SUPREME COURT OF NOVA SCOTIA

Citation: *Yates v. Nova Scotia Board of Examiners in Psychology*, 2018 NSSC 127

Date: 20180531
Docket: Hfx. No. 460070
Registry: Halifax

Between:

Pamela Yates

Applicant

v.

Nova Scotia Board of Examiners in Psychology
and the Attorney General of Nova Scotia

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions (costs)
Final Written Submissions:	April 13, 2018
Counsel:	Dennis James, Q.C., and Grace MacCormick (A/C), for the Applicant Marjorie Hickey, Q.C., and Ryan Baxter, for the Respondent, Nova Scotia Board of Examiners in Psychology

By the Court:

Background

[1] On June 19, 2017, I heard an application brought by the Applicant, Dr. Pamela Yates, for judicial review of a decision of the Respondent, The Nova Scotia Board of Examiners in Psychology. The Attorney General of Nova Scotia took no part of the proceeding.

[2] My decision was set forth in *Yates v. Nova Scotia Board of Examiners in Psychology*, 2018 NSSC 43. At the conclusion of my reasons I said the following:

> 178. I concluded my analysis of the previous issue iv(a) and (b) with the determination that the decision must be set aside and remitted back to the Board for reconsideration of Dr. Yates' application under s. 15 of the *Act* in its entirety.
>
> 179. I conclude my analysis of issue (v) (the final issue) by observing that, because the decision by the respondent(s) to exercise the discretion conferred by the *Act* under s. 15(5) is one possible outcome of that reconsideration, all materials previously submitted by the Applicant for consideration by the respondent(s) must also be made available beforehand to the respondent Board and (if applicable) the IRC, since (among other things) they would be very relevant to a s. 15(5) analysis if undertaken.
>
> 180. The Applicant shall receive her costs of this application. If the parties are unable to agree with respect to same, I will accept written submissions within thirty days.

[3] The parties have been unable to agree as to the costs which Dr. Yates should receive as a result of the application. Dr. Yates' position is that the costs specified in Tariff "C" of the *Civil Procedure Rules* are inadequate to do justice between the parties. She points out that her actual legal bill exceeded $27,000.00 and the affidavit of her counsel, Dennis James, Q.C., has been proffered in support of this fact. She seeks an award of costs in excess of $17,000.00, inclusive of disbursements, which would amount to an approximately 64% recovery of her legal expenditure.

[4] Dr. Yates also requests her costs of another court application which she initiated. As noted in *Yates, supra.*, there was a decision of this court which pre-dated my decision. It is reported in *Yates v. Nova Scotia Examiners in Psychology*, 2016 NSSC 152. Therein, Justice LeBlanc dismissed her application for judicial

review of the Board's decision to reject her initial application (on December 17, 2014) because it had been filed late. Justice LeBlanc's decision was without prejudice to her ability to reapply, and she did so. This latter application was the process which resulted in my decision, which I will henceforth refer to as *Yates #2* to avoid confusion.

[5] When the Applicant reapplied to the Board, the latter's response was initially thus, as noted in *Yates #2*, *supra*.:

> 156. On October 6, 2016, a letter was sent by Registrar Wilson to the Applicant (Record, Tab 4). It stated the Board declined to process Dr. Yates' present application because:
>
> > The educational qualifications included in your current application have not changed from those previously submitted to the Board. Therefore, the Board cannot process your current application. The Board relies on its prior decision and will not be rendering a new decision as the matter has already been determined.
> >
> > [Emphasis added]
>
> 157. By letter dated October 13, 2016, (Tab 5 – Record) Dr. Yates requested a reconsideration of the Board's decision not to process her second application. In that letter, she noted, *inter alia*:
>
> > In addition to providing additional information in order to address issues previously communicated by the Nova Scotia Board of Examiners in Psychology, I requested that my application of September 29, 2016, be considered in the context of the Agreement on Internal Trade (AIT) and the Mutual Recognition Agreement given that I am presently registered in the province of Saskatchewan, rather than being evaluated as a new graduate from the masters or doctoral program.
> >
> > In summary I have provided additional information in my application of September 29, 2016 in an attempt to address the Board's stated concerns with respect to my educational qualifications. I have also requested that my application be reviewed in the context of my current status as a psychologist holding a certificate of registration from another province, which was not the case during the January 2015 review when the Board was of the assumption that I was not, nor had ever been, a psychologist registered in a Canadian jurisdiction. While the Internal Review committee superficially acknowledged the error, there is no record that it analysed my application on the basis of an applicant with a certificate of registration. With respect to the latter, I request that the Board consider availing itself of its discretionary option to waive all or part of its

