

SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Community Services) v. Cleary, 2012 NSSC 12

Date: 20120109

Docket: Hfx. No. 352457

Registry: Halifax

Between:

Nova Scotia (Department of Community Services)

Applicant

v.

Andrea Cleary

Respondent

Judge: The Honourable Justice Peter P. Rosinski.

Heard: November 9, 2011, in Halifax, Nova Scotia

Counsel: Ryan Brothers, for the Applicant
Andrew Pavey, for the Respondent

By the Court:

[1] Ms. Cleary was successful as a respondent in a judicial review application made by the Department respecting a decision of the Assistance Appeal Board made under the *Employment Support and Income Assistance Act and Regulations* - see 2011 NSSC 451.

[2] Ms. Cleary claims costs in the amount of \$1500 plus disbursements pursuant to Tariff “C” of *Civil Procedure Rule 77*.

[3] The Department argues that Tariff “C” is applicable but that the court should exercise its discretion and award between \$900 - \$1000 plus disbursements as the appropriate cost award.

Analysis

[4] *Civil Procedure Rule 77* makes it clear that the winning party in litigation is presumptively entitled to partial compensation of their expenses of litigation, and that customarily this has been viewed as a substantial but not complete

indemnification of their expenses of litigation. In relation to applications for judicial review, Rule 77.06(3) reads:

(3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[5] Both parties agree, and I accept that Tariff “C” is the applicable guideline. I note that Rule 77.10 intends that an award of party and party costs includes necessary and reasonable disbursements. Ms. Clearly has not proposed a specific sum, or evidence of what disbursements were incurred in this judicial review application process.

[6] The principal concern in such an exercise of discretion by the court is to do justice between the parties - Rule 77.02(1); and to “award of costs that are just and appropriate in the circumstances of the application” - para. 3 Tariff “C”.

[7] I observe that in this case, the Department’s position was that Ms. Clearly had been overpaid income assistance in the amount of approximately \$24,000. The Department argued strenuously that the Assistance Appeal Board had erred in its definition of “cohabitation” such that Ms. Cleary was presumptively ineligible for

any of the assistance she had received during the period September 2002 to November 30, 2004 [or January 2006 as the Department had initially claimed].

[8] The Application was heard on November 9, 2011, effectively taking one half-day.

[9] The range of costs for more than an hour but less than on half-day is from \$750 to \$1000. Rule 77.02(2) allows a court to make reasonable costs awards beyond the Tariff “C” guidelines. In a previous application for judicial review, Justice Hood of this court found in favour of Ms. Cleary and awarded costs of \$1500 plus disbursements - see 2010 NSSC 231. That case involved statutory interpretation of the *Employment Support and Income Assistance Act and Regulations*, and specifically whether student loans fall within the definition of chargeable income.

[10] It is not clear in that decision how much time the judicial review hearing required, however it would seem to me that it would have taken a similar amount of time to the herein application. Therefore, I consider that precedent particularly useful in my assessment of costs herein.

[11] In my view, this matter was of great importance to the parties and particularly to Ms. Cleary who as an individual was facing a possible repayment of \$24,000. The legal dispute was relatively complex, as is often the case in judicial review. The statutory interpretation involved herein required an examination of the definition of “cohabitation” in the unusual context of estranged married spouses. In my view, a significant effort would have been involved in preparing for and conducting the application.

Conclusion

[12] To do justice between the parties, in the circumstances of this case, it is appropriate to award \$1500 costs plus disbursements to Ms. Cleary, and I so order.

[13] To the extent that the parties cannot agree on the disbursements, I order that those be taxed before an adjudicator pursuant to Rule 77.16(2).

[14] I would request Ms. Cleary to prepare a draft order for my signature.

J.