NOVA SCOTIA COURT OF APPEAL

Citation: *Sandeson v. Nova Scotia (Attorney General)*, 2023 NSCA 41

Date: 20230518
Docket: CA 520695
Registry: Halifax

Between:

William Michael Sandeson

Appellant

v.

The Attorney General of Nova Scotia, and the
Executive Director of Correctional Services Nova Scotia

Respondents

Judge:	Bourgeois, J.A.
Motion Heard:	May 18, 2023, in Halifax, Nova Scotia in Chambers
Written Decision:	June 13, 2023
Held:	Motion to amend Notice of Appeal dismissed
Counsel:	Hanna Garson, for the appellant Myles H. Thompson, for the respondents

Decision

[1] On May 18, 2023 I heard a motion brought by the appellant, William Michael Sandeson, to amend a Notice of Appeal filed on January 23, 2023. After hearing submissions of counsel and considering the material before me, I advised at the conclusion of the hearing the motion was dismissed with reasons to follow. These are my reasons.

Background

[2] In August, 2020, the appellant was on remand at the Central Nova Scotia Correctional Facility, and was cited for breaching institutional rules. This disciplinary decision was challenged by the appellant and upheld by Chief Superintendent Scott Keefe.

[3] The appellant subsequently filed a Notice for Judicial Review in the Supreme Court of Nova Scotia. After a number of pre-hearing appearances, the judicial review was heard by Justice Peter Rosinski in October, 2022, and dismissed by order issued January 5, 2023 (written reasons reported as 2022 NSSC 340).

[4] On January 23, 2023, the appellant, represented by legal counsel, filed a Notice of Appeal with this Court. In it, he seeks to challenge the decision of Justice Rosinski, and sets out the following grounds of appeal:

1. The application judge erred in fact and law by ruling the Appellant was afforded procedural fairness throughout the disciplinary process.

2. The application judge erred in applying the reasonableness standard of review to the Executive Director's determination of whether the Appellant was afforded procedural fairness.

3. The application judge erred in law and fact by finding the Executive Director of Correctional Services' decision was reasonable.

4. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[5] A motion for date and directions was held on March 2, 2023. A hearing date for the appeal was scheduled for September 18, 2023 and filing dates for the appeal book and factums were given.

[6] On May 3, 2023 the appellant filed a Notice of Motion seeking to amend the Notice of Appeal. The motion was supported by an affidavit affirmed by Emma Arnold. The proposed amendments seek, primarily, to expand the appeal to consider an earlier interlocutory decision of Justice Darlene Jamieson rendered in June, 2022. In particular, the appellant seeks to add the following to the Notice of Appeal:

> The Appellant appeals from the interlocutory motion judgment dated June 15, 2022, Supreme Court of Nova Scotia in part made by the Honourable Justice Jamieson in the proceedings in the Supreme Court of Nova Scotia showing court number Hfx No. 507045.
>
> . . .
>
> The Honourable Justice Jamieson's decision was made on June 15, 2022 at Halifax, Nova Scotia, and the order was issued on June 30, 2022.

[7] Under "Grounds of appeal", Mr. Sandeson proposes to add:

> (4) The learned motion judge erred in law by allowing the Respondent's (sic) to adduce improper fresh evidence.

[8] In addition to adding a challenge to the earlier decision of Justice Jamieson, the motion also seeks to broaden the grounds of appeal relating to Justice Rosinski's decision, proposing the following new ground:

> (15) The learned application judge erred in law by admitting improper fresh evidence through viva voce testimony.

[9] The respondents contest the motion and rely upon an affidavit affirmed by Myles Thompson and filed on May 15, 2023.

Analysis

Amendments relating to the Jamieson decision

[10] It is helpful for the analysis to follow to briefly review the decision the appellant now seeks to have included in his current appeal.

[11] In response to the appellant's application for judicial review of the Keefe decision, the respondents brought a motion seeking an order permitting the filing of fresh evidence in the judicial review. Due to the procedural fairness concerns raised by the appellant in his application, the respondents sought leave to supplement the Record for judicial review by filing an affidavit of Mr. Keefe. In her written decision (2022 NSSC 170), Justice Jamieson noted the appellant consented to the affidavit of Mr. Keefe being admitted to supplement the record, as he wished to bring out important information through cross-examination.

[12] Justice Jamieson was satisfied the appellant had raised procedural fairness concerns, therefore it was appropriate for the Keefe affidavit to be admitted to supplement the Record. However, the affidavit was not admitted in its entirety. Rather, exercising her gatekeeper function, Justice Jamieson directed a number of paragraphs be removed, the affidavit refiled, and further provided the appellant the opportunity to file an affidavit in response.

[13] The materials before me demonstrate that the respondents filed an amended affidavit from Mr. Keefe as directed by Justice Jamieson, and the appellant filed an affidavit in response. The appellant did not appeal any aspect of Justice Jamieson's order. As such, both affidavits formed part of the Record at the judicial review hearing, and the appellant took the opportunity to cross-examine Mr. Keefe.

