

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Embalmers and Funeral Directors) v. Curry*,
2024 NSCA 93

Date: 20241113

Docket: CA 525783

Registry: Halifax

Between:

Nova Scotia Board of Registration of
Embalmers and Funeral Directors

Appellant

v.

Joseph Curry

Respondent

Judge: The Honourable Justice Cindy Bourgeois

Appeal Heard: September 25, 2024, in Sydney, Nova Scotia

Subject: Statutory appeal – absence of statutory duty –
discretionary costs quantum

Cases Cited: *Curry v. The Nova Scotia Board of Registration of
Embalmers and Funeral Directors*, 2023 NSSC 95;
*Canada (Minister of Citizenship and Immigration) v.
Vavilov*, 2019 SCC 65; *Curry v. The Nova Scotia Board
of Registration of Embalmers and Funeral Directors*,
2023 NSSC 178; *Nova Scotia Health Authority v.
Finkle and West*, 2024 NSCA 87; *Link v. Link*, 2022
NSCA 14; *Fraser v. MacIntosh*, 2024 NSCA 85;
Housen v. Nikolaisen, [2002] 2 S.C.R. 235; *H.L. v.
Canada (Attorney General)*, [2005] 1 S.C.R. 401.

Statutes Cited: *Embalmers and Funeral Directors Act*, R.S.N.S., 1989,
c. 144; *Tariff C of Civil Procedure Rule 77*.

Facts: A funeral director at Forest Haven Memorial Gardens
cremated human remains based on instructions from the
deceased's family. The remains were mislabelled by the

Nova Scotia Medical Examiner's office, leading to the cremation of the wrong remains. The funeral director did not independently verify the identity of the remains before cremation (para's [1-3](#)).

Procedural History: *Curry v. The Nova Scotia Board of Registration of Embalmers and Funeral Directors*, 2023 NSSC 95: The court found that the Board erred in law by concluding the funeral director breached the *Embalmers and Funeral Directors Act* and set aside the revocation of his licence (para [5](#)).

Parties Submissions: Appellant (Nova Scotia Board of Registration of Embalmers and Funeral Directors): Argued that the hearing judge erred in interpreting the *EFDA*, finding the Board's reasons insufficient, and awarding excessive costs to the funeral director. They sought reinstatement of their original decision (para [6](#)).

Respondent (Joseph Curry): Argued that he was not obligated to identify the remains as they were already identified by the Medical Examiner, and he was not responsible for the misidentification (para [16](#)).

Legal Issues: (1) Did the hearing judge err in law by concluding the funeral director was not under a statutory duty to identify the remains prior to cremation? (para [20](#)).

(2) Did the hearing judge err in terms of the quantum of costs awarded to the funeral director? (para [20](#)).

Disposition: The appeal was dismissed with costs awarded to the funeral director.

Reasons: Per Bourgeois J.A. (Wood, C.J.N.S. and Bryson, J.A. concurring): The Court found that section 32C(1) of the *EFDA* did not impose a statutory duty on the funeral director to verify the identity of the remains before cremation. The provision applies to holders of a funeral home license, not funeral directors. (para's 25-30). The information guideline issued by Service Nova Scotia did not support the Board's interpretation of section 32C(1) as imposing such a duty on the funeral director

(para's 25-31). The hearing judge's award of costs was within his discretion, and the Board failed to demonstrate any error of law or patent injustice in the award. (para's [34-36](#)).

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Appellant

v.

Joseph Curry

Respondent

Judges: Wood, C.J.N.S., Bryson and Bourgeois, J.J.A.

Appeal Heard: September 25, 2024, in Sydney, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of
Bourgeois, J.A.; Wood, C.J.N.S. and Bryson, J.A. concurring

Counsel: Sean MacDonald, for the appellant
Stephen Jamael, for the respondent

Reasons for judgment:

[1] On December 13, 2021, Joseph Curry was a funeral director employed by Forest Haven Memorial Gardens (“Forest Haven”), a crematorium and funeral home. Mr. Curry was expecting human remains to be delivered for cremation based on instructions he received from the deceased’s family.

[2] As expected, remains were delivered to the funeral home. They were contained in a bag marked with a tamper-proof identification tag from the Nova Scotia Medical Examiner’s office. Mr. Curry proceeded to cremate the remains, as directed by the family. He did not open the bag to confirm the identification of the remains prior to cremation.

[3] Tragically, it was soon discovered the remains had been mislabelled by the Medical Examiner’s office, and were not the decedent Mr. Curry believed had been transported to the funeral home. The wrong remains had been cremated.

