SUPREME COURT OF NOVA SCOTIA
Citation: Baron v. Nova Scotia (Community Services), 2009 NSSC 122

Date: 20090417
Docket: Hfx No. 293850
Registry: Halifax

Between:

Judith Baron

Applicant

and

Minister of Community Services (N.S.)

Respondent

Judge:	The Honourable Justice John D. Murphy
Heard:	October 1, 2008, in Halifax, Nova Scotia *Special Chambers*
Final Written Submissions:	October 17, 2008
Counsel:	Claire McNeil, for the applicant Terry D. Potter, for the respondent

By the Court:

INTRODUCTION

[1] Ms. Baron applied to the Department of Community Services to cover the cost of dentures, which she required for medical reasons, as a special needs request. The request was denied, and this denial was affirmed on an internal ministerial

appeal. The Applicant appealed to the Assistance Appeal Board. According to the Appeal Board's decision, dated February 23, 2006, the Applicant submitted that her problems had been present for at least two years; that she needed $4,500.00 "up front" for the dentures; that she could not afford to pay this amount; that she had pain and mental problems in relation to the jaw problem, and was on "a lot of medications, which is very costly." The Department's position was that the need for assistance was established, but that the request was not covered by the Dental Assistance Plan. The Board concluded:

> **Finding of Facts**
>
> Caseworker has followed through extensively with the procedure and client is most grateful for her assistance. Unfortunately, according to the Act, I am denying the appeal. Judith has asked for assistance from MSI Letter included, which was sent.
>
> **Reasons** (Quote relevant sections of Employment Support and Income Assistance Act, regulations or Policy and indicate how they relate to the issues and the facts.)
>
> Regulation cpt 10, Policy – section 11
>
> Policy Dental Coverage Provision is very clear and does not cover the request.

[2] Ms. Baron did not seek judicial review of the Appeal Board's 2006 decision. About 16 months later, having obtained legal advice, she submitted another request to the Department. Cole Webber of Dalhousie Legal Aid wrote to the Department on the Applicant's behalf on July 18, 2007, asking that the Department "reconsider its decision not to grant this item of special need." In response, in a letter dated August 13, 2007, Terry D. Potter, counsel for the Department advised that:

> [t]his request has already been fully dealt with.... [M]y client made a decision on this request. The decision was subjected to the appeals process and there was no judicial review of the appeal decision. The matter has been decided and another decision is not warranted.

The Department's position amounts to invocation of the doctrine of *res judicata*.

[3] The Department denied a request for an appeal hearing with respect to Mr. Potter's letter. In an undated letter to Mr. Webber, Carmen L. LeBlanc, Co-ordinator of Appeals for the Department, wrote that:

> [t]he Board made a decision on February 23, 2006, this decision is binding and I do not believe that the Department has made a new decision that warrants an appeal process.

[4] Ms. Baron asks this Court for a *certiorari* order, quashing the Minister's decision to refuse to process the special needs request advanced in 2007, and for a *mandamus* order requiring the Minister or the Minister's agents to provide a decision on that request, and, if the request is refused, to observe statutory appeal requirements. The Applicant submits that the Appeal Board was denied the opportunity to render a decision on the issue of *res judicata* by the refusal of agents of the Department to consider her 2007 request or her appeal.

RES JUDICATA

[5] The Supreme Court of Canada has held that *res judicata*, including the aspect known as issue estoppel, which is relevant in this proceeding, applies in administrative proceedings. In **Danyluk v. Ainsworth Technologies Inc.**, [2001] 2 S.C.R. 460, the Court said, at paras. 20-21 (some citations omitted):

> The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation.... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel)....
>
> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

The Court went on to discuss issue estoppel at paras. 22 and 24-25:

> The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* .... Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (S.C.C.), [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.
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> ***
>
> ... Dickson J. (later C.J.), speaking for the majority in *[Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248] at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> The preconditions to the operation of issue estoppel were set out by Dickson J. in **Angle**, *supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[6] The factors set out by Dickson J. are preconditions. Their presence does not mean that issue estoppel automatically applies. The court retains a discretion as to whether issue estoppel applies. In **Danyluk** the Court said, at para. 33 (citations omitted):

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied....

