, she appealed the decision to suspend her allowance to SARB. The director argued that SARB had no jurisdiction to deal with the matter because the appellant was no longer in receipt of assistance when she filed the appeal. In its decision, SARB held that:

The principle laid down by the court in *Reichstein* is that if a person is no longer receiving a Family Benefits allowance when the Director creates an overpayment, the Board has no jurisdiction to review the decision to recover the overpayment. In that case the Appellant had voluntarily withdrawn from benefits some months before the Director's decision and, as a result, the court pointed out that his decision was not one to cancel or suspend benefits.

In determining whether the Appellant was a recipient at the time of her appeal, the Board finds that an ordinary, everyday reading of sections 13 and 14 of the *Family Benefits Act* lead[s] to the conclusion that the Appellant's status as a recipient entitled to appeal to this Board crystallized on notice of the Director's decision, together with reasons, being received by her legal adviser on January 31, 1994. That status was not affected by a subsequent withdrawal from benefits, whatever the reason. In the Board's view, the wording in section 14 [of the FBA], in referring to the right of an appeal of an "applicant or recipient," must necessarily include those whose benefits have been cancelled under section 13. If the legislation was intended to exclude the appeal rights of those whose benefits had been cancelled or, as in this case, a person who withdrew before filing an appeal, it could have done so explicitly.54

The *Valecillo* decision arguably stands for the proposition that it is the individual's status as a "recipient" at the date of the overpayment decision—regardless of when the appeal was filed—that should determine appeal rights.

Based on the Divisional Court's jurisprudence on the issue over twenty years, SARB's general approach to jurisdiction was neatly summarized in decision *W0112-08/W0503-31* (2001/2002; Shoen):

If the Director cancels the appellant's allowance, and also assesses an overpayment, the [Social Assistance Review] Board will generally not have jurisdiction, if the appellant is appealing the overpayment, and does not appeal the cancellation. In such circumstances the Board will only have jurisdiction if the appellant has been re-instated on Family Benefits, and is therefore having the overpayment reduced from his or her allowance [emphasis added].55

The emphasis was on the Board's jurisdiction to review an overpayment decision against someone who was no longer receiving benefits when the overpayment was first assessed. The above approach effectively summarizes the principles set out in the Divisional Court's *Reichstein* jurisprudence on SARB's lack of jurisdiction over former

---

54. SARB M-11-07-21 (1996; Fyles) [unreported].
55. Ibid.
recipients. The main issue in each of these decisions, and subsequent decisions of the SBT, is when the former recipient first received notice of the overpayment decision, i.e. was it before or after the cancellation of his or her benefits?

(2) SBT Jurisdiction in Overpayment Appeals by Former Recipients

For the most part, the Social Benefits Tribunal has simply followed the Reichstein jurisprudence and SARB’s approach to deciding whether it has jurisdiction to hear appeals from former OW recipients. The SBT takes the very same approach to deciding its jurisdiction over ODSPA\textsuperscript{56} appeals.

In SBT-0104-03177 (5 September 2001) [unreported]\textsuperscript{57}, the appellant had been verbally notified that an ODSP overpayment was going to be assessed against him. He wrote to ODSP in mid-February 2001 to withdraw from the program, noting that he had received several letters stating that he owed money and his benefits were being reduced, but that he had never received any written notice of the overpayment. His income support was terminated effective 1 March, but he was not sent a written notice of the decision until 13 March 2001. After a lengthy discussion of the relevant principles, the SBT held that the appellant’s right to appeal as a “recipient” had “crystallized” when he received written notice of the overpayment, which included the reasons for the overpayment assessment and how it was calculated. The SBT held that it would be unfair to find a lack of jurisdiction on the basis that the appellant was off the system at the time of the overpayment notice, as the appellant had been verbally advised of the overpayment before his withdrawal from assistance. In deciding jurisdiction, the Member provided an excellent summary of the Tribunal’s approach to overpayment decisions, and the impact of the timing of key events:

[W]hether the Tribunal can hear an appeal related to an overpayment ... depends on the particular circumstances of the case and the status of the Appellant at the time of the Director’s decision to assess the overpayment. ...

[T]he Tribunal finds that the Appellant’s right to appeal as a recipient crystallized when he received written notice of the overpayment which included reasons for the assessment of the overpayment and how it was calculated and therefore it has jurisdiction with respect to this matter. To find a lack of jurisdiction because the Appellant was taken off the system effective March 1, 2001 and the decision with reasons was not sent until March 13, 2001 would be far too strict an interpretation of the term “recipient” and would produce an unfair result in this case considering the fact that the Respondent had already advised the Appellant verbally of the overpayment prior to his voluntary withdrawal letter and while he was still receiving income assistance [emphasis added].\textsuperscript{58}

So, while the SBT applied the Reichstein principle that only a “recipient” has a right of appeal, it has introduced an element of uncertainty insofar as verbal notice may now

\textsuperscript{56.} ODSPA, \textit{supra} note 37.

