SUPREME COURT OF NOVA SCOTIA
Citation: *Layes v. AGNS*, 2018 NSSC 29

Date: 20180202
Docket: Hfx No. 471151
Registry: Halifax

Between:

Kevin J. Layes

Plaintiff as Applicant

v.

Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendant as Respondent

Judge: The Honourable Justice Ann E. Smith

Heard: January 12, 2018, in Halifax, Nova Scotia

Written Decision: February 26, 2018
{Oral decision rendered February 2, 2018.}

Counsel: Robert H. Pineo, for the Applicant
Michael T. Pugsley, Q.C., for the Respondent

By the Court:

INTRODUCTION

[1] The Applicant, Kevin J. Layes, seeks an Order to have the remains of his late father, John James Layes, Sr., exhumed and bodily samples obtained and examined by experts of his choice. Mr. Layes believes that his family members, including his mother, sisters and brothers, drugged his father, causing his death. He says that in order to develop evidence about this alleged poisoning, he needs to have experts analyze samples obtained from his late father's remains.

[2] This proceeding was started on December 8, 2017 with the filing of a Notice of Application in Chambers. The Respondent is the Attorney General of Nova Scotia, representing her Majesty the Queen in Right of the Province of Nova Scotia.

[3] Mr. Robert Pineo represents Mr. Layes, although Mr. Layes filed the Notice of Application in Chambers as a self-represented litigant.

[4] Mr. Michael Pugsley, Q.C. represents the Attorney General. Mr. Pugsley advises that the Attorney General represents Dr. Mathew Bowes, the Chief Medical Examiner of the Province of Nova Scotia.

[5] Mr. Pugsley, on behalf of the Attorney General, moved for an order setting aside the application and declaring it a nullity for lack of notice to the Crown contrary to the *Proceedings Against the Crown Act*, R. S., c. 360, s. 1. The Respondent further moved for an order that after notice is given, the matter proceed as an action and not as an application.

[6] The motions were heard by this Court on January 12, 2018. I had before me written briefs of both counsel, the Affidavit of Kevin Layes, sworn December 7, 2017 and the Affidavit Dr. Matthew Bowes, sworn January 9, 2018. I reserved my decision.

BACKGROUND

[7] At the outset, I note that the *Nova Scotia Health Protection Act*, S.N.S. 2004, c. 4, (as amended) is relevant with respect to who may order the exhumation of a body. Section 52(1) of that *Act* provides that no person shall disinter or remove a buried human body without the written permission of the medical officer for the place in which the body is buried or with the consent of the Attorney General. Neither the medical officer or the Attorney General has given permission to have the body of Mr. James Layes, Sr. exhumed.

[8] Subsection 52(2) of the *Health Protection Act* provides that "the disinterment, removal, transportation and reinternment of a human body shall be carried out in the manner directed by a medical officer unless otherwise provided for in the regulations."

[9] Before dealing with the issue of notice to the Crown, I will review several undisputed facts that are relevant to the issues before the Court.

[10] Mr. John James Layes passed away at age 79 years on January 18, 2014 in the QEII Hospital in Halifax.

[11] The death of Mr. Layes, Sr. became the subject of a medical examiner's investigation after Mr. Kevin Layes alleged wrongdoing on the part of his family members leading to his father's death. As part of the medical examiner's investigation, Mr. Layes' remains were exhumed.

[12] Dr. Bowes conducted a post mortem examination of the remains on March 7, 2014 at the Dr. William D. Finn Centre for Forensic Medicine. Dr. Bowes' Report of Post Mortem Examination reports that Dr. Bowes determined the cause of death to be "pneumonia complicating: Emphysema." Dr. Bowes found that the manner of death was natural, with ischemic heart disease a contributing factor. Dr. Bowes' Affidavit attached a "Peer Review Form" dated 2014 (I cannot read the month or date) signed by reviewing pathologist Dr. Marnie Woods.

[13] On January 15, 2015, Mr. Layes filed a Notice of Action and Statement of Claim with the Nova Scotia Supreme Court in Halifax. That proceeding is Hfx No. 435388. Mr. Kevin Layes is the sole Plaintiff. The Statement of Claim identifies the defendants Rose Layes as the mother of Kevin Layes, Pearl (Layes) Kelly as his sister and Francis Kelly as his brother-in-law. Other defendants are John Layes Jr. and Richard Layes, whom I assume are Kevin Layes' brothers, Dr. Mary C. Gorman, who is identified as a family physician and director of the

Geriatric Assessment and Rehabilitation Unit for the Guysborough Antigonish Strait Health Authority and Dr. Stephen Paul Sturmy who is stated to have been the deceased Mr. Layes' family physician in Antigonish.