[4] Mr. Curry’s licensing body, the Nova Scotia Board of Registration of Embalmers and Funeral Directors (the “Board”) undertook an inquiry and determined that by failing to independently identify the remains and undertaking a “wrongful cremation”, Mr. Curry had breached the *Embalmers and Funeral Directors Act*, R.S.N.S., 1989, c. 144 as amended (the “*EFDA*”) and the Funeral Director’s Code of Professional Conduct. As a consequence, the Board permanently revoked Mr. Curry’s funeral director licence.

[5] Mr. Curry availed himself of the appeal provisions contained in the *EFDA*. His appeal was heard by Justice D. Timothy Gabriel on October 24, 2022. On March 15, 2023, the hearing judge rendered a decision in which he concluded the Board had erred in law when it found Mr. Curry had breached the *EFDA*. He further found the Board’s reasons were not sufficient to explain how Mr. Curry had breached the Code of Professional Conduct (2023 NSSC 95). The hearing judge set aside the Board’s decision and the revocation of Mr. Curry’s funeral director licence. In a subsequent decision, the hearing judge directed the Board to pay costs to Mr. Curry in the amount of \$3,000.

[6] The Board now appeals to this Court. It asserts the hearing judge erred in his interpretation of the *EFDA*, was wrong in finding the Board’s reasons to be insufficient and ordered an excessive amount of costs in favour of Mr. Curry. The

Board asks for its original decision to be reinstated. For the reasons that follow, I would dismiss the appeal.

Background

[7] As in the court below, the Board acknowledges the misidentification of the remains occurred well before the delivery to Forest Haven. Both parties agreed, and the hearing judge found, the misidentification had resulted from an error at the Medical Examiner's office.

[8] The remains were released by the Medical Examiner's officer to a third-party transport service, which relied upon the identification label to deliver them to Forest Haven. Mr. Curry relied upon the identification label affixed by the Medical Examiner's office. The Board argued below, and again before this Court, that Mr. Curry had an obligation to identify the remains beyond merely relying upon the identification provided by the Medical Examiner's office.

[9] On December 20, 2021, the Board issued a Notice of Inquiry to Mr. Curry. It provided:

The Nova Scotia Board of Registration of Embalmers and Funeral Directors (hereafter, "the Board") has been notified that a wrongful cremation occurred at Forest Haven Memorial Gardens on December 13, 2021. The cremation was completed by you, Joseph Curry, **in your capacity as a licensed funeral director**. As such, you are hereby notified that, having received allegations of non-compliance with the *Embalmers and Funeral Directors Act* ("EFDA"), Embalmers and Funeral Directors Regulations, and subsequent contravention of the Code of Professional Misconduct, the Board will be holding an inquiry into these allegations pursuant to Section 23 of the *Embalmers and Funeral Directors Act*, R.S.N.S. 1989, c. 144. Further information regarding these allegations is set out below.

(Emphasis added)

[10] As noted above, the Board brought the inquiry pursuant to s. 23 of the *EFDA*, which includes:

Suspension or revocation of licence of embalmer, apprentice or director

23 (1) Subject to the regulations, the Board may, after due inquiry, suspend or revoke the licence of an embalmer, an apprentice embalmer, a funeral director or an apprentice funeral director where at least four members of the Board find that the embalmer, apprentice embalmer, funeral director or apprentice funeral director has been guilty of non-compliance with this Act, the regulations

or the by-laws or any misrepresentation, negligence, professional misconduct or fraud.

(2) Any person whose licence is suspended or revoked may appeal to a judge of the Supreme Court within three months from the date of the suspension or revocation, or such extended time as a judge of the Supreme Court thinks reasonable and the judge, upon hearing the appeal, may make such order either confirming, amending or setting aside the suspension or revocation or for further inquiries by the Board into the facts of the case and as to costs, as to the judge seems right.

[11] In the Notice of Inquiry, the Board referenced s. 32C(1) and (2) of the *EFDA* which state:

Duties of funeral home licence holder

32C (1) Every person who holds a **funeral home licence**¹ shall

(a) ensure that human remains are labelled at all times while in the custody of the funeral home and while being transported to the funeral home, regardless whether the remains are being transported by a third-party transport service;

(b) ensure that every person transporting human remains is satisfied as to the identity of the remains at the time of initial pickup and at delivery to the intended destination; and

(c) create and follow a documented standardized process to ensure that human remains and cremated remains are continuously identified, from when the remains are picked up by a third-party transport service or are received by the funeral home and until the remains are released to the next of kin.

(2) Every person who holds a **funeral home licence** is responsible for ensuring that every person transporting human remains to the funeral home complies with the requirements set out in the regulations.