\textsuperscript{57.} SBT-0104-03177 (5 September 2001) per R. Walden-Stephan [Walden-Stephan].

\textsuperscript{58.} \textit{Ibid.} at 1–3.
operate in favour of jurisdiction, despite the appellant's ceasing to receive benefits before a written overpayment notice is ever sent.

However, the general rule remains that, in order to receive a hearing on appeal, the appellant must have been a "recipient"—i.e. must have been actively on some form of assistance—when the overpayment notice was sent out. For example, a decision dated May 18, 2004, SBT Member Vincent Ching determined that

the Appellant was a "recipient" at the time of the cancellation of her assistance and assessment of overpayment. The Appellant was in receipt of Temporary Care Assistance from October 2002 to April 2003. She was issued the Temporary Care Assistance for the month of April 2003. On April 8, 2003, the Administrator decided to terminate her assistance and assess an overpayment. It is apparent that she was still a recipient at the time of cancellation.

Based on the above findings, the Tribunal determines that it does have the jurisdiction to consider the issue of the overpayment, since the Appellant was a recipient on April 8, 2003, the date of the Administrator's decision to assess the overpayment."

Likewise, in SBT-0205-02879, an OWA appeal from the administrator's overpayment decision intended for enforcement by administrative recovery, Member Huising held that,

[b]ecause the Appellant was no longer a recipient under the Ontario Works Act at the time the overpayment was assessed the Tribunal does not have jurisdiction to hear the appeal. Should the Appellant be re-instated to benefits and find that the overpayment deductions are being made she may wish to consider appealing the overpayment decision at that time.

The unavoidable conclusion from the two decades of decisions highlighted above is that the SBT has no jurisdiction over appeals brought by people who were former recipients at the time the overpayment was assessed. The resulting situation—former recipients having overpayments assessed against them without legal recourse—is manifestly unjust, which the legislature could not have intended. As Driedger observes,

[T]he jurisdiction to avoid absurdity can be invoked in virtually every case. It may be relied on to help resolve any type of problem, from ambiguity or vagueness, to overlapping provisions, to the temporal operation of legislation. The court's jurisdiction to avoid absurdity parallels and complements its jurisdiction to promote legislative purpose. Whereas purposive analysis justifies the preference for interpretations that lead to good consequences, which are presumed to be intended, avoiding absurdity justifies the rejection of interpretations that lead to bad consequences, which are presumed to be unintended.

59. SBT-0305-04424, at p. 2.

60. SBT-0205-02879 (10 April 2003) per Anna Huising at 3.

If ever there were grounds for the court to exercise its jurisdiction to avoid absurd and unjust interpretations of the law, surely they are amply present in the circumstances of persons facing legal sanctions without legal recourse.

3. **Notice Requirements Not Yet “Prescribed”**

The authority of OW to recover overpayments administratively under section 21 of the Act is based on the premise that a notice has been given under subsection 21(1), which states that an enforceable notice of overpayment “shall” set out the “prescribed information”. Under the principles of statutory interpretation, largely codified in the Ontario Interpretation Act, the word *shall* must be construed as being “imperative” rather than simply “permissive”. The OWA defines the word *prescribed* to mean “prescribed by the regulations”. In other words, a section 21 notice must contain information that has been prescribed by regulation under that specific section of the Act.

Although specific regulation-making authority exists in the legislation, the minister has yet to promulgate any regulations at all under section 21.

The OW position in some jurisdictions is that the notice requirements set out in subsection 67(2) of the General Regulation are sufficient for the purposes of a section 21 overpayment notice. However, subsection 67(2) sets out the requirements for a notice given under subsection 67(1), which provides that a “notice under section 24 of the Act shall be in writing and shall be delivered to the applicant or recipient personally or by prepaid regular mail to the individual’s last known address” [emphasis added]. Section 67 refers only to the notice requirements under section 24 of the Act and says nothing at all about the requirements for a valid overpayment notice under section 21.

While the language of section 21 does not formally require the delivery agent to provide a recipient with an overpayment notice, the practice, as we know, is that delivery agents send out overpayment notices every day. Indeed, there are no compelling arguments against doing so. In doing so, the notices OW sends out must “set out the amount of the overpayment and the prescribed information concerning the decision” [emphasis added].

The explicit requirement that a section 21 notice contain “the prescribed information” reveals the legislature’s clear intention that the notice to be provided under section 21 would be substantially different from notices given under other parts of the Act. The

---

62. *Interpretation Act, supra* note 38 at s. 29(2).
63. OWA, s. 2.
65. O. Reg. 134/98 am. to O. Reg. 137/05.
66. See OWA s. 24; O. Reg. 137/05, ss. 67(2), 71(2).
simple uncontested fact that former recipients have no right of appeal from overpay-
ments assessed against them after they stopped receiving benefits is surely proof
enough that overpayment notices provided to current recipients have no meaningful
application to former ones. At very least, it presents a question: How does a notice
advising a former recipient that he or she may file an internal review request and
thereafter an appeal, *when he or she has no such rights*, be considered even notionally
sufficient in such cases?