[7] This discretion is wider in the case of decisions by administrative tribunals, as the Court in **Danyluk** discussed at para.62:

> The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, 1983 CanLII 19 (S.C.C.), [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

[8] In **Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Wright**, [2006] N.S.J. No. 336 (C.A.), ("**Wright**") the Court of Appeal addressed the exercise of discretion. Cromwell J.A. said, at para.68:

> The Supreme Court of Canada has provided seven factors as part of an open ended range of considerations: *Danyluk* at para. 67. They are:
>
> (i) the wording of the statute from which the power to issue the administrative order derives
>
> (ii) the purpose of the legislation
>
> (iii) the availability of an appeal
>
> (iv) the safeguards available to the parties in the administrative procedure, including issues concerning natural justice
>
> (v) the expertise of the administrative decision maker
>
> (vi) the circumstances giving rise to the prior administrative proceedings

(vii) the potential injustice

THE LEGISLATIVE SCHEME

[9] The purpose of the *Employment Support and Income Assistance Act* ("E.S.I.A.A." or "the Act") is to "provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency" (s.2). The basic principles of assistance are set out at section 7:

> 7 (1) Subject to this Act and the regulations, the Minister shall furnish assistance to all persons in need.
>
> (2) Persons assisting the Minister in the administration of this Act shall
>
> (a) receive applications for assistance; and
>
> (b) in accordance with this Act and the regulations,
>
> (i) determine whether the applicant is eligible to receive assistance,
>
> (ii) determine the amount of financial assistance the applicant is eligible to receive,
>
> (iii) determine the other forms of assistance available that would benefit the applicant,
>
> (iv) advise the applicant of the amount of financial assistance that will be provided, the other forms of assistance that will be available for the applicant and the conditions to be met to ensure the continuation of the assistance provided,
>
> (v) advise the applicant that the applicant has the right to appeal determinations made pursuant to this Act, and
>
> (vi) from time to time review the assistance provided to a recipient, and in particular whether any conditions imposed have been met, and promptly advise the recipient of any changes in eligibility and of the right to appeal the change.

The Applicant submits that the use of the word “shall” in s.7 indicates that the Minister and the Minister’s agents have no discretion in those areas identified in that section.

[10] Section 12 of the Act deals with appeals to the Minister and the setting down of appeals before assistance appeal boards. It provides, in part:

> 12 (1) Any person who has applied for or who has received assistance pursuant to this Act may appeal any decision related to the person's application or assistance received.
>
> ***
>
> (3) An appeal may be filed with the Minister at any time within thirty days after the decision complained of is communicated to the applicant or person who received assistance.
>
> (4) The Minister shall review the appeal and, within ten days after the receipt of an appeal, advise the person appealing whether the decision complained of is upheld, varied or reversed, and the reasons for upholding or changing the decision.
>
> (5) Within ten days after receipt of the notice pursuant to subsection (4), the person appealing shall advise the Minister whether the person will continue the appeal and, where the appeal is not continued, the decision set out in the notice is deemed to be satisfactory.
>
> (6) Where the appeal is continued, the appeal shall be set down for hearing before an appeal board.

[11] The powers and duties of assistance appeal boards are described at s.13:

> 13 (1) An appeal board shall hear an appeal in camera, permitting access only to a representative of the Minister, the appellant, the appellant's counsel or agent and such other persons as the board may determine.
>
> (2) The board shall determine the facts and whether the decision made, on the basis of the facts found by the board, is in compliance with this Act and the regulations.

> (3) Where the board determines that the decision is contrary to this Act and the regulations, the board shall vary or reverse the decision in accordance with this Act and the regulations.
>
> (4) A decision of the board shall contain the facts found by the board, a statement of the issue in the appeal, the applicable provisions of this Act and the regulations and a statement of the reasons for the board's decision.