[14] The appellant now seeks to add a challenge to Justice Jamieson's decision by injecting it into the current appeal. In my view, this is an improper and flawed approach. In reaching this conclusion, I note:

- Justice Jamieson's decision, as the appellant acknowledges, is interlocutory in nature;

- Rule 90.13(2) requires an appeal of an interlocutory order to be filed within 10 days after it is issued;

- Justice Jamieson's order was issued on June 30, 2022. Therefore, the time for filing an appeal of that order has long passed;

- The appellant has not sought to extend the time to file an appeal of Justice Jamieson's order. Nor has he addressed the factors this Court considers when granting an extension of time to advance an out-of-time appeal.

[15] I am satisfied that in the present instance, adding a challenge to Justice Jamieson's order to the current Notice of Appeal would constitute an improper end-run around the time requirement contained in Rule 90.13. I decline to do so.

The Rosinski amendment

[16] The appellant also seeks to add a new ground of appeal relating to Justice Rosinski's decision. This request engages Rule 90.39 which provides:

> **90.39 Amending notice of appeal**
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> **(1)** A party may amend a notice of appeal, notice of cross-appeal, or notice of contention no more than fifteen days after the day the notice is filed.
>
> **(2)** A judge of the Court of Appeal may permit a party to amend a document filed at any time.
>
> **(3)** An amended document must be filed and served immediately after it is amended.

[17] The appellant is beyond the initial fifteen day period, and as such, permission from the Court is required to amend the Notice of Appeal.

[18] In *LeBlanc v. LeBlanc*, 2023 NSCA 18, Justice Beaton reviewed this Court's approach to motions to amend. She wrote:

> [5] In *R. v. J.T.*, 2022 NSCA 21, Derrick J.A. identified the test to be applied on a motion such as this:
>
> > [10] It is well established that the authority to permit an amendment to a Notice of Appeal is found in *Civil Procedure Rule* 90.39(2). The governing considerations are whether (a) the amendment is reasonably necessary, and (b) the extent to which it will result in prejudice to the respondent (*Lane v. Carsen Group*,

> 2003 NSCA 42; *R. v. DeYoung*, 2017 NSCA 13). In *R. v. Rouse*, 2020 NSCA 28, Justice Bryson held a proposed amendment that "is not plainly unsustainable or fails to present an arguable issue" should be granted (para. 18).

(See also *Nyiti v. Cape Breton University*, 2009 NSCA 54, at para. 5, a case where the same kind of motion was dismissed).

[6] In *R. v. Marriott*, 2012 NSCA 76, Fichaud, J.A. discussed the exercise of the Court's discretion to grant the motion, as found in Rule 90.39(2):

> [5] The judge's exercise of discretion under Rule 90.39(2) should be governed by whether: (1) the amendment is arguable on its face, (2) the amendment is reasonably necessary for the administration of justice by enabling the presentation and determination of a material issue between the parties, and (3) the interval between the original, and properly timed notice of appeal and the amendment would cause irreparable prejudice to the respondent. On the first point, if the amendment is arguable on its face, the merits of the amendment are for the panel on the appeal, not the motions judge. Another way to express the second point is to say that the amendment must be sought in good faith, and not for an ulterior purpose. On the third point, the mere fact that the respondent will now have to reply to the issue in the amendment does not constitute prejudice. […] (citations omitted)

[7] It appears the first two criteria set out in *Marriott* correspond to the "reasonably necessary" question described in *J.T.* and the third consideration corresponds to the "prejudice" test set out in *J.T.*

[19] As the above authorities demonstrate, it is not a particularly high bar for an appellant to satisfy the Court a proposed amendment ought to be permitted. However, in the present circumstances and based upon the materials filed in support of the motion, I am not prepared to permit the amendment.

[20] The appellant is asking to add a ground alleging Justice Rosinski erred in law by admitting improper fresh evidence by way of *viva voce* evidence. However, as discussed earlier herein, the introduction of fresh evidence was allowed by Justice Jamieson. Her decision was not appealed, and from a review of Justice Rosinski's decision, it is not clear how or if, the issue of fresh evidence was a matter placed before him. This raises a concern the proposed new ground may simply be another means of attempting to undermine Justice Jamieson's decision.

Given the context, it was not clear from the materials before me, whether the proposed ground is arguable.

[21] To assist in understanding how the proposed ground was rooted in Justice Rosinski's decision under appeal, the appellant's counsel was asked to provide further clarity. In particular, counsel was asked to explain the source and nature of the fresh evidence being challenged and how Justice Rosinski erred in law. With respect, I am left with little understanding of who offered the offending evidence, how it was elicited and how, in light of Justice Jamieson's earlier order, Justice Rosinski erred in its admission.

[22] I am unable to conclude that the proposed amendment is reasonably necessary. I am further unable to assess whether allowing the addition of the proposed ground of appeal would result in prejudice or be necessary for the administration of justice.

Disposition

[23] For the reasons above, the motion is dismissed. The respondents have requested costs in relation to the motion.

[24] Counsel for the appellant submits that costs would not be warranted in the present circumstances. She submits that PATH – Prisoner Advocacy & Transformation Hub, with which she is affiliated, is a not-for-profit association and should not be subject to a costs award.

[25] I am satisfied in the circumstances of this matter, costs in the amount of $200 are appropriate. For clarity, costs are payable to the respondents by the appellant personally, not by PATH or counsel, within 30 days of the issuance of the Order dismissing the motion.

Bourgeois, J.A.