

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Fortis, 2005 NSSC 125

Date: 20050526

Docket: SH 227010

Registry: Halifax

Between:

Fortis Benefits Insurance Company, a body corporate

Applicant

v.

Her Majesty the Queen in Right of the Province of Nova Scotia,
as represented by the Registrar of Cemetery and Funeral Services

Respondent

DECISION

(Application for Declaration)

Judge: The Honourable Justice John D. Murphy

Heard: January 26, 2005, in Halifax, Nova Scotia

Counsel: Karen A. Fitzner and Daniel W. Ingersoll, for the
Applicant
Johnathan T. Kenyon, for the Respondent

By the Court:

INTRODUCTION

[1] Fortis Benefits Insurance Company seeks a declaration that neither the **Embalmers and Funeral Directors Act**, R.S.N.S. 1989, c.144 (“**E.F.D.A.**”) nor the **Cemetery and Funeral Services Act**, R.S.N.S. 1989, c.62 (“**C.F.S.A.**”) prohibits insurance agents from marketing an insurance product in funeral homes in Nova Scotia. Fortis also requests that a directive issued by the Registrar appointed pursuant to those Acts be declared *ultra vires*.

[2] The Respondent opposes the Application, submitting that the **E.F.D.A.** and **N.S. Reg. 66/204** made thereunder (“**E.F.D. Regulations**”) prescribe activities, not including insurance sales, which may be carried out in funeral homes, and prohibit Fortis from conducting its business in those locations. The Respondent maintains that the Registrar acted within his authority.

FACTS

[3] The relevant facts are contained in the affidavit of Francois Genest, Senior Vice-President and Canadian C.E.O. of the Applicant, and are not disputed by the Respondent.

[4] Fortis, an insurance company incorporated under the laws of Minnesota, U.S.A. and registered to do business in Nova Scotia and all other provinces of Canada, sells annuities and insurance to individuals to address funeral, cemetery and other final expenses, including payment of outstanding credit card balances and other debts. Its products may also be used to cover future expenses for surviving children and spouses. Fortis sells from funeral home premises in every Canadian province except Nova Scotia.

[5] The Respondent, represented by the Minister of Consumer Affairs, regulates embalmers and funeral directors as well as cemeteries and funeral services. The same persons hold the offices of Registrar and Deputy Registrar under the **E.F.D.A.** and **C.F.S.A.**

[6] Since 2001, during meetings and in correspondence with Fortis and funeral home operators, the Respondent has taken the position that only “funeral merchandise or services” can be sold in funeral homes. The Respondent maintains that the definition of “funeral merchandise or services” in the **E.F.D.A. Regulations** limits activities that can occur in Nova Scotia funeral homes, and any part of buildings in which they are located, so that insurance agents or representatives may not operate from or meet with consumers in those premises.

[7] The Respondent provided directions to funeral home operators respecting their involvement in the promotion and sale of funeral cost insurance in an Information Bulletin dated April 7th, 2003. The “Information Bulletin” includes the following:

Funeral home personnel are permitted to provide a consumer with an estimate of the cost of selected funeral goods and services that the consumer may wish to purchase insurance to cover.

Funeral home personnel may provide a consumer with the name and contact information for an insurance agent or representative who sells funeral cost

insurance. The insurance agent or representative may not operate from the funeral home or any part of the building in which the funeral home is located, or meet with the consumer at the funeral home.

Funeral home personnel may provide a consumer with a brochure and a self-completing application form for a funeral costs insurance product which the consumer may take away with him/her to study and complete. Funeral home personnel must not provide any assistance to the customer in interpreting insurance information, in making application for any insurance product, or by taking the customer's payment for their insurance. Funeral home personnel may not accept payment in any form for directing consumers to funeral cost insurance products. Under the *Insurance Act*, only licensed insurance agents are permitted to receive compensation from the sale of insurance.

Funeral home personnel may wish to inform consumers considering funeral costs insurance that insurance products are not covered by the protections for pre-arranged funeral plans in the *Cemetery and Funeral Services Act*, and that the insurance is not monitored by Service Nova Scotia and Municipal Relations as are pre-arranged funeral plan trust funds.