In the absence of a Regulation prescribing the information to be contained in a section
21 notice, an OW administrator arguably cannot issue such a notice, and any notice
purportedly issued under section 21 is invalid. That being the case, there are only two
overpayment-recovery methods still available to the administrator under the *Act*:

(1) recovery from ongoing benefits, in the case of present recipients; and

(2) recovery by way of civil proceedings, in the case of former recipients.

This position is amply supported by recent case law in a variety of legislative contexts.
For example, in *Society of Composers, Authors and Music Publishers of Canada v. Canada*
(*Copyright Board*) (1993), the Federal Court of Canada held that the Copyright
Board could not make directions by procedural orders rather than by regulation when
it was specifically authorized to make them by regulation.

Likewise, in *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), the
Federal Court held that Crown corporations were exempt from general assessment
requirements under the *Canadian Environmental Assessment Act* as the statute pro-
vided that assessments were to be done in accordance with regulations, and no
regulations had yet been made.

Finally, in *[SMC Pneumatics (Canada) Ltd. v. Canada (Minister of National Reve-
nue—M.N.R.)]* (1999), the Federal Court refused to allow a taxpayer refund on the
basis that the form of the refund application had not yet been prescribed.

Authority for the contrary proposition may be found in *Re Welland Forge Ltd. and
In that case, the Court of Appeal held that an employer could compel an employee to
attend a medical examination, even though workers' compensation legislation pro-
vided that an examination could be required only in accordance with the regulations,
and no regulations had been made. In his reasons to that effect, Brooke J.A. wrote,

*I do not agree with the conclusion of the Divisional Court that because no Regula-
tions have been passed thereunder the section must be construed as prohibiting a*

---

    (F.C.A.).
70. 27 O.R. (2d) 1 (Ont. C.A.) [*Welland Forge*].
medical examination of the employee at the instance of the employer ... Cases dealing with the effect of the absence of regulations where provision is made for their passing in specific sections under consideration really turn on giving effect to what appears to be the principal intention of the legislation.\textsuperscript{71}

While the \textit{Welland Forge} decision stands in stark opposition to the position asserted here, it has been cited in only one other decision since 1979 and, even then, not for the proposition quoted above.\textsuperscript{72}

Thus the preponderance of jurisprudence on the subject appears to support the position that where a statute calls for the promulgation of regulations that are never made, the particular enabling provisions become ineffective. It is therefore submitted that, absent the “prescribed information” required for an effective section 21 notice under the Act—\textit{i.e.} the information “prescribed by regulation”—no notice purportedly given under that provision is effective. That being the case, all extant section 21 notices are arguably ineffective. Far more certain is the patent insufficiency of any purported section 21 notice that fails to inform former recipients that, if the overpayment was assessed after they stopped receiving benefits, they have no right to appeal the decision to the SBT.

\section*{IV. The Appropriate Remedy: Civil Proceedings}

In practically any other context, the accepted principles and practices of debt recovery would require the debtor to be given fair notice of the debt and given a date by which the debt must be paid after which the applicable legal processes will be brought to bear. In private debt cases (between private individuals or individuals and businesses), creditors may retain collection agencies or legal counsel to recover the debt.\textsuperscript{73} In that event, the debtor’s first written notice of the debt may come in the form of a demand letter, a credit report, or a Statement of Claim. In any case, the private debtor receives written notice of the case he or she has to meet and, ultimately, able to put the creditor to the strict proof of the claim in a fair, public hearing before the courts.

Conversely, the \textit{Ontario Works} Act grants no such rights to overpaid former recipients who incur overpayments after they stop receiving benefits. No notion of fairness could possibly include circumstances of that kind. Thus, the only conceivably applicable method of overpayment recovery from former OW recipients is by way of civil proceedings under section 22.

\textsuperscript{71} \textit{Ibid.} at 7.  

\textsuperscript{72} \textit{Re Ontario Hydro \& Ontario Hydro Employees' Union, Local 1000, et al.} (1983), 41 O.R. (2d) 669 at 680 (C.A.). The only mention of the \textit{Welland Forge} decision was to find that it was “a case where it was held that the statute in questions, properly interpreted, did not apply to the issue before the board of arbitration.” Nowhere does \textit{Ontario Hydro} address the authority of government to act on the basis of legislation calling for regulations that were never made.  