> requirements for registration per Section 15(5) of the *Psychologist Act of Nova Scotia*…in light of the information provided in my application of September 29, 2016.
>
> …I am requesting that my application of September 29, 2016 be processed for consideration for licensure in the Province of Nova Scotia, as well as requesting internal review of the decision communicated in your October 6, 2016 letter.
>
> [Emphasis added]
>
> 158. The Board, as a consequence, reconsidered its decision not to process the present application and informed the Applicant by letter dated November 4, 2016 that it would do so…

[6] Apparently, the Board's decision to reconsider came about after Dr. Yates had applied to the court for assistance in that respect. In the wake of the Board's agreement to reconsider, an order was taken out dated November 16, 2016. The Applicant's motion for judicial review of the decision not to refer her (second) application to the Board was dismissed and the Board was directed to consider the application for registration submitted September 30, 2016. This order is silent as to costs. This is the additional matter (Hfx No. 456601) in relation to which the Applicant also seeks costs in this motion. I will return to this further in these reasons.

[7] In the case at bar, the Respondent's primary position is that a departure from the application of Tariff "C" is not warranted and that the Tariff amount is appropriate in this case.

[8] The Respondent goes on to indicate that in the event that the court finds that a lump sum (as opposed to that prescribed by Tariff "C") is appropriate, that an award of costs of $6,000.00 plus disbursements is just.

[9] Moreover, the Board has indicated that it is prepared to reimburse Dr. Yates for her disbursements of $293.71 incurred for the judicial review application in matter Hfx No. 456601, but is opposed to paying more.

Analysis

[10] This matter consumed slightly in excess of one half day of actual court time. As such, I first have recourse to *Civil Procedure Rule* 77.06(3), and, in particular, Tariff "C" thereof.

[11] First, the rule:

> 77.06(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.

[12] Tariff "C" states:

> Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia
>
> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
>
> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.
>
> (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)
>
> Length of Hearing of Application Range of Costs

Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000-$2000
1 day or more	$2000 per full day

[13] The authorities provide guidance in relation to the exercise of the discretion which the Applicant has requested. Without purporting to have exhaustively set forth all of these authorities, I will proceed to consider some that certainly could be described as representative.

[14] For example, the Respondent has referred to *Edwards v. Edwards Dockrill Horwich Inc.*, 2010 NSSC 287 and specifically to para. 39 thereof:

> While, as a general rule, costs follow the event and are awarded to the successful party, there are occasions where the court's discretion permits a different order to be made. Orkin, in *The Law of Costs*, 2d ed., identifies several exceptions to the general rule that costs should be awarded to the more successful party. These exceptions include misconduct by the parties, miscarriage in procedure and oppressive and vexatious conduct of the proceedings (vol. I, pp. 2/63-72). The author notes that costs have been denied in cases "where success was divided or where the court was unable to conclude that one party was more successful [then] the other ... or where neither party was blameless" (p. 2/80).

[15] In *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 189, Justice LeBlanc observed at para. 5 that in the normal course, costs of a proceeding for a judicial review are to be assessed in accordance with Tariff "C".