Funeral homes should not release to sellers of insurance any information that identifies who has purchased pre-arranged funeral plans. Such disclosure, without prior consent from the consumer, would be in violation of an individual's protection of privacy rights. (emphasis added)

[8] The **C.F.S.A.** permits sale of pre-arranged funeral plans under license, and they are offered by funeral home operators. The Applicant says that it should not be prohibited from selling insurance products in funeral homes, when sale of pre-arranged funeral plans is permitted in those premises. The Respondent maintains that the products differ, with pre-arranged funeral service plan sales being regulated by **C.F.S.A.** terms and conditions, while funeral cost insurance products are not addressed in legislation governing funeral homes.

[9] Fortis requests a declaration:

- (a) that neither the **E.F.D.A.** nor the **C.F.S.A.** prohibits insurance agents from offering insurance products within funeral homes; and
- (b) that the directive issued by the Registrar in the Information Bulletin was *ultra vires*; or
- (c) in the alternative, that the legislation does not prohibit funeral directors from providing

administrative functions assisting consumers with their selection of final expenses products (including insurance), or, with consent of persons who have purchased pre-arranged funeral plans, from providing their names to the Applicant.

ISSUES

[10] The issues raised by the Application are as follows:

1. Does the Application raise proper subject matter for a Declaration?
2. Does either the **E.F.D.A.** or the **C.F.S.A.** prohibit insurance agents from offering insurance products at funeral homes?
3. Is the directive contained in the Information Bulletin *ultra vires* the Registrar?
4. Is Fortis entitled to alternative relief?

ISSUE #1 - APPLICATION FOR A DECLARATION

[11] The parties are in agreement that the matter proceed by way of Application for Declaration to the extent the issues involve a dispute with respect to proper interpretation of legislation and determination whether Fortis has a legal right to sell insurance products to consumers at funeral homes. The process is supported by the authorities, which establish that interpretation of statutory provisions, determination of the *vires* of government action, and defining parties' legal rights, are proper matters for declaratory judgment. (See Blake, Administrative Law in Canada, (3rd ed.), Butterworths at p.205; Jones and de Villiers, Principles of Administrative Law (4th ed.) 2004 Thompson Carswell at page 692; **Mitchell v. Nova Scotia Minister of Education** (1990), 104 N.S.R. (2d) 322 (N.S.S.C.); **Sydney Precision v. Cape Breton** (2003), 219 N.S.R. (2d) 129 (N.S.S.C.); and **Bedford Service Commission v. N. S. (A.G.)** (1976), 18 N.S.R. (2d) 132 (N.S.S.C.A.D.).

[12] The Respondent disputes that a declaration can be an appropriate remedy with respect to Fortis' alternative submissions that the **E.F.D.A.** and **C.F.S.A.** do not prohibit funeral directors from providing administrative functions in assisting consumers with selection of final expense products (including insurance), or from releasing, with their consent, the identity of persons who have purchased

pre-arranged funeral plans. The Respondent maintains that those issues are not in dispute, because the Registrar, on the Respondent's behalf, has set out in the Information Bulletin the administrative functions which can be performed by funeral homes.

[13] In my view the Information Bulletin does not resolve the first issue raised by the alternative claim; although the bulletin outlines administrative functions which funeral homes may perform, a dispute remains whether funeral homes are prohibited from undertaking additional functions which the Registrar indicates the legislation does not allow, particularly whether funeral home personnel may assist customers in making application for insurance products. In light of the foregoing authorities, the Court may indicate by declaration whether the legislation limits administrative functions which funeral directors can perform to the extent set out by the Registrar in the Information Bulletin.

[14] I am unable to determine that a dispute exists between the parties concerning release to insurance vendors of information identifying pre-arranged funeral plan purchasers. That alternative claim appears to relate to provision of lists "with the consent of residents of Nova Scotia who have purchased pre-arranged funeral plans" (Genest affidavit, para.19(d)), while the Information Bulletin, in the final paragraph quoted in paragraph number 7 of these reasons, appears to restrict disclosure "without prior consent of the consumer." As the parties seem to be in agreement that lists can be released, but only with the purchaser's consent, no basis to consider availability of declaratory relief with respect to release of lists has been established.

