NOVA SCOTIA COURT OF APPEAL
Citation: *Sandeson v. Nova Scotia (Attorney General)*, 2023 NSCA 81

Date: 20231109
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:	The Honourable Justice Carole A. Beaton
Appeal Heard:	September 18, 2023, in Halifax, Nova Scotia
Subject:	Administrative law; Administrative law – judicial review; Administrative law – procedural fairness; Appeal; Appeal – mootness; *Correctional Services Act*; Evidence – fresh evidence; Procedure – procedural fairness
Summary:	The appellant appeals from a judicial review of a disciplinary process conducted in a correctional setting. He argues the judge erred in determining the appellant had been afforded procedural fairness throughout that process. The respondents seek to adduce fresh evidence, and argue the appeal is moot.
Issues:	(1) Should the fresh evidence tendered by the respondents be admitted?

Issues (cont'd)

(2) Is the appeal moot?

(3) Did the judge err in concluding the appellant had not been denied procedural fairness?

Result:

(1) The new evidence tendered by the Director of Correctional Services meets the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 for the admission of fresh evidence. It goes to the issue of mootness raised by the respondents.

(2) Applying the test in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the appeal is not moot as it engages a live controversy. A separate appeal by the same appellant currently underway could potentially engage the future use of his correctional disciplinary record.

(3) The judge's reasons demonstrate he correctly addressed and assessed the procedural fairness issue put before him. The judge's additional consideration of the reasonableness of the disciplinary process decisions is unnecessary, but of no impact. The judge's assessments of credibility and fact-finding are entitled to deference.

The appeal is dismissed without costs to either party.

NOVA SCOTIA COURT OF APPEAL
Citation: *Sandeson v. Nova Scotia (Attorney General)*, 2023 NSCA 81

Date: 20231109
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

Judges:	Farrar, Fichaud and Beaton, JJ.A.
Appeal Heard:	September 18, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Beaton, J.A.; Fichaud and Farrar, JJ.A. concurring
Counsel:	Hanna Garson, for the appellant Myles Thompson, for the respondent

Reasons for judgment:

[1] Mr. Sandeson appeals the result of a judicial review conducted pursuant to the *Correctional Services Act* ("the *Act*"), SNS 2005, c. 37. Justice P. Rosinski of the Nova Scotia Supreme Court (the "judge") concluded the disciplinary adjudication process conducted in the correctional institution where Mr. Sandeson was housed was reasonable, and that Mr. Sandeson had received procedural fairness throughout that process (2022 NSSC 340).

[2] Mr. Sandeson asks this Court to overturn the finding of the judge and to expunge from his institutional disciplinary record a finding that he was responsible for making a threat. The respondents oppose the request, and seek to introduce fresh evidence in support of their position the appeal is moot.

[3] For the reasons that follow, I would admit the fresh evidence tendered by the respondents and dismiss the appeal.

[4] A brief review of the history of the matter gives context for the arguments advanced by each party. In August 2020, Mr. Sandeson was awaiting retrial on a charge of first degree murder. He was remanded to the Central Nova Scotia Correctional Facility ("Burnside"). In a report prepared August 24, 2020, he was cited by correctional staff for having breached institutional rules found in the regulations to the *Act*, both by disobeying a lawful order and by threatening others. Adjudicator/Deputy Superintendent Tracy Dominix ("the Adjudicator") met with the staff involved, to review the allegations. Staff members indicated Mr. Sandeson had refused correctional personnel directions about where he was to be housed, maintaining he required a Health Care Unit ("HCU") placement; in the course of doing so he stated he would harm any inmate with whom he might be required to share quarters.

[5] Two days later, in a meeting with the Adjudicator, Mr. Sandeson was confronted with the allegations. He admitted to disobeying a direct order by refusing to return to a non-HCU placement. As to the assertion he had said he would harm another inmate, Mr. Sandeson acknowledged making comments, reporting that while he did not recall precisely what he had said, he did so to facilitate avoiding a non-HCU placement.

