IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Kelly v. Nova Scotia (Police Commission) 2005 NSSC 142

Date: 20050602
Docket: SN 234907
Registry: Sydney

Between:

Carleton F. Kelly

Applicant

v.

Nova Scotia Police Commission

Respondent

and

Constable Clayton Burt and the Cape Breton Regional Municipality

Intervenors

Judge: The Honourable Justice Frank Edwards

Heard: March 24 and May 19, 2005, in Sydney, Nova Scotia

Counsel: Carleton F. Kelly, in person
Jacqueline Scott, for the respondent
David W. Fisher, for the Intervenor, Constable Burt
Robin Campbell, Q.C., for the Intervenor CBRM

By the Court:

[1] ***Background:*** Carleton Kelly ("Kelly") has brought a *certiorari* application seeking judicial review of a November 5, 2004 decision of the Police Review Board ("the Board"). The Board dismissed Kelly's complaint against Constable Clayton Burt ("Burt") of the Cape Breton Regional Police Service.

[2] The events that give rise to these proceedings date back to October 10, 2002, when Burt was called at home by a 14 year old female who advised that she had been sexually assaulted by Kelly. Kelly was arrested by Burt on October 12, 2002, for allegedly having threatened the 14 year old female. Kelly was released with the condition that he have no contact with the girl.

[3] On November 14, 2002, Kelly was arrested again and charged by Burt for threatening the 14 year old female a second time. Kelly alleged that at the time of his arrest he told Burt that he had witnesses who could prove that he did not make the alleged threat. Burt denied that he was told of such witnesses. Kelly was remanded to the Cape Breton Correctional Centre for breaching the October 12 undertaking and the November 14 charge. Kelly spent two days in jail.

[4] On March 11, 2003, the two threat charges against Kelly and the breach of undertaking charge were dismissed by the Provincial Court. The 14 year old female was later charged and pleaded guilty to lying about the second threat. The Crown elected not to recommend a charge of sexual assault pursuant to the October 12 allegation.

[5] Kelly filed a Form 5 complaint against Burt on March 12, 2003, in which Kelly alleged that Burt had failed to properly and impartially investigate the October 12 and November 12 allegations on the basis of Burt's friendship with the female's stepfather. Kelly attached to his form a four-plus page summary of the events which form the basis of his complaint.

[6] On October 21, 2003, Kelly filed a Form 13 Notice of Review with the Registrar of the Board.

[7] The review hearing took place before the Board on May 12, 13, 14 and June 1 and 2, 2004. In the course of the hearing, the Board heard evidence from 26 witnesses. On November 5, 2004, the Board released written reasons for its decision to dismiss Kelly's complaint. The Board found that Burt "did not engage

in discreditable conduct in relation to his investigation of the Ms. A. complaint, contrary to Section 5(1)(a)(I) of the ***Police Act*** Regulations."

[8] By Originating Notice dated November 12, 2004, Kelly set out numerous grounds for this application for judicial review, which were subsequently amended in his Affidavit deposed to on February 18, 2005.

[9] ***Legislative Framework - The Police Act***: The relevant sections of the ***Police Act*** (the "Act") are as follows:

> Composition
>
> 28 (1) There shall be a Police Review Board composed of three members appointed by the Governor in Council.
>
> Powers
>
> 29 The Review Board may conduct hearings into
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> (a) complaints referred to it in accordance with the regulations;
>
> (b) matters of internal discipline referred to it in accordance with the regulations; and
>
> ...
>
> Hearing *de novo*
>
> 32 A hearing by the Review Board shall be a hearing *de novo* and the parties to the proceeding may

(a) appear and be heard and be represented by counsel; and

(b) call witnesses and examine or cross-examine all witnesses. R.S., c. 348, s. 32.

33 (1) At a hearing under this Act, the Review Board may

(a) make findings of fact;

(b) dismiss the matter;

(c) find that the matter under review has validity and recommend to the body responsible for the member of the municipal police force what should be done in the circumstances;

(d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the municipal police force or the suspension of the member with or without pay;

(e) affirm the penalty imposed;

(f) substitute a finding that in its opinion should have been reached;

(g) award or fix costs where appropriate; and

(h) supersede a disciplinary procedure or provision in a contract or collective agreement.

Requirements for decision

(2) The decision of the Review Board shall be in writing and provide reasons therefor, and shall be forwarded to persons entitled to be parties to the proceeding.