ISSUE #2 - DOES EITHER THE E.F.D.A. OR C.F.S.A. PROHIBIT INSURANCE AGENTS FROM OFFERING INSURANCE PRODUCTS AT A FUNERAL HOME?
A. EMBALMERS AND FUNERAL SERVICES ACT AND REGULATIONS

[15] The relevant provisions of the **E.F.D.A.** and **E. F. D. Regulations** provide as follows:

(a) **E.F.D.A.**

s.2 In this Act,

- (e) 'funeral home' means an establishment or facility, by whatever name called, offering or providing funeral merchandise or services to the public;
- (h) "Minister" means the Minister of Consumer Affairs;
- (i) 'Registrar' means the Registrar of Embalmers and Funeral Directors;

4(1) The Director of Consumer Services under the *Consumer Services Act* is the Registrar of Embalmers and Funeral Directors.

(2) The Registrar has the functions and duties set out in this Act and the regulations and such other functions and duties as the Minister may determine.

33(1) The Governor in Council may make regulations

- (a) prescribing the functions and duties of the Registrar;
- (e) respecting the terms, conditions and restrictions upon which a funeral home license may be issued;
- (q) defining any word or expression used in this Act and not expressly defined herein;
- (r) generally, for the better carrying out of the provisions of the Act.

(b) E.F.D. Regulations

1(1) The Registrar shall, on behalf of the Board of Registration of Embalmers and Funeral Directors, administer the issuing of licenses for embalmers, apprentice embalmers and funeral directors.

17A For the purpose of clause 2(e) of the Act, 'funeral merchandise or services' means

- (a) the services offered or performed by a funeral director or embalmer incidental to the arrangements, care and preparation of human remains for burial, or other disposition;
- (b) the merchandise, articles or supplies used, offered for sale or sold directly to the public by the funeral director, in conjunction with services related to burial or other disposition.

- (c) the services offered or performed by a funeral director or embalmer incidental to the arrangements, care and preparation of human remains for cremation; or
- (d) the merchandise, articles or supplies used, offered for sale or sold directly to the public by the funeral director, in conjunction with services related to cremation, and

18(1) No building, other than a residence, monument display room, or a flower shop shall be attached to a funeral home.

[16] The parties agree that the Court should apply the “modern” approach to interpret the **E.F.D.A. and E.F.D. Regulations**, as endorsed by the Supreme Court of Canada in **Bell ExpressVu Partnership v. Rex**, [2002] 2 S.C.R. 559 and **Gylkris v. Hydro Quebec** (2004), S.C.C. 60, and applied by the Nova Scotia Court of Appeal in **Municipal Contracting Ltd. v. N.S. (A.G.)**, (2003), 211 N.S.R. (2d) 36. At paragraph 26 of **Bell ExpressVu**, Cory J. adopts the definition of the “modern” approach set out by Professor Driedger:

In Elmer Driedger’s definitive formulation, found at p.87 of his Construction of Statutes (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings.

[17] In **Municipal Contracting Ltd. v. N.S. (A.G.)**, supra, after reviewing the **Bell ExpressVu** decision, Bateman J.A. stated:

[94] Both s.9(5) of the *Interpretation Act* and the Supreme Court’s endorsement of the ‘modern’ approach invite the interpreter of legislation to look beyond the words alone to the object and spirit of the legislation...

[18] More recently, in **Gylkis v. Hydro Quebec**, supra, the Supreme Court of Canada reiterated as follows at paragraph 5:

The approach to statutory interpretation is well known (*Bell ExpressVu Limited Partnership v. Rex...*) A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words but also the scheme and object of the statute, and the intention of the legislature. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations.

[19] Fortis and the Respondent disagree concerning the result which should be obtained when the modern approach is followed in this case to analyze the scheme and object of the **E.F.D.A.** and the intention of the legislature. Although they concur that the scheme and object of the Act is to regulate and license embalmers, funeral directors and funeral homes, they disagree concerning the extent to which the legislation controls activity in funeral home premises. The parties provided extensive information concerning the history of the **E.F.D.A.**, including evolution of the relevant sections since the **Embalmers Act** was first introduced in Nova Scotia in 1912, as well as analysis of the legislative debates when the current provisions, including the definition of funeral home in Section 2(e), were adopted. Examination of the legislative history, including development of training and licensing requirements for embalmers and funeral directors, operational requirements for funeral homes, limits on advertising contained in the Act and Regulations, and provision for administration by the Minister of Consumer Affairs (now the Minister of Service Nova Scotia and Municipal Relations) indicates a primary object of the legislation to be consumer protection.