[14] The Statement of Claim alleges, among other serious matters, that the defendants were responsible for Mr. Layes' death. The claim states that "the Defendants and each one knew and/or did administer psychoactive drugs which did kill and or contributed to the death of John James Layes Sr." The Nova Scotia *Fatal Injuries Act*, R.S., c. 163, s. 1 is plead and relied on.

[15] The Notice of Action and Statement of Claim was not served on any of the defendants in Hfx No. 435388. On August 24, 2016 Mr. Kevin Layes filed a motion with this Court for an order to renew the Notice of Action and Statement of Claim, with the motion scheduled to be heard on September 6, 2016. The motion did not proceed. I note that the motion was not filed within 14 months of the date the action was filed, i.e., by March 15, 2016. I understand from Mr. Pineo that the motion to renew did not proceed, in all, or in part, because his client wishes to develop the evidence of wrongdoing on the part of the defendants that he says he needs to support the motion to renew.

[16] On September 16, 2016 Mr. Kevin Layes started another action – Tru No. 455514 in which he is the sole Plaintiff. I will refer to this action as the "Truro action." The Defendants are the same as the defendants in Hfx No. 435388 with the exception that Dr. Matthew Bowes is also a defendant. Like Hfx No. 435388, Kevin Layes alleges in the Truro action that the defendants were responsible for his father's death. The *Fatal Injuries Act* is plead and relied on.

[17] The claims against his family members and the physicians in the Truro action are substantially the same as the claims made in Hfx No. 435388.

[18] In terms of the claims against Dr. Bowes in the Truro action, Kevin Layes alleges that Dr. Bowes obstructed the autopsy of the remains of John James Layes, Sr. (eight separate allegedly improper actions on Dr. Bowes' part are set forth at paragraph 105 of the Statement of Claim). One of those allegations is that Dr. Bowes "refused exhumation of the body so that further fluid and tissue samples could be obtained to either continue with his autopsy or allow an independent medical examiner to conduct an autopsy." It is alleged that Dr. Bowes undertook those allegedly wrongful actions and acted in combination with the other defendants to "obfuscate and otherwise cover up the murder of John James Layes Sr."

[19] On November 17, 2016 Kevin Layes brought an *ex parte* chambers motion in the Truro action. The motion was heard by Justice Richard Coughlan (sitting in Pictou). The motion sought an order to permit the exhumation of the remains of John James Layes, Sr. for forensic examination. The Notice of Action and Statement of Claim had not been served on any of the defendants as of November 17, 2016.

[20] For reasons not known to me, however, Mr. Pugsley became aware of the proposed *ex parte* application and wrote to the Court shortly before the motion was scheduled to be heard voicing his concern, among other things, that the motion had been brought on an *ex parte* basis.

[21] Justice Coughlan dismissed the motion for an order to exhume the body of the late Jr. Layes, Sr., requiring that notice of the motion be given to the defendants. On November 20, 2017, the Plaintiff filed a Notice of Discontinuance of the Truro action.

[22] The within Notice of Application in Chambers was filed on December 8, 2017.

[23] With that review of the relevant factual background, I now turn to the issue of whether the Applicant was required to provide the Respondent with notice of the proceeding pursuant to the *Proceedings Against the Crown Act*.

Notice under the *Proceedings Against the Crown Act*

[24] Section 18 of the *Proceedings Against the Crown Act* provides as follows:

> No action shall be brought against the Crown unless two months' previous notice in writing thereof has been served on the Attorney General, in which notice of the name and residence of the proposed plaintiff, the cause of action and the court in which it is to be brought shall be explicitly stated.

[25] The Applicant says that the within matter is not an action. Mr. Pineo describes the proceedings as a motion for the collection and preservation of evidence. He says that section 18 has no applicability. In particular, he says that the Crown's assets and financial health are not at risk. Rather, he says, it is a proceeding for an order to require the Crown to allow the exhumation and testing, or not to interfere with an exhumation and testing.

[26] The Applicant says that no notice was required under the *Act*.

[27] In the alternative, the Applicant says that the Crown has, effectively, had 14 months' notice as a result of the Truro action, with its claims against Dr. Bowes having been filed in September 2016.

[28] I will deal first with the Applicant's argument that the Crown effectively had notice of the within application because it knew about the Truro action. I reject that argument. The Truro action stood discontinued on November 20, 2017. At that point, the claims against Dr. Bowes were at an end. Notice to the Crown, if required, is formal notice. The Crown may choose to waive formal notice, but it certainly is under no obligation to do so and has not done so in this case.

[29] The Crown did not have notice under the *Proceedings Against the Crown Act* of the within matter.

[30] The second question is whether notice under that *Act* should have been given.