[16] This has been tempered by other judicial dicta, however. In *Brennan v. Nova Scotia (Minister of Agriculture)*, 2015 NSSC 237, Justice Wood pointed out:

> 9. The hearing of the review took approximately two hours and therefore the highest amount which could be awarded under Tariff C is $4,000.00, if the maximum multiplier of four is used. I am satisfied that in the circumstances of this case a cost award in that amount would not do justice between the parties.
>
> 10. Judicial review is, by its nature, more complex than many other chambers applications. In this case the parties were required to address the standard of review, statutory interpretation, as well as an analysis of the inspector's initial decision to seize the horses, the separate decision not to return them and the Deputy Minister's review of the inspector's actions. Although the hearing was only two hours long that was due, in part, to counsel preparing comprehensive briefs and the Court imposing strict limits on the length of argument to accommodate the Court's available time slot. In order to achieve such efficiencies counsel would frequently have to spend more, and not less, time in preparation.

[17] This does not detract from the presumptive application of Tariff "C" to the case at bar, as Justice Wood also noted in a subsequent decision *Homburg v. Stichting Autoriteit Financiele Markten*, 2017 NSSC 52. Therein, he pointed out that the proper approach on a costs motion is to begin with the presumption that the Tariff should be applied. The onus is still borne by the party seeking departure from the Tariffs to establish circumstances to indicate why an award which exceeds the Tariff is necessary to do justice between the parties. This presumption is applicable regardless of the nature of the proceeding before the courts.

[18] This caution has been reiterated in other cases. For example, in *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 100, Justice Campbell commented at para. 17 that judicial discretion to depart from the Tariff:

> … is not an invitation to throw certainty to the wind and award costs based on a percentage of the legal fees actually or reasonably incurred. If the standard is between two-thirds and three quarters of the reasonable legal bill, the tariff as set out the in the rules would be redundant. As Justice Hood noted in *Beaini v. APENS et al.*, the recovery of between two thirds and three quarters is not an absolute rule. "If it were, it would fetter the court's discretion and, in my view, it is clear that the court should look at the circumstances of each case to determine the appropriate costs award."

[19] This point was made even more forcefully by Justice Goodfellow in *Armour Group Ltd. v. Halifax (Regional Municipality)*, 2008 NSSC 123. He stated that the court should adhere "in almost every case" to the Tariffs because of the degree of certainty that they provide to litigants. He elaborated in para. 23 of *Armour*:

> The speed of escalation of legal fees is not one that the court can or should try and keep pace with. Solicitors and clients are in the market place and set their own contractual fee and service conditions. The court through its establishing of Tariffs is meant to provide a reasonable level of recovery of party and party costs. It should be remembered that party and party costs are not legal fees but rather the property of the party. See *Roose v. Hollett et al.* (1996), 147 N.S.R. (2d) 295 (C.A.). In the vast majority of situations recently I find that the requests for increased costs in chamber's applications are tantamount to a request for a high portion of costs on a solicitor and client basis and the law is very clear as to what is required before a court ought to exercise its discretion in awarding solicitor and client costs. The court should not take the position of approving of the escalation of legal fees and should adhere in almost every case to the new Tariffs which are meant to provide a high level of certainty to litigants as to the degree of recovery they can reasonably anticipate should they be the recipient of an award of costs or as to the costs the party may be called to pay if unsuccessful.

[20] Earlier, in *Armour*, at para. 20, he had pointed out that:

> "…rarely does a half day, let alone a day long Chambers application, have the degree of complexity by itself that would amount to a factor warranting abandoning the new Tariff "C" for Chambers costs".

[21] In *Keltic Transportation Inc. v. Montgomery*, 2014 NSSC 414, Justice Hood pointed out that a case must possess special characteristics, or special circumstances, leading to the requirement of "exceptional legal services" in order to depart from Tariff "C". At para. 18, she enumerated some of these circumstances in a non-exhaustive fashion, which included complexity, public interest, pre-chambers process, questions of law that are unsettled, conduct or misconduct of a party and/or a solicitor, settlement/alternatives, associate counsel, multi counsel and experts.