[20] Fortis maintains that absent legislative intent to prohibit insurance representatives at funeral homes, the **E.F.D.A.** and **E.F.D. Regulations** should not be interpreted to rule out their presence without an express statutory statement. It submits that the public protection aspect of the legislation relates to controlling the professional activities of funeral directors, but does not extend to governing insurance companies nor prohibiting insurance representatives from meeting consumers at funeral homes.

[21] Fortis suggests that because **E.F.D. Regulation 17A** defines “funeral merchandise or services” for “the purpose of clause 2(e) of the Act” (which defines “funeral homes”), Regulation 17A should not be interpreted as listing the only

activities allowed at a funeral home, or prohibiting other services or activities from occurring there. It maintains that if the legislature intended in the **E.F.D.A.** to prohibit offering of products other than “funeral merchandise or services” as defined, it could have done so, and that there is no authority under Section 33 of the **E.F.D.A.** to enact regulations to prohibit activities at a funeral home.

[22] In my view, the interpretation advanced by Fortis is not consistent with the legislation’s scheme and object of regulating funeral homes. Section 33(1)(e) of the **E.F.D.A.** gives the Governor in Council authority to prescribe conditions and restrictions upon which funeral home licenses may be issued, thereby authorizing limitation or prohibition of activities at funeral home establishments. The reference in Regulation 17A that the meaning of “funeral merchandise or services” is “for the purpose of clause 2(e) of the Act” does not limit its construction as Fortis contends. The definition of funeral home in Section 2(e) of the **E.F.D.A.**, amplified in Regulation 17A pursuant to authority in Section 33(1), including Subsections (q) and (r) of the Act, is as effective to define permitted activity as if the entire definition were contained in the Act itself. I do not accept Fortis’ contention that a prohibition cannot be contained in a regulation or in a definition section of the Act.

[23] I have concluded, based on a review of the entire Act and considering the intention of Parliament, that the definition of “funeral home” in Section 2(e) of the Act, and the limited description of funeral merchandise or services in Section 17A of the **E.F.D. Regulations** are exhaustive, and limit the activities permitted at funeral homes to those enumerated. The sale of insurance cannot be construed as related or incidental to the merchandise or services described in the legislation as offered or performed by funeral directors; it is not an activity prescribed to take place at funeral homes by the **E.F.D.A.** and **E.F.D. Regulations**.

[24] Fortis’ argument that Regulation 17A neither lists the only permitted activities at funeral homes nor forbids other services or activities is inconsistent with Section 18(1) of the **E.F.D. Regulations**, which prohibits attaching a building, other than a residence, monument display room, or flower shop to a funeral home. It would be meaningless if a business not allowed to operate in a building attached to a funeral home could circumvent the prohibition contained in Regulation 18(1) by operating inside the funeral home.

[25] The modern approach suggests that legislative provisions should be interpreted as complementary to, rather than inconsistent with, each other.

[26] In **Bell ExpressVu**, supra, the Supreme Court rejected the type of restrictive legislative interpretation Fortis advocates in this case, commenting as follows at paragraph 48:

In this context, one finds little support for the restrictive interpretation of s.9(1)(c). Indeed, as counsel for the Attorney General of Canada argued before us, after consideration of the Canadian broadcasting policy Parliament has chosen to adopt, one may legitimately wonder

Why would Parliament enact a provision like the restrictive interpretation? Why would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come [page 591] in and sweep all of that aside? What purpose would have been served?

On the other hand, the interpretation of s. 9(1)(c) that I have determined to result from the grammatical and ordinary sense of the provision accords well with the objectives set out in the Broadcasting Act.

[27] Similar questions would arise in this case, if the Applicant's submission were accepted. Why would the legislature adopt a licensing scheme limiting activities which could occur in a neighbouring building but not in the funeral home itself? Such an interpretation would be illogical and inconsistent with the legislative intent which is clear from the entire scheme of the Act. The consumer protection objective apparent from the direct prohibition respecting businesses attached to a funeral home set out in **E.F.D. Regulation 18(1)** strongly suggests that **E.F.D.A. Section 2(e)** and **Section 17A of the E.F.D. Regulations** should be construed as prescribing an exhaustive list of activities permitted in funeral homes.