\textsuperscript{73} Frank Bennet, \textit{Bennet on Collections} (Toronto: Carswell, 1998) at 1–2.
Section 22 of the OWA provides that: "The administrator may recover an overpayment as a debt due to the delivery agent in a court of competent jurisdiction, whether or not notice has been provided under section 21."\(^{74}\) In other words, if a person—any person, whether presently or formerly in receipt of OW benefits—incurs an overpayment, the administrator may sue that person in civil court to recover it. Unlike the notice provisions of section 21, there are no words of limitation in section 22 stipulating who may or may not be sued over an overpayment debt: the provision authorizes the administrator to "recover an overpayment" without reference to the overpaid person's present status with the program. Section 22 is the only overpayment recovery method in the Act not explicitly limited to current "recipients". Again, if the legislature had intended for section 21 to apply to former as well as current recipients, it could have explicitly so provided. Likewise, if the government had intended for section 22 to apply only to present "recipients", it could have specifically legislated to that effect. For good reasons, it chose not to: civil proceedings against a current recipient would make no practical sense, given the recovery methods available against "recipients" under sections 20 (reduction of basic financial assistance) and 21 (administrative overpayment recovery).

That being the case, section 22 was almost certainly intended as the method-of-choice for recovering overpayments from former recipients.

In other words, if civil proceedings look like the remedy reserved for recovering overpayments from former recipients, if no other remedy has any practical application to them, and if section 22 provides the only recovery method not expressly limited to current "recipients", how could section 22 be considered anything but the legislature's intended remedy against former recipients?

So long as OW's limitation period is preserved, overpaid former recipients can be sued in civil court. As Crown actions under the OWA are no longer subject to statutory limitation, the only limitation periods OW would need to protect are those for overpayments assessed prior to 1 January 2004 when the new Limitations Act came into force.\(^{75}\) If the action is successful and judgment issues for the administrator, OW would have the right to enforce by any of the various creditors' remedies available at law, including garnishment of income and the seizure and sale of real and personal property.\(^{76}\)

---

\(^{74}\) OWA, s. 22.

\(^{75}\) Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, proclaimed in force 1 January 2004 at s, 16. (1), which provides: "There is no limitation period in respect of ... (j) a proceeding described in subsection (2) that is brought by (i) the Crown, or (ii) a delivery agent under the Ontario Disability Support Program Act, 1997 or the Ontario Works Act, 1997 ..." Subsection 16.(2) of the Act provides that: "Clause (1) (j) applies to proceedings in respect of claims relating to, (a) the administration of social, health or economic programs; or (b) the provision of direct or indirect support to members of the public in connection with social, health or economic policy."

\(^{76}\) Execution Act, R.S.O. 1990, c. E.24, as am.
Otherwise, the common law rules of procedural fairness are clear:

At minimum, the doctrine of fairness requires that, before a decision adverse to a person's interests is made, the person should be told the case against him or her and be given an opportunity to respond. The purpose is twofold. First, the person to be affected is given an opportunity to defend the case or assert a claim. Second, by allowing that person to provide information the decision-maker is better able to make a rational and informed decision. A person is more willing to accept an adverse decision if the process has been fair [emphasis added]. 77

Administrative recovery under section 21 denies overpaid former recipients the "opportunity to respond" to the case against them, a right amply protected by civil proceedings under section 22. The primary rationale for OW's choice of administrative recover in favour of civil proceedings is the relative economic and administrative efficiency of the former as opposed to the slower and far more expensive processes engaged by the latter. The whole matrix of legal rules and established procedures surrounding the administration of social assistance in Ontario favours procedural fairness. The application of section 21 to former OW recipients pulls in the opposite direction, denying such persons even the cold comfort of fair procedures. That this should occur when fair procedures have already been prescribed by law and yield precisely the same (albeit costlier) results to the government only adds procedural insult to legal injury.

V. CONCLUSION: TWO WAYS FORWARD

Walter Lippmann once wrote of a "higher law" than the kind of bare procedural compliance born out by the "thin" or "narrow" concept of the rule of law, a law residing in the intuitive "denial that men may be arbitrary in human transactions". 78 In prose too stirring not to quote whole, Lippmann calls this higher law

the spiritual essence without which the letter of the law is nothing but the formal trappings of vested rights and the ceremonial disguise of caprice and willfulness. Constitutional restraints and bills of rights, the whole apparatus of responsible government and of an independent judiciary, the conception of due process of law in courts, in legislatures, among executives, are but the rough approximations by which men have sought to exorcise the devil of arbitrariness in human relations. Among a people which does not try to obey this higher law, no constitution is worth the paper it is written on; though they have all the forms of liberty, they will not enjoy its substance. The laws depend upon moral commitments which could never possibly be expressly stated in the laws themselves: upon a level of truthfulness in giving


testimony, of reasonableness in argument, of trust, confidence, and good faith in transactions; upon a mood of disinterestedness and justice, far above anything that the letter of the law demands. It is not enough that men should be as truthful as the laws against perjury require and as reasonable as the rules of evidence compel a clever lawyer to be. To maintain a constitutional order they must be much more truthful, reasonable, just, and honorable than the letter of the laws. There must be more than legal prohibition against arbitrariness, against overreaching, deception, and oppression. There must be an habitual, confirmed, and well-nigh intuitive dislike of arbitrariness; a quick sensiveness to its manifestations and a spontaneous disapproval and resistance. For only by adhering to this unwritten higher law can they make actual law effective or have criteria by which to reform it.

