SUPREME COURT OF NOVA SCOTIA
Citation: Campbell v. Nova Scotia (Community Services), 2009 NSSC 176

Date: 20090603
Docket: Hfx No. 272059
Registry: Halifax

Between:

Sally Elizabeth Campbell

Applicant

and

Minister of Community Services

Respondent

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

By the Court:

INTRODUCTION and BACKGROUND

[1] Ms. Campbell applied to the Department of Community Services for "special needs" assistance to pay for medical marijuana, which was recommended by her doctor. The Department denied her request. The Assistance Appeal Board (the "Board") affirmed the denial in a decision dated August 18, 2005. The Board

cited s.2(ab)(ii) of the *Employment Support and Income Assistance Regulations*, which provides:

> (ab) "special need" means a need for
>
> > (ii) another item or service that is in the opinion of a caseworker essential for an applicant, recipient, spouse or dependent child,
>
> but does not include an item or service that is insured under Provincial insured health services programs or otherwise funded by government

[2] The Board stated that the test under s.2(ab)(ii) was in two parts:

> The first test is that an item must be found to be essential and the second test is that the items must not be otherwise funded by government. Both parts of the test must be satisfied.

The Board concluded that the Applicant's condition had been made tolerable by other measures described in a letter from her doctor, and stated that:

> [t]his letter also indicated that she would benefit from a regular exercise purpose [*sic*] which has not been undertaken. It is for these reasons that the Board has denied her appeal....

Although the Board did not specifically state that medical marihuana was not "essential" for the Applicant, it is clear that finding was a key element of its decision, in view of the statements to the effect that other treatments had made her condition tolerable.

[3] The Applicant subsequently provided the Department with another note from her doctor, Dr. W.R. Vitale, dated November 23, 2005, which included the statement that medical marijuana:

> ..has proven essential to her health and well-being. It reproducably relieves her symptoms of pain and nausea, and paradoxically (counter to expectations) also improves her concentration, focus and energy level. Please consider appropriate funding in her budget to obtain marijuana from a commercial or government supplier of medical marijuana.

[4] The Department did not change its conclusion and Ms. Campbell appealed to the Board. In a second decision dated April 7, 2006, the Board stated that:

> ..it is evident that the appellant is ill, suffers from her illness and the in gestation [*sic*] of marihuana seems to alleviate her suffering to some degree. But, based only on Ms. Campbell's evidence and the vague and unchallenged 23 NOV 05 letter of Dr. Vitale ... I am not convinced that the use of medical marijuana is 'essential' to Ms. Campbell. In my view, the test fails as does the appeal.

[5] The Applicant has applied for judicial review of the Board's April 2006 Decision. A preliminary issue is whether the second Board had jurisdiction to hear the appeal, or whether *res judicata* barred the Board from hearing the matter. This decision deals with that preliminary issue.

STANDARD OF REVIEW

[6] Ms. Campbell submits that the standard of review with respect to the issue of *res judicata* is correctness. The Board did not rule on operation of *res judicata*, which was raised by the judge who adjourned the hearing when the judicial review application first came before this Court. The Applicant submits that by considering the second appeal and rendering a decision, the Board implicitly held that *res judicata* did not prevent it from proceeding. Arguing that *res judicata* is a matter of jurisdiction, the Respondent says the parties could not give the Board jurisdiction by consent.

[7] In **Dunsmuir v. New Brunswick**, [2008] 1 S.C.R. 190; 2008 SCC 9, while formulating a new analysis for determining the standard of review of administrative decisions, Bastarache and LeBel JJ. (for the majority) said, at paras.59-60:

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*.... It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.... These questions will be narrow.

> We reiterate the caution of Dickson J. in [*Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227] that reviewing judges must not brand as jurisdictional issues that are doubtfully so.
>
> [60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" ([*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, 2003 SCC 63], at para. 62, per LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, per Arbour J.).

Assuming that the question of *res judicata* is a proper one for the Court to consider, I am satisfied that the standard of review of any question of *res judicata* would be correctness, whether it is regarded as a matter of jurisdiction or as a matter of "general law" as described in **Dunsmuir**.

RES JUDICATA

[8] The Supreme Court of Canada discussed the *res judicata* principle in **Toronto (City) v. C.U.P.E., Local 79**, [2003] 3 S.C.R. 77, 2003 SCC 63. Arbour J., for the majority, said, at para.50:

> ... A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue.... Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

[9] The Supreme Court has held that *res judicata* may apply in administrative matters. 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 LEGISLATIVE SCHEME

[10] The purpose of the *Employment Support and Income Assistance Act* ("E.S.I.A.A.") 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.

Ms. Campbell 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 section 7.

[11] Section 12 of E.S.I.A.A. addresses appeals and 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.

[12] The powers and duties of 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.

The Applicant 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. She says there is no indication in the legislation of any limitation on the Board’s power to rehear or to reconsider issues or appeals, or to rehear subsequent appeals of the same matter.

ANALYSIS

[13] The Respondent takes the position that the issue of “special needs” coverage for the medical marijuana requested by the Applicant was *res judicata* when it was heard by the second Appeal Board. While the issue of *res judicata* was not raised on that appeal, the Respondent submits (without citing authority or responding to an invitation to do so post-hearing) that *res judicata* is a matter of jurisdiction. The Respondent seeks a finding that *res judicata* applies generally to decisions of the Assistance Appeal Board.

[14] The Applicant submits that *res judicata* is not appropriate 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 an ongoing and dynamic relationship, with

continuing responsibilities and obligations, between the person in need and the Department. The Applicant submits that changes in circumstances, or (as alleged 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 (E.S.I.A.A, s.7(2)(b)(vi)). Ms. Campbell contrasts the "ongoing and dynamic" situation as between the assistance recipient and the Department with the discrete transactions and finality of litigation that is epitomized by *res judicata*.

[15] The respondent cites the test for issue estoppel set out in **Angle v. Minister of National Revenue**, [1975] 2 S.C.R. 248 and repeated in **Danyluk**:

> (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.

It must be noted, however, that these factors are preconditions. Their presence does not mean that issue estoppel automatically 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....

[16] 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.

[17] In the present case, I have concluded that it is not appropriate for this Court to make a finding as to whether *res judicata* (i.e. issue estoppel) applied to the second application and appeal hearing. It would be open to the Board to apply *res judicata* to an appeal, but it did not address the issue in this case. Even if *res judicata* has been considered, the Board would have possessed a discretion to decline to apply it. In these circumstances, this Court should not impose a finding of *res judicata* at the judicial review stage.

CONCLUSION

[18] There is no basis upon which to make a finding that the matter was *res judicata* before the second Appeal Board. As such, the judicial review proceeding may continue.

[19] Because *res judicata* was raised by the Court and found not to be a basis to determine the outcome of the Application, no costs are awarded with respect to this aspect of the proceeding.

J.