[28] Fortis' suggestion that insurance sales are permitted in the absence of an express prohibition is not supportable - it would be impractical to require specific enumeration in a statute or regulation of every type of activity prohibited in a funeral home, or in any other establishment. In the context of the **E.F.D.A.** and **E.F.D. Regulations**, the absence of a provision specifically prohibiting the sale of insurance products in funeral homes is not fatal to the Respondent's position. The

definition of “funeral merchandise or services” in **Regulation** Section 17A, considered in the entire legislative scheme (particularly Sections 2(e) and 33 of the Act, and Regulation 18(1)) prescribes those activities which may take place at funeral homes - insurance sales are not included in or incidental to the activities authorized.

B. CEMETERIES AND FUNERAL SERVICES ACT

[29] The **C.F.S.A.** is consumer protection legislation which provides for licensing sellers of pre-arranged funeral plans (which are not insurance products such as those Fortis sells), pre-need cemetery plans, and cemetery lots, and also regulates agreements for the purchase of those products. The **C.F.S.A.** does not make any reference to insurance products, and does not address or authorize their sale. Fortis correctly states that the Act does not apply to insurance companies and does not prohibit the sale of insurance at funeral homes. However, the **C.F.S.A.** contains no provision inconsistent with the foregoing interpretation of the **E.F.D.A.**; on the contrary, by specifically defining “pre-arranged funeral planning” in Section 2(n) and providing in Section 7 for solicitation of approved plans under license, the **C.F.S.A.** suggests a legislative practice of enumerating and regulating approved activity.

ISSUE #3 - IS THE DIRECTIVE CONTAINED IN THE INFORMATION BULLETIN *ULTRA VIRES* THE REGISTRAR?

[30] Fortis’ position is that the directive, “The insurance agent or representative may not operate from the funeral home or any part of the building in which the funeral home is located or meet with the consumer at the funeral home...” is *ultra vires* the Registrar. The Applicant maintains that the **E.F.D.A.** and **E.F.D. Regulations** give the Registrar the primary role of keeping a register of licensed individuals and ensuring that licenses are issued to those meeting requirements and qualifications under the Act and Regulations, but that he has no authority over Fortis or the power to direct that insurance representatives may not operate out of funeral homes.

[31] I have determined that the sale of insurance is not allowed in funeral homes. Under the **E.F.D.A.** the Registrar is charged with the administration of licensing of embalmers, funeral directors and funeral homes. His responsibilities include

inspection of funeral homes for the purposes of issuing or renewing funeral home licenses (**E.F.D. Regulations** Section 19), and investigating complaints regarding non-compliance with the **E.F.D.A.** by licensees (**E.F.D.A.** Section 24). Although the Registrar may not have direct authority over the Applicant, he has authority over the licensing of funeral homes. The Information Bulletin was directed to funeral home operators. Providing advice to licensees concerning the conditions applicable to their licenses is within the scope of the Registrar's responsibilities under the **E.F.D.A.** The directive that an insurance agent or representative may not operate from within a funeral home is based upon a proper interpretation of the applicable legislation, and the Registrar did not exceed his authority by communicating that information.

ALTERNATIVE RELIEF

[32] The Registrar's authority under the **E.F.D.A.** includes determining whether funeral directors would, by providing administrative functions related to the sale of insurance products, go beyond providing "funeral merchandise or services" to the public, as contemplated by Section 2 of the **E.F.D.A.** and Section 17A of the **E.F.D. Regulations**. The directives contained in the Information Bulletin, including advice that funeral home personnel must not assist customers applying for insurance products, are not inconsistent with the proper interpretation of the applicable legislation. Fortis' alternative request for a declaration that nothing in the legislation prohibits funeral directors from providing administrative functions assisting customers with selection of final expense products is therefore rejected.

CONCLUSION

[33] Fortis' Application for a Declaration that the **E.F.D.A.** and **C.F.S.A.** do not prohibit insurance agents from offering insurance from within funeral homes, and that the Registrar's directive in the Information Bulletin is *ultra vires*, is dismissed. The Applicant is not entitled to an alternative declaration that funeral directors may perform administrative functions to assist consumers with sale of final expense products. As Fortis has not established that a dispute exists respecting its receiving from funeral directors lists of pre-arranged funeral plan purchasers who consent to their identity being disclosed, no declaratory relief is available with respect to that issue.

COSTS

[34] The issues in this Application involve interpretation of consumer protection legislation not previously considered by a Nova Scotia Court. Although the Applicant was unsuccessful, given the public interest nature of the proceeding, there will be no costs awarded.

J.