If the “broad” (substantive) and “narrow” (procedural) views of legality can ever be reconciled, it may lie in Lippmann’s simple acknowledgement that the rule of law provides only the skeletal framework for the deeper flesh-and-blood moral commitments of a free and democratic society. Of necessity, such commitments must include a sense of fair play that rejects the arbitrary exercise of public authority.

*Black’s Law Dictionary* defines *arbitrary* action as action “without fair, solid, and substantial cause; that is, without cause *based upon law*” [emphasis added].80 The Supreme Court of Canada has held that state action may be considered “prescribed by law” if it is *accessible* enough for the citizen to recognize it as a law to be followed and *precise* enough that he or she can actually follow it.81 The overpayment-recovery rules established under the *Ontario Works Act*, its regulations, and jurisprudence are both accessible and strikingly precise: administrative recovery may be pursued against “recipients,” persons “to whom basic financial assistance *is* provided” [emphasis

---

79. *Ibid.* Without some extra-legal ideal of justice, there could be no meaningful assertions about the justness or injustice of particular acts or rules of behaviour. As C.S. Lewis observed in his *Case for Christianity* (New York: McMillan, 1943) at 5, “Whenever you find a man who says he doesn’t believe in a real Right or Wrong, you will find the same man going back on this a moment later. He may break his promise to you, but if you try breaking one to him he’ll be complaining ‘It’s not fair’ before you can say Jack Robinson. A nation may say treaties don’t matter; but then, next minute, they spoil their case by saying that the particular treaty they want to break was an unfair one. But if treaties don’t matter, and if there’s no such things as Right and Wrong ... what is the difference between a fair treaty and an unfair one?”


81. Pete Hogg, *Constitutional Law of Canada: 1999 Student Edition* (Toronto: Carswell, 1999) at 724. On this point, Professor Hogg notes, “As to accessibility, the Court has held that a statute, a regulation or a rule of common law will qualify. On the other hand, directives and guidelines which, although issued by government departments or agencies, fall outside the class of officially published delegated legislation, will probably not qualify. As to precision, the Supreme Court of Canada has held that a limit on a right need not be express, but can result ‘of necessity from the terms of a statute or regulation or from its operating requirements.’” See also: *R. v. Therens*, [1985] 1 S.C.R. 613 at 645 (S.C.C.); *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573 (S.C.C.); *B.C.E.G.U. v. B.C.*, [1988] 2 S.C.R. 214; *Irwin Toy v. Que.*, [1989] 1 S.C.R. 927 at 981 (S.C.C.); and *R. v. Swain*, [1991] 1 S.C.R. 933 at 968 (S.C.C.)
added]. Former recipients, persons to whom assistance was provided, are nowhere mentioned in section 21. The overpayment notices issued to former recipients after they become former recipients cannot be those contemplated by the Act as they clearly contemplate rights and procedures having no application to former recipients, i.e. the right to request an Internal Review and, if necessary, appeal to the SBT. Finally, former recipients have no right of appeal from overpayment decisions issued after they stop receiving benefits. From a purely legal standpoint, this is totally unacceptable. From the vantage of Lippmann’s “higher law”, the prospect of society’s most vulnerable members being subjected to legal consequences without any accessible or precise legal basis and without legal recourse should shock the conscience of the community. In other words, this is not “merely” a legal or procedural problem. It is a moral one, but, mercifully, one with two readily available solutions: one relatively quick and inexpensive, the other rather more involved and far costlier than the first.

1. Legislation

The first and most logical solution would be for the Government of Ontario simply to amend the OWA and its regulations to allow for administrative recovery from former recipients.

Such amendments need not be extensive or take too much of the legislature’s time. Indeed, making section 21 applicable to former recipients may require little more than amending the Act’s definition of recipient to mean “a person to whom basic financial assistance is or has been provided”. Under that definition, former recipients could be issued valid section 21 notices speaking specifically to their rights and interests as persons whose overpayments were assessed after they ceased receiving benefits. More importantly though, such a definition would mean that former recipients would no longer be denied the basic procedural fairness of a right of appeal that they have been denied under the OWA and its predecessor legislation for more than twenty years.

With the Act’s definition of recipient amended to include former recipients, the remaining issues could easily be resolved by the minister finally making a regulation setting out the “prescribed information” under section 21. At minimum, such information should include the kind of notice prescribed under section 24, i.e. notice of the decision and the date it becomes effective; reasons for the decision; the fact that the former recipient must request an internal review if he or she wishes to appeal to the SBT; the time within which the internal review must be requested; and the time within which the former recipient may file an appeal to the Tribunal.