(Emphasis added)

[12] Relying on the above provisions, the Board advised Mr. Curry the inquiry would address two allegations:

- 1.) That you did not follow proper procedures and did not confirm the identity of human remains prior to cremation
- 2.) That you cremated the wrong deceased person as a result of your failure to confirm the identification and maintain chain of custody procedures

¹ As will be discussed later, Mr. Curry did not hold a “funeral home licence”.

[13] The Board also advised that several provisions of the Code of Professional Conduct were relevant to the circumstances of the complaint. It wrote:

Upon a thorough review of the complaint and the supporting documentation provided, the following sections of the Code of Professional Conduct are applicable to the allegation documentation:

- 1.) treat deceased persons with dignity and respect.
- 2.) To only demonstrate conduct to the benefit of public trust.
- 5.) provide services while adhering to strict standards of public health and personal safety.
- 6.) To, at all times, maintain the highest standards of the funeral profession and carry out all professional obligations to owners and employers.
- 8.) To abide by all provincial legislation respecting my profession.
- 10.) To be respectful of fellow colleagues and to adhere to sound business practices and the promotion of fair competition.
- 13.) provide an option for the family of a deceased person in their custody to identify the human remains if requested by the family or next of kin.

[14] The inquiry hearing was held on January 7, 2022, at which time Mr. Curry provided information and was questioned by Board members. On February 11, 2022, the Board released its Notice of Decision. Several aspects of the Board's decision are notable:

- The purpose of the inquiry was identified as follows:
 - . . .The purpose of this Inquiry is to ascertain whether Joseph Curry exercised due diligence in identifying a patient whose cremation was arranged with Forest Haven Memorial Gardens, **as referenced in Section 32(C) of the EFDA**, and if the wrong patient was cremated because of Mr. Curry's failure to confirm the identification and maintain chain of custody procedures.
- The entirety of the Board's analysis was contained in three paragraphs:

Funeral directors and embalmers are entrusted with a special responsibility to look after families during their time of need. These families can be vulnerable while grieving, and funeral directors and embalmers are expected to act in a manner that lends dignity to the profession and ensures that families are treated in a respectful and dignified manner. Although he has no previous infractions, his actions resulted in an irreversible outcome. Funeral Homes are required to create and maintain a documented, standardized process, and licensees are expected to follow this process to ensure wrongful cremations do not occur.

Compliance with the Code of Professional Conduct requires that licensees, at all times, maintain the highest standards of the profession, demonstrate conduct that is both honest and to the benefit of public trust, and be respectful of fellow colleagues. Mr. Curry's actions do not demonstrate dignity and respect for the patient that was wrongfully cremated or their family. The act of wrongful cremation by a funeral director does not encourage public trust, maintain the highest standards, nor do these actions lend dignity to the profession. By wrongfully cremating a patient, **Mr. Curry did not abide by the provincial legislation** or sound business practices, and because a wrongful cremation occurred, the family's right to view their loved one was removed.

Mr. Curry's communication with the Board of Registration throughout his testimony during the inquiry demonstrated a misunderstanding of the Board's duty to investigate wrongdoing, as he was critical of the Notice of Inquiry issued, the Board's role and authority, and the term wrongdoing as it applies to these allegations.

- The Board found Mr. Curry had contravened the sections of the Code of Professional Conduct set out in the Notice of Inquiry.
- The Board reached two additional conclusions:
 - 1). The actions of Joseph Curry demonstrate that **he is guilty of non-compliance with the EFDA**, and professional misconduct in relation to his failure to verify identity of a patient prior to cremation. Such actions, or failure to act, has led to the wrongdoing by Joseph Curry.
 - 2). It would not be in the public interest to allow Joseph Curry to continue to practice as a licensed funeral director in the Province of Nova Scotia. Personal or professional conduct of a licensee that creates mistrust within the profession and does not inspire confidence or trust in the public cannot be allowed to continue with respect to Mr. Curry and his license status.

(Emphasis added)

[15] Mr. Curry launched an appeal of the revocation of his licence pursuant to s. 23(2) of the *EFDA* which provides:

23 (2) Any person whose licence is suspended or revoked may appeal to a judge of the Supreme Court within three months from the date of the suspension or revocation, or such extended time as a judge of the Supreme Court thinks reasonable and the judge, upon hearing the appeal, may make such order either confirming, amending or setting aside the suspension or revocation or for further inquiries by the Board into the facts of the case and as to costs, as to the judge seems right.