[31] I note that the grounds for the order sought (exhumation and the taking of bodily samples) set out in the Notice of Application in Chambers include:

> That a previous autopsy and samples taken from the remains of the late John James Layes, Sr. we (sic) mishandled by the Chief Medical Examiner for the Province of Nova Scotia.
>
> That the Respondent has refused to consent to the exhumation of the remains of the late John Layes, Sr.

[32] It is to be recalled that one of the various claims against Dr. Bowes in the discontinued Truro action was that Dr. Bowes refused exhumation of Kevin Layes' late father's remains. In my view, at the heart of the relief sought by the Applicant in this Application, is the allegation that Dr. Bowes mishandled the autopsy of the Applicant's father. Otherwise, there is no basis for the request to exhume the body. What Kevin Layes is saying is that the results of Dr. Bowes' autopsy failed to reveal the true cause of his late father's death – poisoning by his family members. So while the Notice of Application in Chambers does not set out a cause of action against Dr. Bowes, the relief sought, by the Applicant's own claims, is grounded in the assertion that Dr. Bowes mishandled the autopsy.

[33] While on its surface, the Application is framed as merely the request for an exhumation order, contained within the Application is the allegation that essentially alleges tortious behavior on the part of Dr. Bowes.

[34] I agree with counsel for the Crown that if a Court determines that an exhumation is warranted, then the clear implication is that the autopsy was botched. There is no reason to dig up a body which has been interred for over four years, in the absence of a finding that the autopsy was negligently carried out. Such a finding could have potential adverse consequences for both Dr. Bowes and the Crown.

[35] I also note that Mr. Layes helps to defeat his own argument that the Application in Chambers is a stand-alone matter, which does not claim in negligence or otherwise against Dr. Bowes, when he says that the action in negligence against Dr. Bowes in the Truro action was effective notice of this Application in Chambers, if such notice is required, which he disputes.

[36] In claims arising out of a tort or based on tort liability the *Proceedings Against the Crown Act* applies. That was confirmed by the Nova Scotia Court of Appeal in *Nova Scotia v. Carvery*, 2016 NSCA 21.

[37] I note that while the *Proceedings Against the Crown Act* refers to notice in the context of "actions", (section 18), it also defines "proceedings against the Crown" as including "a claim by way of set-off or counterclaim raised in proceedings by the Crown and interpleader proceedings to which the Crown is a party." (s. 2(f)) Clearly, the Legislature intended that the Crown be given notice not just of actions but in other proceedings as well. In addition, it is to be remembered that Applications in Court resulted from amendments to the *Civil Procedure Rules* that postdated the enactment of the *Proceedings Against the Crown Act*.

[38] The Nova Scotia Court of Appeal in *Union of Nova Scotia Indians v. Nova Scotia (Attorney General)*, 1999 180 NSCA 160 determined that the chambers judge had erred by finding that notice was required to be given to the Attorney General pursuant to the *Proceedings Against the Crown Act* in the context of an application brought by a group of aboriginal organizations who sought an order quashing an Order in Council which had approved the granting of an option and easement over Crown lands to a natural gas pipeline partnership.

[39] The Court of Appeal found that the proceeding was in the nature of an administrative law challenge to the exercise of the statutory power conferred on the Crown to dispose of Crown land. The Court of Appeal quoted from the decision of the English Court of Appeal in *Dyson v. Attorney General* (1910), [1911] 1 K.B. 410 where Farwell L.J. said that the proceeding was not one where "the estate of

the Crown is directly affected." The Court of Appeal concluded that the matter was not a proceeding in which a person claimed against the Crown that land, goods or money of the subject were within the possessions of the Crown.

[40] The within proceeding can be distinguished from the kind of administrative law review described in the *Union of Nova Scotia Indians* case.

[41] The Application directly raises allegations against Dr. Bowes which give rise to tort claims.

Conclusion – Notice to the Crown

[42] In the unique circumstances of this case, I find that the Applicant has not given the notice required by the *Proceedings Against the Crown Act*. He must do so. As such, the within Application is a nullity and is dismissed.

[43] I also find that the Application should not have been brought as an Application in Chambers. Applications in Chambers are to be heard in a half hour or less if no cross examination is required, or at a special time for a less than half-day hearing.

[44] The Applicant has brought a free-standing application in Chambers in circumstances where Justice Coughlan, in the now discontinued Truro action, in essence, refused the same relief sought – the exhumation – because no notice had been given to the defendants in that case. Mr. Layes now seeks the same relief that he sought before Justice Coughlan.

[45] Given the very serious issues raised by the Applicant in this matter, it is obvious that the Respondent will be defending the matter and will be adducing expert evidence. A proceeding alleging misconduct on the part of the Medical Examiner and a request that the Court order the second exhumation of human remains is not a matter that can possibly proceed as an Application in Chambers.