If the Act’s definition of recipient is not amended to include former recipients, then a valid section 21 notice would have to include a clear statement that the Social Benefits Tribunal has no jurisdiction over former recipients whose overpayments were assessed after they stopped receiving benefits. Failure to point this out to former recipients

82. OWA, s. 2.
83. Supra note 63, s. 67(1).
would amount to nothing less than the government telling former recipients they have a right of appeal when it knows (or certainly ought to know) that such is not the case. Again, the "higher law" of a just society requires more of government than bare procedural compliance. Its agents "must be more truthful, reasonable, just and honorable than the letter of the laws," a standard hardly met by misrepresenting the law and the rights it confers to former social assistance recipients.

2. Litigation

The longer and infinitely more expensive way to address these issues is by way of judicial review. As of this writing, the issue of whether OW may pursue administrative recovery from former recipients under section 21 has never been fully litigated and appears to have been the subject of litigation only once.

In District Municipality of Muskoka v. W., the local OW office sent the former recipient a letter advising that she had incurred an overpayment. The letter was not sent to the correct address so did not come to her attention until several months later. The former recipient requested an internal review of the overpayment decision, which was denied because requested later than ten days after the date of the notice. Given the train of SBT decisions cited above, it was extremely unlikely that the Tribunal would hear an appeal on the former recipient's behalf as she had stopped receiving benefits before the overpayment was assessed. The administrator filed a letter with the Superior Court of Justice, which then issued a Writ of Seizure and Sale directed to the local Sheriff's Office. The Writ was purportedly issued pursuant to the provisions of section 21(2) of the Ontario Works Act and the original overpayment notice sent to the former recipient the previous year. The former recipient brought a Motion for an Order setting aside the Writ and seeking costs. The grounds of the Motion were that the moving party was not a recipient when the overpayment notice was sent, that the notice did not contain the "prescribed information" required under section 21, and that she had been denied the opportunity to appeal the alleged overpayment. The matter was resolved by the administrator's withdrawal of its Writ against the former recipient.

The crux of the matter is the meaning of the term recipient and the SBT's jurisdiction to hear appeals from overpayments assessed after recipients stop receiving benefits. The thrust of this paper has been that recipient means a current recipient and that the SBT has no jurisdiction in such cases. But there are several legal and public policy arguments OW could make to the contrary, which may be summarized as follows:

One basic rule of statutory interpretation is that particular provisions should be interpreted in the context of the legislation's broader purposes and objectives. As the

84. Lippmann, supra note 76.
85. Motion filed on behalf of the former recipient by counsel at the Lake Country Community Legal Clinic on 28 June 2002 for a Motion returnable 29 July 2002. There is no reported decision in this case as it was resolved by way of withdrawal by the ministry.
Court of Appeal held in \textit{Welland Forge}, “Cases dealing with the effect of the absence of regulations where provision is made for their passing in specific sections under consideration really turn on giving effect to what appears to be the principal intention of the legislation.”\textsuperscript{86} Section 1 of the \textit{OWA} states that the purpose of the \textit{Act} is to establish a program that,

(a) recognizes individual responsibility and promotes self-reliance through employment;

(b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed;

(c) effectively serves people needing assistance; and

(d) is accountable to the taxpayers of Ontario.\textsuperscript{87}

Finding that former recipients have no right of appeal to the SBT means that their only remaining remedy is the far costlier and more time-consuming avenue of judicial review. In light of the \textit{Act}'s purposes, establishing a specialized tribunal and then removing matters within its expertise from its jurisdiction is hardly a “responsible” or “accountable” use of taxpayers’ money. Likewise, interpreting the \textit{Act} as requiring former recipients to seek relief through the courts when they could obtain the same relief through the quick and inexpensive processes of the Tribunal arguably does not “effectively serve people needing assistance”.

Then there is the double-edged sword of the \textit{Interpretation Act}'s principle of the law “always speaking” and matters expressed in the present tense being applied to particular circumstances as they arise.”\textsuperscript{88} Present tense language is a convention of legislative drafting. The ministry could argue that the \textit{Act}'s present tense definition of \textit{recipient} does not necessarily mean that one must be a current recipient when an overpayment is assessed for there to be a right of appeal to the SBT. If the law is “always speaking” and “to be applied to the circumstances as they arise”, then it must be applicable for all purposes authorized under the legislation. The clear legislative intent of section 21 is to facilitate overpayment recovery from OW recipients, and it would arguably defeat the intent of the section if section 21 applied only to current recipients. While the preponderance of case law appears to support the writer’s view on this point,\textsuperscript{89} there

\begin{itemize}
\item \textsuperscript{86.} \textit{Welland Forge}, supra note 68.
\item \textsuperscript{87.} \textit{OWA}, s. 1.
\item \textsuperscript{88.} \textit{Interpretation Act}, supra note 38, s. 4.
\end{itemize}
is arguably a substantial public interest in facilitating the government's recovery of overpayments from former recipients by means of the quick and inexpensive procedures set out in section 21.