[12] Ms. Baron says the use of the word “shall” in describing the obligations of the Minister and the Board in responding to a Notice of Appeal indicates that they have no discretion in determining whether an appeal will proceed. The Applicant says there is no indication in the legislation of any limitation on an appeal board’s power to rehear or to reconsider issues or appeals, or to rehear subsequent appeals of the same matter.

ANALYSIS

[13] The Respondent’s position is that Ms. Baron requested a “reconsideration” of the original decision, while offering no new information or documentation in support of the request. There is, as the Respondent points out, no legislative basis for the Department to reconsider a decision. The Respondent adds that the legislative requirements for a “special need” application were not met, and maintains that there was no new information upon which the Department could make a decision. The proper course for the Applicant, the Respondent says, was to obtain new medical documentation and reapply. If the Court determines that the Department was required to make a decision based on the reconsideration request, the Respondent says *res judicata* applies and the Appeal Board had no jurisdiction to rehear the matter.

[14] Ms. Baron submits that *res judicata* is not appropriate in the context of requests for assistance under the E.S.I.A.A. which arise in circumstances “where the potential outcomes of a wrong decision may result in homelessness and starvation.” The interests at stake, it is submitted, require “a high level of judicial scrutiny and a high standard of procedural and substantive fairness by the board,” given that the issues involved affect the necessities of life. The Applicant describes the scheme of the Act as a continuing and dynamic relationship, with ongoing responsibilities and obligations, between the person in need and the Department. The Applicant submits that changes in circumstances, or (as allegedly in this case) a lack of change

or improvement, indicate the need for review and adjustment in order to respond to the person's need over time. The dynamic nature of the relationship, it is submitted, is demonstrated by the eligibility review process, which permits the Department to conduct reviews "from time to time" and requires it to advise of eligibility changes, with a right of appeal of such changes. The Applicant contrasts the "ongoing and dynamic" situation as between the assistance recipient and the Department with the discrete transactions and finality of litigation that is allegedly epitomized by *res judicata*.

[15] It is difficult to accept Ms. Baron's argument that a person seeking special needs benefits under the Act has the right to make new applications (which her counsel maintained, in response to a question posed during the hearing, should be unrestricted) with no change in circumstances, and to pursue appeal board proceedings if those applications are rejected. The legislation does not provide any entitlement to a "reconsideration" of a decision by the Department. In this case, it does not appear to be disputed that there had been no change in the Applicant's circumstances when Mr. Webber requested that the Department "reconsider" the original decision.

[16] The phrases "*res judicata*" and "issue estoppel" were not raised in the correspondence among Mr. Webber, Mr. Potter and Ms. LeBlanc, previously quoted in paras.2 and 3, although Mr. Potter's words made it clear that the Department's position was that the request had been "fully dealt with..." and Ms. LeBlanc maintained that the Department had made no new decision to warrant an appeal process. These comments amount to an assertion of *res judicata*. I will review the elements of issue estoppel as they relate to Ms. Baron's situation.

Issue Estoppel - Elements

(Preconditions identified in Angle (*supra*) and recognized in Danyluk (*supra*))

[17] ***Same parties*** According to the Applicant, agents of the Minister refused to deal with her second application or to refer it to the Appeal Board. Had the matter proceeded, the same parties would have been involved.

[18] ***Same question*** The Applicant submits that the Appeal Board failed to decide the issue before it, which was whether the Applicant was entitled to assistance for

obtaining dentures as a special needs expense. According to the Applicant, the board's reasons were "utterly indecipherable and provide no insight on what issue they thought they were deciding, or their reasons for decision." Nevertheless, Ms. Baron has not provided any information to suggest that the request she made in 2007 differed from what she had sought in 2006.

[19] ***Finality*** The February 2006 Appeal Board decision was subject to judicial review, but the Applicant did not seek this remedy. As such, the decision would stand as final between the parties.