Decision is final

> (3) The decision of the Review Board shall be final.

[10] The Code of Conduct and Discipline is contained in Part 2 of the Regulations. It begins with Section 5, which reads as follows:

> 5(1) A member of a police force commits a disciplinary default where the member
>
> > (a) engages in discreditable conduct by
> >
> > (I) acting in a disorderly manner or in a manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the police force,
> >
> > ...
> >
> > (c) neglects duties by
> >
> > (I) neglecting to or, without adequate reason, failing to promptly, properly or diligently perform a duty as a member of a police force.

[11] The matter originally was scheduled for hearing before me on March 24, 2005. At that stage, Kelly, who was self-represented, had set out 18 grounds of review. These grounds related to his view that the Board had been biased, that it had erred it its conclusion and that it did not have the power to control its own process.

[12] At the commencement of the March 24 hearing, I raised the additional issue of procedural fairness. I queried Counsel on their views as to whether the Board had been obliged to give Kelly (as an unrepresented litigant) some assistance regarding some of the procedural aspects of conducting a hearing. In particular, I expressed concern that the complainant Kelly had called the officer about whom he was complaining as his own witness. He did this apparently without an appreciation of the consequences/limitations of questioning your own witness and the concurrent potential advantage conferred upon opposing counsel, that is, the ability to cross-examine/lead his own client.

[13] I acknowledged that Kelly's "direct" of Burt more closely resembled cross-examination and that the Board had given Kelly a great deal of latitude in questioning his own witnesses. I queried whether that latitude made up for the potential advantage to opposing Counsel. Also, the procedure deprived Kelly of the opportunity to hear what Burt had to say first before he, Kelly, did his own questioning. As any experienced Counsel will acknowledge, the best ammunition for an effective cross-examination often comes from the witness on direct. Kelly lost that advantage. At the same time, opposing Counsel had the advantage of hearing Kelly's questions first. He thus got further potential advantage in

questioning his own client without having to anticipate what would be asked in cross-examination. The procedure followed also limited Kelly to some extent (again the Board gave Kelly wide latitude) to responding to Burt's "cross-examination" by questions in re-direct.

[14]   In the same vein, I noted that Kelly had called other police officers as his own witnesses thereby conferring upon opposing counsel the potential advantage of "cross-examining" sympathetic witnesses. (See, for example, the testimony of Associate Chief David Wilson, transcript pp. 753-815.)

[15]   Also, on March 24, I expressed concern about the "scope" of the hearing before the Board. I suggested that unnecessary and irrelevant evidence had been permitted to be called and that some questionable cross-examination had taken place.

[16]   After a lengthy discussion of the above, I adjourned the hearing until May 19, 2005, to permit the parties to make further written submissions. I gave Counsel the citations for various cases that I thought might be of assistance. Because Kelly

did not have the same access as Counsel to law libraries, I had my judicial assistant photocopy the cases in question for him.

[17] On May 19, 2005, I heard oral submissions from Ms. Scott on behalf of the Defendant and Mr. Fisher on behalf of both Intervenors Burt and the Cape Breton Regional Police Service. I then indicated to Kelly that I would not have to hear from him. I found that Kelly had not had a fair hearing before the Board. I advised that I would be setting the Board's decision aside and ordering a new hearing before a differently constituted Board. I also undertook to provide full written reasons for my decision.

[18] ***Scope of the Hearing:*** At the outset of the Board hearing on May 12, 2004, the Chairperson made the following remarks:

> "A few preliminary matters re procedure. This is not a court of law and it is our intention that everybody has an opportunity to be fully heard. Proceedings shall be fairly conducted and somewhat informally. That is to say, the strict rules of evidence will not apply. Normally the evidence will be accepted, and provided it's relevant to the issues that are before us this morning, it will be accepted and then we will determine what weight to give that evidence. Each party, of course, will be given an opportunity to cross-examine the other party's witnesses, and the Review Board, as well, will have an opportunity to ask questions of the witness."

[19] The Chairperson then put on record some items discussed in a pre-hearing telephone conference. None of them are relevant to the issues before me. In its November 5, 2004 decision, the Board defined the issue before it as follows: "Whether Constable Burt was biased against Mr. Kelly in his investigation of Ms. A's October 12 and November 12 allegations."