Further, the general appeal rights provided in section 26 of the Act are tied to either "eligibility for" or "the amount of" a person's entitlement and, arguably, do not preclude appeals by former recipients. Therefore, an argument could be made that all overpayment assessments have retroactive effect on "the amount of" the entitlement and a potential effect on "eligibility for" or "the amount of" future benefits. In that light, the Act appears to contemplate application to "former recipients", despite its present tense definition of recipient.

Finally, the Act specifically lists a variety of decisions that cannot be appealed to the Tribunal. If the Government of Ontario had intended to include "decisions respecting overpayments declared after the recipient ceased receiving benefits" in that list, it could have explicitly done so. It did not. Likewise, the minister could have made a regulation prescribing that there was to be no right of appeal from overpayment decisions made against former recipients. As neither of these steps has been taken, OW could argue that the legislature intended the SBT to have jurisdiction over overpayment appeals by former recipients. That notwithstanding, if such an intention is not clear on the face of the legislation, then it is arguably ambiguous and, by the rules of statutory interpretation, ambiguous provisions should be resolved in favour of the individual. On that basis, the Act should be interpreted as extending rights of appeal to former, as well as current, recipients. On the other hand, if section 21 is ambiguous (which it is not), then surely resolving that ambiguity in favour of the individual would mean prohibiting administrative recovery from former recipients.

All of this is only to highlight some of the substantial legal and public policy issues in dispute and the extent to which their judicial determination could bring needed clarity to the law of social assistance in Ontario.

90. OWA, s. 26(2) provides that "No appeal lies to the Tribunal with respect to the following matters: 1. A decision with respect to employment assistance that does not affect eligibility for or the amount of income assistance or a mandatory benefit; 2. A decision respecting discretionary benefits; 3. A decision of the Lieutenant Governor in Council respecting assistance in exceptional circumstances; 4. A decision to provide a portion of basic financial assistance directly to a third party; 5. A decision made under subsection 17(2) to appoint a person to act on behalf of a recipient; 6. A variation, refusal or cancellation of assistance caused by an amendment to this Act or the regulations; 7. A decision respecting emergency assistance; 8. A prescribed decision."

91. Section 68(1) of the General Regulation, supra note 63 provides that "For the purpose of paragraph 8 of subsection 26 (2) of the Act, the following are prescribed decisions: 1. A decision of the administrator not to extend the time as set out in subsection 69 (3). 2. A decision to refuse, suspend or cancel basic financial assistance or to reduce basic financial assistance on the death of a member of the benefit unit."

The government of a free society acts according to the letter and spirit of its own laws. In this case, the letter of the Ontario Works Act is that OW may pursue administrative recovery only from a “recipient,” a person to whom basic financial assistance is provided, i.e. from current recipients. The spirit of the law requires that anyone against whom the government renders an adverse decision should have the opportunity to dispute the decision and be heard on appeal. But the way this law has been framed, interpreted, and applied for decades leads inexorably to the conclusion that overpaid former OW recipients have no standing before the Tribunal and, therefore, no right of appeal (notwithstanding what they may have been told in the overpayment notice). The government of a free and democratic society does not make up the rules as it goes for the sake of administrative efficiency or its own convenience. To be sure, one of the four aspirations of the Act is to establish a program that is “accountable to the taxpayers of Ontario”, which, of necessity, requires prudent fiscal management and good stewardship of public funds. As John Ralston Saul observed in his Doubter’s Companion,

It would be foolish to waste time and money unnecessarily. On the other hand, what is necessary? What unnecessary? The question that must be asked about efficiency is whether it should be treated as a driving force in a civilization or even in a society or even in an economy. Or is it no more than one of those useful little tools which can help us all to do better if it is used appropriately93

The inherently inefficient avenue of judicial review can easily be avoided. Of the OWA’s four stated objectives in section 1, “effectively serving persons needing assistance” comes third. Accountability to the taxpayers of Ontario comes fourth. By addressing the obvious gaps and inconsistencies in the legislation, the Government of Ontario has a golden opportunity to demonstrate that the priority of the Act’s objectives was not coincidental and that, at very least, the needs of Ontarians and the rule of law do not come last.