[20] I conclude that the three criteria or the preconditions to operation of issue estoppel have been met, and that I must determine whether the principle should be applied based on discretionary factors.

Issue Estoppel

Discretionary factors (as enumerated in Wright (*supra*))

[21] Ms. Baron's position, which the Respondent refutes in each instance, may be summarized as follows with respect to discretionary considerations relevant to this case.

[22] ***Potential Injustice*** The Applicant takes the position that *res judicata* bars access to justice, and argues that the result of applying the doctrine might be to put more pressure on judicial resources by causing increased numbers of judicial review applications of Appeal Board decisions in which *res judicata* was relied upon. Further, the Applicant submits that the nature of proceedings before the Board (for instance, the lack of a record and the holding of hearings *in camera*) suggests that less importance should be attributed to considerations of consistency or of avoiding inconsistent decisions than would be the case with court proceedings. Also, as noted above, the Applicant contends that the "dynamic and ongoing relationship" between the Department and an assistance recipient distinguishes the situation from traditional court litigation. Rather, the Applicant submits, preventing injustice is a strong reason to reject the operation of issue estoppel.

[23] ***Wording of the statute; availability of appeal*** The Act provides for an appeal of "any decision related to the person's application or assistance received" (s. 12(1)). The Minister is required to review the appeal and advise the appellant

whether the decision is upheld; if so, the appellant has the option of continuing the appeal. If it is continued, "the appeal shall be set down for hearing before an appeal board" (ss. 12(4)-(6)). The Applicant says the right of appeal and the non-discretionary duties imposed upon the Minister "implicitly authorizes the board to hear and rehear matters."

[24] ***Purpose of the legislation*** Section 2 provides that "[t]he purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency." According to the Applicant, the potentially serious consequences of an error "in relation to needs necessary to human survival" support an emphasis on "the pursuit of justice" over the concern with wasting resources.

[25] ***Safeguards to the parties; natural justice*** The Applicant points out that the procedural safeguards before the Board are minimal; there is little or no provision for disclosure, legal advice for assistance recipients, recording of hearings or other such matters. As such, the Applicant submits, concerns about wasting resources have diminished significance in this context.

[26] ***Expertise of the decision makers*** The legislation does not impose any requirement for special expertise for Board members, including legal expertise. The Applicant submits that decisions on legal issues such as *res judicata* would therefore be vulnerable to judicial review, and that application of *res judicata* in this context might lead to increased requests for judicial review.

[27] ***The circumstances giving rise to the administrative proceeding*** Ms. Baron says there are significant concerns about the reliability of the appeal decision. She submits that the interests at stake and the "damage to human dignity caused by a wrong decision in the context of access to food, housing and health care" indicate that further Board review should be available. The Applicant submits that her illness has not abated and that she has no other means of having these needs met. As such, she says, two appeals in two years is not excessive.

[28] The discretionary factors do not, in my view, justify interfering with the conclusion that Ms. Baron's request was *res judicata,* when the essential elements or preconditions of issue estoppel were met. An order in the nature of *mandamus* is not warranted.

Note on form of 2007 Request

During oral submissions, Respondent's counsel requested that *res judicata* in this case not be determined on the narrow basis that Ms. Baron's 2007 request was for "reconsideration" and not a new application for special needs assistance. The disposition of this application would not be different if the second request had taken the form of a new application without a change in circumstances, instead of a request to reconsider the 2006 decision. Application of *res judicata* principles depends upon whether the requisite elements or preconditions are present as a matter of substance, not form, and the discretionary factors which must be applied in the circumstances of each case are unlikely to be resolved based only on technicality or application format.

CONCLUSION

[29] I am satisfied that the elements of issue estoppel are met in this case, and that Ms. Baron's 2007 request was *res judicata*, having been previously decided on identical facts and law. Discretionary factors do not justify setting this result aside. The Application for *certiorari* and *mandamus* orders is therefore dismissed.

[30] Given the relationship between the parties, and the Applicant's circumstances, I make no order as to costs.

J.