[6] Taking into account all the information presented, the Adjudicator determined Mr. Sandeson had breached both rules: he admitted disobeying the

order, and she was satisfied on a balance of probabilities he had made the threats staff attributed to him. Mr. Sandeson was confined to segregation for two days as punishment for his infractions. Mr. Sandeson's violations of the regulations also became part of his disciplinary record.

[7] Proceeding under s. 72 of the *Act*, Mr. Sandeson filed an internal review of the Adjudicator's decision[1]. In it, he asserted there had been a lack of procedural fairness because: (i) the disciplinary report had not been disclosed to him in sufficient time prior to his "hearing" with the Adjudicator; (ii) he was not given an opportunity to call witnesses; (iii) the evidence on the allegations was deficient; (iv) he had plead guilty only to "disobey any lawful order" owing to his refusal to move, but not in relation to "threaten others".

[8] Chief Superintendent Keefe ("Mr. Keefe") conducted the review. On February 8, 2021, he determined there would be no change to the earlier decision of the Adjudicator. Mr. Keefe's decision formed the basis of the judicial review brought by Mr. Sandeson which is the subject of this appeal.

[9] At the judicial review hearing, the judge received the affidavits of Mr. Sandeson and Mr. Keefe; both parties were cross-examined. The judge made credibility determinations, finding the evidence of Mr. Sandeson to be "wanting at times" and that he was "self-servingly selective in his presentation of facts". The judge found Mr. Keefe to be "compelling". The judge also chronicled the relevant provisions of the *Act* and regulations, and the steps taken in the process, in some detail. In his decision, the judge found:

> [9] I am satisfied that the decision of CS Keefe to confirm the adjudicator's decision was "reasonable", and that Mr. Sandeson was afforded a sufficient level of procedural fairness throughout the disciplinary process from August 24, 2020, to February 9, 2021.
>
> . . .
>
> [11] Specifically in relation to the procedural issues, based on the affidavit evidence of the Chief Superintendent generally, and specifically as contained at paras. 37, 56-84 of his affidavit, as supplemented by his *viva voce* testimony, I am satisfied that there was a fundamentally fair process throughout the investigation

1 Although not germane to the issues on appeal, both parties agree several months passed between the filing of the appeal of the Adjudicator's decision, and the eventual internal review conducted, owing to lost paperwork.

> and appeal by Mr. Sandeson of the "threaten others" charge. No material prejudice was occasioned to Mr. Sandeson's position by any of the procedural steps that were taken by Correctional Services staff.
>
> [Emphasis added]

[10] Before turning to the merits of Mr. Sandeson's appeal, it is necessary to consider first the respondents' motion to introduce fresh evidence, as it is germane to a second issue, which is the respondents' assertion the appeal is moot.

Fresh evidence motion

[11] The test for the admission of fresh evidence which has been applied for over four decades is well known: is the proposed evidence credible, relevant to the issues on appeal or capable of having affected the outcome of the proceedings, and was it otherwise unavailable at the time the matter was heard (*Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775-777)?

[12] More recently, in *Barendregt v. Grebliunas*, 2022 SCC 22, the Supreme Court of Canada affirmed the use of the *Palmer* test:

> [32] The test strikes a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings. The first criterion seeks to preserve finality and order by excluding evidence that could have been considered by the court at first instance, had the party exercised due diligence. This protects certainty in the judicial process and fairness to the other party. The remaining criteria — that the evidence be relevant, credible and could have affected the outcome — are concerned with reaching a just result.
>
> . . .
>
> [34] […] I conclude that the *Palmer* test applies to all evidence tendered on appeal for the purpose of reviewing the decision below. In my view, the *Palmer* test ensures the proper balance and is sufficiently flexible to respond to any unique concerns that arise when considering whether to admit evidence regarding facts or events that occurred after the trial.