[22] The Respondent has also raised some additional points. It argues that success was mixed, and that in any event, the multipliers set out in Tariff "C" (4) are inapplicable in this case, since they only apply "following an application in Chambers [that] is determinative of the entire matter at issue in the proceeding…". They go on to argue that the application was not "determinative of the entire matter at issue" because the matter has been sent back by this Court to the Respondent Board for reconsideration.

Application to Case at Bar

[23] Dealing with the last point noted first, I am satisfied that the subject application was dispositive of the matters at issue between the parties. As such, the order generated in the aftermath of the decision is "determinative of the entire matter at issue in the proceeding", and the multipliers are available if recourse to them is necessary.

[24] I say this because the application was one for judicial review of the specific decision of the Respondent Board which was at issue in this matter, and I granted that application, set aside the decision of the Board, and sent it back for reconsideration. This was the relief sought by Dr. Yates, and the decision was thus dispositive of the issue between the parties. While it is true that the Board must now reconsider its decision with respect to her application for licensure in Nova Scotia, if anything further should arise between the parties in the aftermath of that reconsideration, such would be dealt with by the Court in a different application.

[25] I also must respectfully disagree with the Board's contention that success was mixed or divided. It is true that I agreed with the Board's submissions in relation to two of the four points that were disputed. It is also true that the relief granted was ultimately in accordance with what the Applicant sought. In my view, the Applicant was completely successful.

[26] In addition, the application involved complexities that are belied by the relative efficiency and economy with which the matter was argued in court. Although the matter consumed approximately one half day of court time, I find myself nonetheless in agreement with the Applicant's submission that:

> The application involved:
>
> i. The interpretation and application of the *Psychology Act*, involving the interpretation of Sections 15, 16 and the definition of registration. There was no previous interpretation and there was no definition of the term registered;
>
> ii. The Agreement of Internal Trade ("AIT");
>
> iii. The interpretation of the Saskatchewan *Psychology Act* as to registration;
>
> iv. The interpretation and application of the *Fair Practices Registration Act*;
>
> v. Analysis of the Board's decisions to exclude information from Dr. Yates' application; and
>
> vi. The definition and application of the doctrine of fettering.
>
> It is the case that this was an involved legal proceeding which required a significant level of preparation. The decision rendered by this Honourable Court reflects the complexity of the legal issues. The costs incurred by Dr. Yates for the judicial review application also reflect the complexity of the legal issues involved in the hearing…
>
> (*Applicant's brief, p. 2*)

[27] It is also, I believe, fair to consider my finding that the conduct of the Board through the actions of the Registrar, Dr. Wilson, left a great deal to be desired with

respect to the procedural fairness, or lack thereof, accorded to the Applicant in this process.

[28] It will be recalled, among other things, that Dr. Wilson made a unilateral decision to not provide the Internal Review Committee with the materials that had been supplied by Dr. Yates after the decision by the Board rejecting her application.

[29] Dr. Wilson also made the unilateral determination that he would not provide the Board (before its decision on Dr. Yates' application) with the materials that she had forwarded under cover of her letter of October 13, 2016 (see *Yates #2, supra.*, paras. 159 – 161).

[30] In his affidavit, Registrar Wilson explained that his rationale for conveying only the first paragraph of the Applicant's November 18, 2016, letter (verbally) and neither the rest of that letter, the enclosures, or her updated CV was because:

> … [because it] dealt only with recent activities involving Dr. Yates. Because this information did not relate to issues involving a possible transfer under the Agreement of Internal Trade or the Board's criteria for acceptable degrees in psychology, which I understood to be the principle issues under review by the Board, I did not provide a copy … to the Board.

[31] In explanation of his failure to supply the material provided by the Applicant under cover of her letter of December 22, 2016, to the review committee, he noted in his affidavit (para. 13):

> "Because the [above] material referenced … had not been previously been provided to the Board when it made its decision, and because I determined that these texts were not relevant to the principle issues before the Internal Review Committee (criteria for an acceptable degree, and potential transfer under the Agreement of Internal Trade), I did not provide them to the Committee".