[16] To summarize, his position on the statutory appeal was that he was under no obligation to identify the remains as they had been previously identified by the Medical Examiner. Further, although tragic, he was not responsible for the misidentification and resulting cremation of the wrong deceased. He followed all necessary steps and the Board erred in concluding otherwise.

[17] The hearing judge determined:

- Because the *EFDA* provides a statutory right to appeal, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 directs the normal appellate standards of review apply in assessing the Board's decision;
- Section 32C(1) of the *EFDA* did not impose a statutory burden on Mr. Curry to personally verify the identity of the body before cremation;
- Contrary to the Board's assertion, an "informational guideline" published by Service Nova Scotia following amendments to the *EFDA* in 2018 did not support the imposition of a duty on Mr. Curry to identify or verify the identification of the body before cremation;
- The Board erred when it ruled the *EFDA* imposed a positive duty on Mr. Curry after receiving the remains, to make his own identification or to verify the earlier identification undertaken by the Medical Examiner; and
- The Board failed to give sufficient reasons in support of its conclusion that Mr. Curry failed to fulfil the various Professional Standards referenced in its decision.

[18] In a subsequent decision (2023 NSSC 178), the hearing judge directed the Board pay costs to Mr. Curry in the amount of \$3,000.

Issues

[19] In its Notice of Appeal, the Board set out the following grounds of appeal:

- (1) The Court committed an error of law in determining that there was no obligation on the Respondent to identify remains before cremation;
- (2) The Court committed an error of law in determining that the Appellant failed to give sufficient reasons in its revocation of the Respondent's license (*sic*); and
- (3) The Court committed an error of law in awarding costs to the Respondent in an amount that was excessive.

[20] After having considered the record and the arguments advanced by the parties, I am satisfied the appeal can be resolved by addressing the first and third issues above. I would, however, reframe them as follows:

1. Did the hearing judge err in law by concluding Mr. Curry was not under a statutory duty to identify the remains prior to cremation?
2. Did the hearing judge err in terms of the quantum of costs he awarded to Mr. Curry?

Standard of Review

[21] It is important to note that this Court is not hearing an appeal from a judicial review, rather an appeal from a statutory appeal. The hearing judge following *Vavilov* applied the appellate standard of review to assess the Board's decision. We should, in turn, apply the same standard in assessing his conclusions.

[22] In *Nova Scotia Health Authority v. Finkle and West*, 2024 NSCA 87, Justice Fichaud explained:

[58] On an appeal from a decision of a judge, the appellate standard is correctness for an issue of law, including an extractable legal issue from a conclusion of mixed fact and law, and palpable and overriding error for a finding of fact or mixed fact and law with no extractable legal issue. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 8, 10, 19-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, paras. 65 and 69.

[23] The hearing judge's interpretation of the *EFDA* is a question of law, and as such, will be reviewed for correctness.

[24] However, an award of costs is a discretionary decision attracting deference from this Court. We will not interfere unless a clear error of law can be demonstrated or the award results in a patent injustice (*Link v. Link*, 2022 NSCA 14 at para. 41; *Fraser v. MacIntosh*, 2024 NSCA 85 at para. 14).

Analysis

Did the hearing judge err in law by concluding Mr. Curry was not under a statutory duty to identify the remains prior to cremation?

[25] The Board anchored its conclusion that Mr. Curry had a duty to independently verify the identity of the deceased in s. 32C(1) of the *EFDA*. For the reasons expressed by the hearing judge, I am of the view that provision does

not create any such obligation. Further, I agree with the hearing judge's conclusion that the "informational guideline" issued by Service Nova Scotia does not support the Board's interpretation of s. 32C(1), nor does it serve as an independent source of such a duty.

[26] I am further satisfied that in addition to the hearing judge's conclusion regarding the content of the duty in s.32C(1), there is another fundamental reason the Board's appeal must fail. Simply, the provision it asserts placed an obligation on Mr. Curry to independently verify the remains does not apply to him. I will explain.

[27] Section 32C(1) applies specifically to the holders of "a funeral home licence". For ease of reference, I set it out again:

Duties of funeral home licence holder

- 32C (1)** Every person who holds a **funeral home licence** shall
- (a) ensure that human remains are labelled at all times while in the custody of the funeral home and while being transported to the funeral home, regardless whether the remains are being transported by a third-party transport service;
 - (b) ensure that every person transporting human remains is satisfied as to the identity of the remains at the time of initial pickup and at delivery to the intended destination; and
 - (c) create and follow a documented standardized process to ensure that human remains and cremated remains are continuously identified, from when the remains are picked up by a third-party transport service or are received by the funeral home and until the remains are released to the next of kin.
- (2)** Every person who holds a **funeral home licence** is responsible for ensuring that every person transporting human remains to the funeral home complies with the requirements set out in the regulations.

