

SUPREME COURT OF NOVA SCOTIA

Citation: *Mercier v. Nova Scotia (Police Complaints Commissioner)*,
2014 NSSC 309

Date: 20140819

Docket: *Halifax*, No. 357941

Registry: Halifax

Between:

Roger Edouard Mercier

Applicant

v.

Police Complaints Commissioner and The Attorney General of Nova Scotia

Respondents

COSTS DECISION

Judge: The Honourable Justice Arthur LeBlanc

**Final Written
Submissions:** July 3, 2014

Counsel: Roger Edouard Mercier, Self-represented, Applicant
Duane Eddy, for the Respondents

By the Court:

[1] Mr. Mercier challenged a decision of the Police Complaints Commissioner not to refer a complaint he had filed to the Police Review Board. He claimed that the decision was unreasonable and that the Commissioner's investigation denied him procedural fairness on the basis that it was allegedly not conducted impartially. This court dismissed Mr. Mercier's application for judicial review: see 2014 NSSC 79. The Attorney General now seeks costs on the application.

[2] The court may "make any order about costs as the judge is satisfied will do justice between the parties": Civil Procedure Rule 77.02(1). The court has a "general discretion ... to make any order about costs": Rule 77.02(2). That being said, costs generally follow the event and are presumptively assessed in accordance with the tariffs determined under the *Costs and Fees Act*, R.S.N.S. 1989, c. 104: Rules 77.03(3) and 77.06(1). Costs on a judicial review proceeding are presumptively determined under Tariff C: Rule 77.06(3). All that said, the judge has a general discretion, including a discretion to substitute a lump sum where appropriate: Rule 77.08.

[3] The Attorney General submits that Tariff C applies. That tariff governs costs payable on an application heard in chambers. Where the hearing lasts less than one

hour, Tariff C calls for a range of costs between \$250.00 and \$500.00. Where the hearing lasts more than one hour but less than half a day, the tariff sets a range of between \$750.00 and \$1000.00. The hearing was in the second category. As such, the Attorney General seeks costs of \$500.00. This is the extent of the Attorney General's submission.

[4] Mr. Mercier submits that the Attorney General has perpetrated an injustice against him, supported by the court. This appears to be a reference to the dismissal of his judicial review application. He says this is an "open case" which he will continue to pursue, apparently by way of appeal, when his "physical and mental health permits..." His position appears to be that it would not be in the interests of justice for costs to be granted to the Attorney General.

[5] Mr. Mercier was self-represented on his judicial review application. He made no application for relief from liability for costs on account of poverty pursuant to Civil Procedure Rule 77.04. I infer from the contents of the file that Mr. Mercier's filing fees have been waived by the prothonotary, most recently in September 2013, and that he was in receipt of social assistance at that time, with a monthly income of \$613.00. While it is not entirely clear from his submissions that he is relying on alleged impecuniosity as a factor going to costs, in the circumstances I believe this is a point that should be addressed.

[6] It has been held that immunity from costs should be granted under Rule 77.04 only where there is a “comprehensive body of evidence” adduced in support of the request, and where it is established that “the party cannot afford to pay costs” and that the “risk of an award of costs is a serious impediment to litigating a claim”: *MacBurnie v. Halterm Container Terminal Ltd. Partnership*, 2011 NSSC 322, [2011] N.S.J. No. 496, at paras. 9-11. Clearly this analysis is not applicable where the matter has already been litigated.

[7] Of more relevance here is *Farrell v. Casavant*, 2010 NSSC 46, [2010] N.S.J. No. 43, where there was no application under Rule 77.04. Smith A.C.J. commented that “[w]hile there have been occasions in this province (predominantly in the family law context) in which the court has considered a party's financial circumstances when dealing with the issue of costs, this factor is not usually taken into account by the court” (para. 25). Such a practice, she said, “is certainly the exception in this province rather than the rule” (para. 26). She declined to consider the plaintiff's financial circumstances.

[8] I am satisfied that the court is not precluded from taking a party's alleged impecuniosity into account on the issue of costs, even where no application has been made pursuant to Rule 77.04: see, for instance, *Hill v. Cobequid Housing Authority*, 2011 NSSC 219, [2011] N.S.J. No. 291, at paras. 27-31, where

MacAdam J. considered the plaintiff's claim of impecuniosity in deciding to depart from the tariffs and order costs in a lump sum. In that case the plaintiff had provided affidavit evidence of his income, assets, and liabilities. By contrast, in *Farrell*, the Associate Chief Justice was provided with "no evidence ... setting out the Plaintiff's financial circumstances," although there had been some evidence at trial respecting his income (para. 24).

[9] In this case, as in *Farrell*, no specific evidence has been put before the court going to Mr. Mercier's financial situation. Moreover, it is not certain that any reduction would be appropriate even if such evidence were before the court. It is clear from the caselaw that alleged impecuniosity is not a factor to be routinely considered in ordering costs, particularly where there has been no application for relief under Rule 77.04. As such, the Attorney General shall have its costs on the terms requested.

Conclusion

[10] The Attorney General is entitled to costs of \$500.00, including disbursements.

LeBlanc, J.

