

SUPREME COURT OF NOVA SCOTIA

Citation: *Curry v. The Nova Scotia Board of Registration of Embalmers and Funeral Directors*, 2023 NSSC 178

Date: 20230605

Docket: SN 513208

Registry: Sydney

Between:

Joseph Curry

Appellant

v.

The Nova Scotia Board of Registration of
Embalmers and Funeral Directors

Respondent

DECISION ON COSTS

Judge: The Honourable Justice D. Timothy Gabriel

Heard: By written submissions

**Final Written
Submissions:** April 27, 2023

Counsel: Stephen Jamael, for the Appellant
Sean MacDonald, for the Respondent

By the Court:

[1] In *Curry v. The Nova Scotia Board of Registration of Embalmers and Funeral Directors*, 2023 NSSC 95, I overturned the decision of the Respondent Board and reinstated the Appellant's Funeral Directors License, which the Board had revoked.

[2] I determined that the Board had committed a palpable and overriding error when it concluded that the Appellant was under a duty pursuant to the *Embalmers and Funeral Directors Act* ("the Act") to positively identify a body turned over to him for cremation, in addition to the identification which the provincial Medical Examiner's Office was required to have already performed.

[3] I also found that the Board had been procedurally unfair to Mr. Curry in finding him in violation of Section 2 of the *Operators of Crematoria Regulations*, NS Reg 116/2016 ("OCR"), and the Code of Professional Conduct for, among other things, failing to explain, in their written decision, the reasons for some very key findings of fact.

Civil Procedure Rule 77

[4] Civil Procedure Rule 77 ("CPR 77") does not remove my discretion to award an amount of costs which, in my view, will do justice between the parties. What it does do, however, is guide me in the exercise of that discretion. Awards made under the auspices of CPR 77 are presumed to fulfil that objective. My practice is not to deviate from the guidelines therein unless it has been demonstrated, by the proponent thereof, that an award in accordance with the tariffs prescribed therein would fail to do justice between the parties.

[5] Here are the portions of CPR 77 that are relevant in these circumstances:

77.06 Assessment of costs under tariff at end of proceeding

(1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

(2) Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.

(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.

[Emphasis added]

[6] This was an application for judicial review. As such, reference will first be made to Tariff C, which says:

TARIFF C

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	\$1,000 - \$2,000
1 day or more	\$2,000 per full day

[7] The Respondent argues that:

In this appeal, the Appellant had no obligation other than to prepare written and oral submissions. As is required by subsection 23 (3) of [the Act] the entire appellate record was prepared and provided by the Respondent.

The statutory requirement obviated the need for the Appellant to prepare any sort of evidentiary record for this court or otherwise present evidence in any fashion, which would commonly be required in a sort of contested and locked during motion. Again, scope of work required by an Appellant in the statutory regime is limited exclusively to oral and written submissions. This scope would not be so narrowly limited in a contested interlocutory motion.

[8] For these reasons, Respondent's counsel has argued that the total cost award should be set in an amount between \$750 – \$1000, since the entire proceeding took more than an hour but less than one half day to hear. His position is that there is no basis for the application of a multiplier, pursuant to Tariff C (4).

[9] The Appellant's arguments are of little assistance to me given that they were predicated upon the position that Tariff A is applicable. Clearly it is not. Nor have I been provided with any information as to the actual legal fees or any disbursements incurred by the Appellant.

[10] With that having been said, and with respect, the Respondent's argument as to the applicable amount of costs has been almost wholly limited to a consideration of Tariff C (4)(c). As to (4)(a), the Respondent appears to parenthetically argue that the matter was not complex. While there may be some basis for this, it was not a simple matter either. The record had to be minutely examined, and the reasons offered by the Respondent similarly scrutinized in order to determine the basis for some key findings of fact made in the decision. In the end, none could be found. On balance, while I find that while the matter was not complex overall, it was not a pedestrian one either.

[11] As to (4)(b), “the importance of the matter to the parties”, the Respondent's submissions are silent. I would have expected both parties to have made submissions with respect to it. Indeed, it is difficult to imagine a matter more important to the Appellant than the revocation of his license to practice in his profession, the corresponding deprivation of his ability to earn a livelihood, and the stigma attached to the circumstances under which this revocation took place.

[12] This decision was rendered, and the penalty was imposed, even though the Board was aware that the wrong body had been delivered to Mr. Curry for cremation, and that this had occurred because of a mistaken identification either by the Medical Examiner's Office, or by the hospital where the remains had been stored pending delivery to the Appellant.

[13] It is certainly true that I have no information before me to assist in determining what Mr. Curry's actual legal costs and disbursements amounted to. This would have been helpful. But it is also true that there is nothing before me to suggest that an amount determined in accordance with Tariff C would not result in substantial recovery to the Appellant, or that it would fail to do justice between the parties.

Conclusion

[14] I am satisfied that the application of a multiplier of three would be appropriate in the circumstances of this case. As a consequence, the Appellant shall receive a total award for costs in the amount of \$3,000.

[15] I award nothing for disbursements, as none have been proven.

Gabriel, J.