(Emphasis added)

[28] As noted earlier, Mr. Curry does not hold a funeral home licence, rather, he holds a funeral director licence. At the appeal hearing, the parties were asked to address whether the Board erred in applying the obligations contained in s. 32C(1) to Mr. Curry.

[29] The Board acknowledged it had contemplated the wording of the provision but in reaching its conclusion Mr. Curry had breached that section, it had

interpreted the holder of a “funeral home licence” as including the holder of a funeral director licence.

[30] With respect, the Board’s interpretation of s. 32C(1) as being applicable to licenced funeral directors is wanting. The statutory scheme of the *EFDA* demonstrates a clear legislative intention that funeral homes and funeral directors are different entities and are to be treated accordingly. In so concluding, I note:

- The *EFDA* specifically defines a “funeral director” and a “funeral home” separately in s. 2(d) and (e) respectively, evincing an intention that the terms are not legislatively interchangeable;
- The *EFDA* provides for separate licensing of funeral directors (ss. 16 and 22) and funeral homes (ss. 26 and 27), again demonstrating they are legislatively distinct; and
- Similarly, the *EFDA* provides differing processes for the revocation of licences of funeral directors (s. 23 as set out earlier herein) and funeral homes (s. 29).

[31] In addition to the above, the “informational guideline” the Board asserts demonstrates Mr. Curry, as a funeral director, was under an obligation to independently verify the identity of the remains, simply does not support that proposition. It is directed at funeral homes and crematoriums, and provides:

Service Nova Scotia (SNS) is committed to protecting public interest when funeral merchandise and services are purchased. To address concerns regarding the funeral industry, SNS is introducing more stringent and transparent rules for **funeral homes and crematoriums**. ...Funeral professionals will be notified when these amendments take effect later this fall.

(Emphasis added)

[32] Regarding obligations surrounding the “Identification and Transfer of Human Remains” the “informational guideline” notes:

To create a seamless identification system, amendments require **funeral homes and crematoriums** to label human remains as soon as they are taken into custody. This includes cases where third party transfer services are the first point of contact.

Amendments also require **funeral homes and crematoriums** use a standardized process to document and identify remains from the time they are received until they are released to the next of kin.

Funeral homes will be able to choose a label and standardized process that works best for them. Labels must be legible and firmly attached to the human remains. The standardized process used by the **funeral home** must ensure that human remains are identified and documented while in the custody of the **funeral home**.

(Emphasis added)

[33] The Board's reliance on s. 32C(1) as a means of anchoring a finding that Mr. Curry had breached his statutory obligations as a funeral director, was misplaced. The intent of that section is to articulate the obligations of funeral homes. It has no application to holders of funeral director licences. The Board erred in law in finding Mr. Curry breached a provision that did not apply to him.

Did the hearing judge err in terms of the quantum of costs he awarded to Mr. Curry?

[34] As referenced earlier, the hearing judge awarded costs of \$3,000 in favour of Mr. Curry. The hearing judge applied Tariff C of *Civil Procedure Rule 77*. In doing so he identified the length of the hearing as being "more than 1 hour but less than ½ day", and set a base amount of costs of \$1,000. After considering the complexity of the matter, the importance of the matter to the parties, and the amount of effort involved in preparing for and conducting the matter, the hearing judge applied a multiplier of 3.

[35] On appeal the Board does not take issue with the application of Tariff C. Rather, it argues the hearing judge erred by applying a multiplier of 3. The Board references another decision, longer and more complex than the present one, where a multiplier of 2 was applied. It says this demonstrates error on the hearing judge's part. I disagree.

[36] The awarding of costs is discretionary. We only interfere where an appellant demonstrates an error of law or the award is patently unjust. Here, the Board has demonstrated neither. The hearing judge identified the correct Tariff and considered the appropriate elements contained therein. Because a judge in another matter applied the factors differently does not establish this judge erred. Further, the quantum awarded, \$3,000, falls far short of being patently unjust.

Conclusion

[37] For the reasons stated above I would dismiss the appeal. Mr. Curry is entitled to costs as the successful party.

[38] I would have proposed costs payable by the Board in the amount of \$2,500 inclusive of disbursements. However, Mr. Curry's counsel did not file his factum on the date directed by the Court. This necessitated follow-up by the Court and additional work for the Board's counsel. In light of this, I would reduce the costs payable by the Board to Mr. Curry to \$2,000 inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Wood, C.J.N.S.

Bryson, J.A.