VI. AFTERWORD: RAYS OF HOPE?
Just as this article went to press, new decisions came to the writer’s attention in which two separate SBT members found that the Tribunal did, in fact, have jurisdiction to hear overpayment appeals by former recipients who had stopped receiving assistance by the time their overpayments were assessed. The line of reasoning in both decisions was strikingly similar. In SBT 0312-09645,94 Member Roberta Corey invoked the principle of the Interpretation Act that the “law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning”;95 in support of the conclusion that

94. SBT 0312-09645 (2005).
95. Supra note 39.
any reference to applicant or recipient not only includes those persons who met the
definition at the date that the OW Act was passed, but also future applicants or
recipients and those who become former applicants or recipient [sic] at some time
in the future, because "recipient" should be interpreted as "always speaking."
The Respondent [OW Administrator] could argue that its interpretation of the
overpayment powers in the OW Act and the Tribunal’s jurisdiction to consider
overpayment decisions in the present circumstances is further bolstered by its read-
ing of Section 21 of the OW Act for two reasons:

Section 21 would, in the absence of the right of a former recipient to appeal, abro-
gate his or her right to a hearing of the merits of the assessment in any forum, which
is a clear departure from the rationale in the Reichstein decision; that this section
allows the enforcement of the overpayment against a former recipient as if it were
an order of the court and therefore removes the right of that former recipient to
contest the overpayment and as such is a denial of natural justice.

The Tribunal disagrees with this assertion . . . [citing OWA, s. 21]

Section 21(2) makes it clear that an overpayment decision *is only enforceable against*
the recipient as if it were an order of the Ontario Court *if the time for appeal has
expired and if no appeal has been commenced* [emphasis added by the Tribunal).

Clearly, if no right to appeal exists for those who are no longer recipients, then these
sections are inapplicable and this enforcement of the overpayment cannot be under-
taken in the manner set out in this section of the Act.

The right to appeal the decision to impose an overpayment is a condition precedent
to the enforcement of that overpayment as if it were “an order of the Ontario
Court.”

Any overpayment would then have to be enforced in another forum, and the former
recipient would retain the opportunity to contest it on the merits as was pointed out
in the Reichstein decision.

Section, Section 21 of the OW Act as noted above, clearly contemplated an appeal
from a decision to assess an overpayment when it sets out that the Administrator
may give a recipient written notice of a determination that an overpayment exists
and goes on to allow for a declaration of an overpayment and subsequent enforce-
ment of it as if it was a court order if, “the time for commencing an appeal to the
Tribunal has expired; and no appeal has been commenced” [emphasis added by the
Tribunal].

The Tribunal notes that to find otherwise would effectively foreclose on a portion of
the essential bundle of rights and responsibilities that guide the affairs of both those
individuals who seek help within the ambit of the Act and those who are charged
with administering its provisions.

Simply put, to deny those who are no longer recipients of benefits access to the
Appeal proceedings contained in the Act flies in the face of the very intention of the
legislation and imposes on those persons the added and unintended burden of
seeking their remedies elsewhere.

The Tribunal finds therefore that it has jurisdiction to consider an appeal in circum-
stances where an Appellant had been assessed an overpayment at a time when he or
she is not longer a recipient of social assistance.
The Member recognizes that this decision runs against the current of a number of decisions of the Tribunal on the matter. In doing so it wishes to state that the decision arises in large measure as a result of the cogent arguments advanced by a senior counsel for the Respondent in support of this position at a previous Hearing, and not from some jurisdictional flight of fancy.

The second decision, SBT 0411-0819596 (dated 3 August 2005), involved an overpayment appeal under the ODSPA and followed substantially similar logic to Member Corey’s in SBT 0312-09645.

While these decisions reflect rays of hope to the extent that decision makers are now recognizing the gaps and inconsistencies in their controlling legislation, it changes nothing in terms of the state of the law of social assistance in Ontario. Social Benefits Tribunal decisions are not binding, even on the decisions of other Tribunal members. Moreover, it is by no means clear that the decisions to assume jurisdiction in these two cases were firmly grounded in the legislation as it is written. A “recipient” (“a person to whom basic financial assistance is provided . . .”) is not a former recipient (one to whom assistance was provided), and a finding of SBT jurisdiction over appeals of this kind not only “runs against the current a number of decisions of the Tribunal on the matter”. It runs against every other decision of the SBT and SARB on this point. In these two decisions, the Interpretation Act has been applied in order to extend the appeal rights afforded to present recipients to former recipients. But if the law must be construed as “always speaking”, then the question remains: When does the law “speak” in the case of a former recipient whose overpayment was assessed after he or she stopped receiving benefits? Was it when the overpayment was assessed, in which case he or she arguably does not have the rights of a “recipient” under the Act? Or was it when he or she appealed the overpayment decision? As noted above, the Interpretation Act can be applied two ways, with respectable public policy support for both positions. The question, therefore, remains open to either the legislature or the Court of Ontario to resolve in a clear and legally binding way.

96.  SBT 0411-08195 (2005). In this case, Member Brownlee also fleshed out some of the substantial differences between the language of the Family Benefits Act, under which the impugned overpayment had been assessed, and the applicable ODSPA legislation. Oddly enough, Member Brownlee appears to have used language identical to that used by Member Corey above in parts of his reasoning on the jurisdictional issue.