[13] Here, the fresh evidence provisionally entered consists of the affidavit of Mr. Kirk Shepard, the Director of Correctional Services employed by the Correctional Services Division of the Nova Scotia Department of Justice. Mr. Shepard was not cross-examined on his evidence, which focuses on the uses to

be made of an inmate's correctional disciplinary record such as that of Mr. Sandeson. I am satisfied this is new evidence that is relevant and credible. It goes to the question of mootness, put before the Court by the respondents in reply to Mr. Sandeson's arguments. I would admit the evidence, as it is relevant to and can assist the Court in its consideration of the mootness question.

The issue of mootness

[14] The respondents argue this appeal is moot as its outcome could have no practical effect on future decisions relating to Mr. Sandeson's liberty.

[15] To assess mootness, the Court is guided by the test set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.
>
> [Emphasis added]

[16] On the question of whether a live controversy exists, at the time of this decision, Mr. Sandeson has another separate appeal filed with this Court,

scheduled for hearing in June 2024. It relates to his 2023 conviction for second degree murder. As noted earlier, Mr. Sandeson was on remand awaiting retrial when the subject disciplinary events arose. It is arguable the outcome of the other appeal (were Mr. Sandeson to be granted a new trial) or any bid for interim release from custody could bring his institutional disciplinary report into the spotlight.

[17] The evidence of Mr. Shepard does not definitively state the information found in Mr. Sandeson's disciplinary record could never or would never be considered by a court or by correctional officials in future. In addition, Mr. Shepard's affidavit does not identify any limits or restrictions to possible future use of Mr. Sandeson's disciplinary record.

[18] I am persuaded there is potential, albeit tenuous, that Mr. Sandeson's disciplinary record, which includes the threat infraction, could be used in future decisions concerned with Mr. Sandeson's liberty. Those could include, for example, the question of bail or a correctional assessment such as an inmate security classification.

[19] The evidence of Mr. Shepard permits the conclusion there is potential, if only minimal, for Mr. Sandeson's disciplinary record to inform his future status in the federal correctional system. Thus, there exists a live issue. Mr. Sandeson is entitled to have the Court consider this appeal, as the outcome of it impacts the content of his disciplinary record, and that record could come into play in future.

[20] I conclude the matter is not moot, and turn to consideration of the appeal on its merits.

Did the judge err in conducting the judicial review?

[21] Sections 69 through 73 of the *Act* provide the mechanism for the disciplinary hearing process. That process is further amplified in the regulations to the *Act* (N.S. Reg. 99/2006). Mr. Sandeson says the requirement for procedural fairness was a burden on the respondents to ensure.

[22] Mr. Sandeson maintains the judge erred in two respects: by applying a reasonableness standard of review to Mr. Keefe's determination he had been afforded procedural fairness, and in concluding Mr. Sandeson was afforded procedural fairness throughout the disciplinary process.

[23] Questions of procedural fairness do not attract a standard of review (*Morin v. Royal Bank of Canada*, 2023 NSCA 26 at para. 36; *P.N. v. Nova Scotia (Community Services)*, 2020 NSCA 70 at para. 68). The judge was tasked with considering procedural fairness afresh. The question on appeal is whether the judge applied the proper test in his review of that decision.

[24] On appeal, the judge's decision is assessed on a standard of correctness. For Mr. Sandeson's appeal to succeed, the Court must be persuaded the judge erred in his interpretation and application of the law (*Laframboise v. Millington*, 2019 NSCA 43 at para. 14).

[25] The distinction between the task of the reviewing judge in a judicial review and the task of this Court on appeal were considered in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36:

> [45] The first issue in this appeal concerns the standard of review applicable to the Minister's decision. But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:
>
> > Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
>
> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).

> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?
>
> [Emphasis added]

[26] In *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92 (leave to appeal refused [2014] S.C.C.A. No. 527) this Court identified what the judge was to do:

> [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. (See for example, **T.G. v. Nova Scotia (Minister of Community Services)**, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at ¶90).
>
> [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge [citations omitted].