[32] He did this despite the fact that one of the things that the Applicant had specifically requested of the Board, through the Registrar, was that it consider its discretion under s. 15 of the *Act* and excuse some of the requirements specified in that section for licensure in this province. My decision was to the effect that the Board ought to have considered the exercise of its discretion under s. 15(5), in which case the materials that Dr. Wilson deliberately determined not to forward to the Board and the Committee, would have been very relevant.

[33] There is insufficient evidence before me that Dr. Wilson acted in a malicious manner. His actions, in failing to provide the Board and the Review Committee with the above noted materials, and in failing to provide the references submitted by Dr. Yates in support of her application (after he realized that he had "overlooked them") when her materials were sent to the Board, nonetheless transcends merely procedural considerations and reflects a degree of high-handedness and disregard for the Applicant, particularly given what was at stake.

[34] Principally upon the basis of the complexity of the matters with which the parties had to contend in this matter, the importance of the issues (Dr. Yates' very ability to earn a livelihood was at stake) and also predicated (to a lesser degree) upon the actions of Dr. Wilson in this matter, I have determined that an award to the Applicant premised upon Tariff "C" would not do justice between the parties, even if the multipliers were used. I have concluded that it will be necessary to provide the Applicant with a lump sum award of costs which more closely approximates an award that is "just and appropriate in the circumstances of the application".

[35] The affidavit of counsel, Dennis James, dated April 9, 2018, attaches a bill issued to the Applicant in the amount of $27,288.00 in fees and a further $916.34 in disbursements. Almost all of the 96.4 hours spent in total work on the file was expended by Mr. James and an articled clerk at his firm.

[36] The disbursements incurred in the subject application involve photocopies of $588.55 (.25¢ per page), court filing fees $243.06, and deliveries of $84.73.

[37] The global quantum of the legal costs incurred by the Applicant is not contended by the Respondent to be unreasonable. The Respondent simply contests the portion of that bill sought to be recovered by the Applicant and points out that a $17,500.00 cost recovery (which is what Dr. Yates seeks), plus disbursements, represents approximately 64% of the legal costs incurred, and that this represents a higher percentage recovery of legal costs than that which occurred in any of the authorities to which the court has been referred.

Disposition

[38] First, with respect to the costs sought in the earlier proceeding Hfx No. 456601, I note that an order was taken out (as previously noted) at the conclusion of that matter and that it was silent with respect to costs. I am not prepared to go behind that order and issue a separate allocation of costs in relation to it. If the

Applicant was seeking costs in relation to the work expended in relation to that particular matter, it should have been taken up with the presiding justice before the order was taken out.

[39] However, on the basis of the Respondent's agreement to reimburse Dr. Yates for her disbursements of $293.71 incurred in relation to that matter, I will direct that this amount be paid. This will be the only amount payable in relation to that particular application.

[40] As to the costs to be awarded in the case at bar, I note that in *Tessier, supra.*, Justice LeBlanc awarded a lump sum representing 53% of the costs expended by the successful Applicant on judicial review, as opposed to the 75% sought by her, plus disbursements.

[41] In *Brennan, supra.*, Justice Wood awarded a lump sum representing approximately 36% of the costs expended by the successful Applicant on judicial review.

[42] As pointed out in *Trinity, supra.*, this is not to suggest that there is some magical correlation between the bill and the amount of recovery when a departure from the Tariff is necessary. The overall size of the legal bill (and whether it is reasonable given the work undertaken) is one consideration in such cases, but so are the other factors to which reference has already been made. Ultimately, having determined that a departure from Tariff "C" is necessary in these particular circumstances, and where no issue has been raised as to the reasonableness of the legal bill as presented to the applicant, I must determine an award of costs which will do justice between the parties by providing substantial indemnity to the successful Applicant.

[43] Having carefully reviewed Mr. James' affidavit, the submissions of the parties, the bill of costs and expenses and the other factors earlier noted, I have concluded that an award of $12,000.00 plus disbursements would be "just and appropriate".

[44] As a result, this is the amount of costs that I award to the Applicant.