Motion to Convert Application to Action

[46] I now turn to the Attorney General's motion to have the Application in Chambers converted to an action. Given my conclusion that the proceeding is a nullity, due to lack of notice to the Crown, it is not necessary for me to rule on this motion. However, I will nonetheless provisionally determine the motion.

[47] Based on the evidence before the Court at this time, I would have found that the Attorney General has not met the burden established by *Rule 6.02* to justify an action instead of an application. I speak here of an Application in Court, not an Application in Chambers. Whether the Attorney General would meet that burden at a later date, is not before me.

[48] I note that there are strong policy reasons which favour applications over actions, including lower cost and greater speed.

[49] In *Jeffrie v. Henriksen*, 2011 NSSC 292 at paragraph 13, Justice Pickup set out a three-stage analysis to be followed in a motion to convert:

a) First, the court must assess whether any of the presumptions in favour of an application are applicable under *Rule 6.02(3)*;

b) Second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under *Rule 6.02(4)*;

c) Third, the court must determine the extent to which each of the four factors favouring an application are present under *Rule 6.02(5)* and determine the relative cost and delay as between an action and an application under *Rule 6.02(6)*.

[50] The first presumption in favour of an application is as follows: *Rule 6.02(3)*

> (a) Substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights and the erosion will be significantly lessened if the dispute is resolved by application;

[51] The Applicant has asserted that his substantive rights will be eroded if the matter continues as an action. Dr. Bowes states in his Affidavit that "Due to body decomposition since the death of the deceased in January 2014, the chances of medically probative results flowing from an exhumation are very remote." Obviously, the longer the merits of this matter take to be heard, the greater and more remote will be the likelihood that the results of an exhumation, if ultimately ordered, will be, as Dr. Bowes says, "medically probative."

[52] I find that an application in these circumstances is presumed preferable to an action given the erosion of the remains of the late Mr. Layes Sr. and the effect of

that on the Applicant's ability to have independent experts analyze samples of the remains, should that be ultimately ordered by the Court.

[53] If I am wrong about the presumption in favour of an application, the Attorney General has nonetheless not met the burden of showing that an action is preferable to an application. *Rule 6.02(4*) sets out two possible factors to establish a presumption in favour an action. The first is that the party has, and wishes to exercise a right, to trial by jury. An action against the Crown cannot be heard by a jury pursuant to section 14 of the *Proceedings Against the Crown Act*. The second factor is that it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[54] The Crown has not led evidence to establish that there exist witnesses about whom it would be unreasonable to provide information at the outset of the proceeding. In fact, Dr. Bowes' Affidavit refers to the evidence to be produced by the Attorney General as including existing documentary evidence, evidence from himself, from toxicologist Sherri Kacinko and from pathologist Dr. Marnie Woods. He also refers to expert evidence. Expert evidence may be given in an Application in Court.

[55] Finally, I refer to the factors in favour of an application as set out in *Rule 6.02(5)*:

> (a) The parties can quickly ascertain who their important witnesses will be;
>
> (b) The parties can be ready to be heard in months, rather than years;
>
> (c) The hearing is of predictable length and content;
>
> (d) The evidence is such that credibility can satisfactorily be assessed by considered the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

[56] As noted previously, the Respondent has already identified key witnesses who will testify. The Applicant refers to experts he has retained in his Affidavit. This factor favours an application.

[57] The parties have identified, through Affidavit evidence, much of the documentary and expert evidence that likely will be led at trial. The Respondent has not convinced this Court that the proceeding will take years to be ready to be heard. This factor favours the matter proceeding as an application.

[58] In his Affidavit, Dr. Bowes states that the evidence at the eventual hearing will "likely take at least two days of testimony from qualified physicians." Counsel for the Applicant says that the Applicant's evidence will also take two days. At this point in time, the hearing appears to be of a predictable length and largely predictable content. This factor favours proceeding by way of application rather than action.

[59] Finally, there is no evidence before this Court that the evidence to be adduced in this case cannot be satisfactorily assessed by the court by way of affidavit evidence, permitted direct testimony and cross-examination. The Respondent says that it will be required to lead expert evidence, but expert evidence is not prohibited in an Application in Court.

[60] The relative cost and delay of an action in this matter also is a consideration in favour of an application (*CPR 6.02(6)*).

[61] In conclusion, the Respondent, Attorney General, has not met the burden upon it to establish that proceeding by way of action is more appropriate than proceeding by way of application. The Respondent's motion is dismissed.

[62] I leave it to the Applicant to determine how he wishes to frame any new proceeding he may wish to bring against Dr. Bowes, in compliance with the notice provisions of the *Proceedings Against the Crown Act*, whether by way of action or Application in Court. However, for the reasons I have given previously, the content of the within application, as presently framed; i.e., as an Application in Chambers, is improper.

Costs

[63] As Counsel have submitted and I agree, each party is to bear their own costs.

Smith, J.