[27] The judge's task was to consider whether Mr. Sandeson had been afforded procedural fairness in the disciplinary process. It was not necessary for the judge to assess the reasonableness of the administrative decisions made.

[28] Although the judge did include that additional assessment of reasonableness, his reasons demonstrate he did so in tandem with the correct approach, which was to assess afresh the question of procedural fairness.

[29] The judge's reasons satisfy me that he ultimately engaged in the correct analysis on the question of procedural fairness. The judge identified Mr. Sandeson's burden on the judicial review:

> [51] It is Mr. Sandeson's burden to establish that CS Keefe's confirmation of Adjudicator Dominix's decision was not a reasonable outcome, or that he was not afforded sufficient procedural fairness throughout the disciplinary process (pursuant to *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 and *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65).

[30] Later the judge concluded:

> [55] I am satisfied that the procedural process herein was sufficiently fair throughout.
>
> [Emphasis added]

[31] Reasonableness is the presumptive standard of review of the merits of a decision (*Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 7). The judge's discussion of it in this case is ultimately of no consequence. Had the question of the actual decision made in the course of the administrative process in the correctional facility been under scrutiny by the judge, then the reasonableness test would have come in to play, set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[32] The judicial review task of the judge was limited to the challenge to procedural fairness during the disciplinary process, the issue put before the court by Mr. Sandeson. The judge did not need to assess the reasonableness of Mr. Keefe's decision; that he did so is superfluous, but does not amount to error on the procedural fairness question before him, which he properly considered.

[33] The judge was satisfied Mr. Sandeson had been afforded procedural fairness throughout the disciplinary process. He made credibility assessments, factual findings and inferences that supported his conclusion. Deference is owed; this Court is not entitled to interfere with the judge's findings absent error, of which I see none.

[34] The content of procedural fairness takes account of the legislature's presumed intent that the statutory scheme operate efficiently. In his argument Mr. Sandeson recognizes the efficiency of the institutional disciplinary process, given the volume of administrative processes and proceedings under the *Act* in the correctional setting. Mr. Sandeson maintains that regardless, he was deprived of procedural fairness. With respect, I do not agree. The record supports Mr. Sandeson was afforded procedural fairness throughout, starting with having

been provided notice of the allegations made and then given an opportunity to respond to them, and later, a second and thorough vetting of Mr. Sandeson's objections in the internal review conducted by Mr. Keefe.

[35] Whether procedural fairness has been afforded will depend upon the context of the case under scrutiny. As stated in *Ghafari v. Canada (Attorney General)*, 2023 FCA 206:

> [14] Procedural fairness requires that the person affected by a decision have the opportunity to present their case fully and fairly and to have the decision made in a fair, impartial and open process, appropriate to the context of the decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) at para. 28 *(Baker)*. However, the requirements of procedural fairness are context specific: *R. v. Nahanee*, 2022 SCC 37 at para. 53; *Baker* at paras. 21-22.
>
> [15] When a breach of procedural fairness is alleged, this Court must ask itself whether, having regard to all the circumstances, a fair and just process was followed: *Lipskaia v. Canada (Attorney General)*, 2019 FCA 267 at para. 14; *Canadian Pacific Railway v. Canada (Attorney General)*, 2018 FCA 69 at para. 54; *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at paras. 46-47; *Gulia* at para. 9. Those circumstances include "factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the [decision-maker's] constituencies": *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 231.

[36] Within the context of a disciplinary process in a correctional institution setting, conducted pursuant to the *Act*, I see nothing in the record nor the judge's decision that could lead to the conclusion Mr. Sandeson was deprived of procedural fairness, nor that the judge erred in not concluding otherwise.

[37] In conclusion, I would admit the fresh evidence. While the appeal is not moot, I am not persuaded there has been any error that should cause this Court to intervene. I would dismiss the appeal without costs.

Beaton, J.A.

Concurred in:

Farrar, J.A.

Fichaud, J.A.