[20] That issue was clear from the outset of the Board hearing as it had been detailed at some length in the summary Kelly had attached to his Form 5 complaint. The Board's task was therefore to determine whether Burt's investigation was deficient and/or overzealous because of his alleged friendship with the complainant's step-father. A related issue would have been whether, if there was such a friendship, it was appropriate that Burt continue to act on the file or whether he and/or his superiors should have recognized that he was in a conflict of interest.

[21] Much was made, before the Board and before me, of the fact that Burt had no further involvement with the sexual assault investigation (i.e. after he took the statement from the complainant). With respect, that contention is irrelevant. The nub of Kelly's complaint is that Burt did continue to play an active role on the

related threat investigations by arresting Kelly on November 14 on the same complainant's allegation of a threat. It was that arrest, and Burt's investigation of the alleged threat, which Kelly says cost him two days in jail.

[22] The focus of the Board hearing should therefore have been on the actions of Burt. Instead, the Board heard a lot of evidence regarding the character and lifestyle of Kelly, the complainant before the Board.

[23] Worse still, the Board permitted counsel for Burt to elicit detailed evidence of the alleged (October 12) sexual assault by Kelly (transcript pp 268 - 273; also pp 368 - 369). In justifying his line of questioning to the Chair, counsel for Burt stated the following at p. 259:

> "You haven't heard what is necessary for the defence of Constable Burt. That's the difficulty. ***It's easy for my friend to sit there and say I'm not guilty of anything. That's not my position.*** Okay. We have a different point of view, that there was a lot of evidence to support charges, there was all kinds of things going on. It's part and parcel of the overall package. He can't call a witness and say these are the only questions I'm going to ask. The witness is wide open on cross-examination to the questions I want to ask." *(Emphasis mine)*

[24] It must be kept in mind that Kelly was never charged with sexual assault. In fact, contrary to counsel's above stated position, Kelly was not guilty of anything.

The complainant and her friend recanted their allegations that Kelly had threatened them on November 12, 2002. The Crown offered no evidence on both threat charges (October 12 and November 12) and findings of not guilty entered regarding Kelly. As noted, the 14 year old complainant pleaded guilty to lying about the November 12 threat. The Crown realized that the sexual assault allegation rested on the potential evidence of a complainant whose credibility had been "seriously damaged." (See letter June 26, 2003 from Crown attorney - tab 17, p.4.) Hence, no sexual assault charge was ever laid.

[25] Kelly therefore appeared before the Board as an innocent man with a complaint about the actions of a police officer. At no time did he ever allege that Burt had put the complainant up to lying about him. Why the complainant and her friend lied had nothing to do with whether or not Burt conducted a proper investigation. Yet Counsel for Burt was permitted to probe this area (during cross-examination of a Kelly witness) and thereby elicit highly prejudicial evidence regarding Kelly (see transcript pp 311- 312).

[26] Counsel for Burt says he was entitled to wide latitude in his cross-examination of Kelly's witnesses. He states that Kelly's credibility was highly relevant to the resolution of key aspects of the evidence. I agree.

[27] The critical conflict in the evidence of Burt and Kelly relates to discussion between them after the November 14 arrest. Specifically, Kelly claimed that he promptly advised Burt that he had witnesses who could prove that Kelly could not have made the threat at the time and location alleged by the complaint. Burt denied that the conversation took place. Burt testified that the first time he heard about the alleged alibi witnesses was later that day at the courthouse. Burt says at that time he heard Kelly tell the Crown Attorney that he had alibi witnesses. Burt says that the Crown Attorney told Kelly that he was in a "reverse onus" situation. The remand hearing proceeded. Kelly said nothing to the presiding justice and was remanded.

[28] The resolution of this conflict in the evidence would involve an assessment of the credibility of both Burt and Kelly. There is no question that Counsel was entitled, even obliged, to challenge Kelly's credibility. That does not mean that Counsel was entitled to attempt to prove that the alleged sexual assault had in fact

occurred. While Counsel is entitled to wide latitude, there are limits. In *Sopinka, Lederman and Bryant,* ***The Law of Evidence in Canada*** (2nd Ed) p. 936, the authors state the following:

> "16.104 Although counsel's license to cross-examine is a broad one, it is not without limitation. Counsel cannot, under the guise of cross-examination, circumvent other rules of evidence by asking a question, the answer to which would be inadmissible if offered in chief. ***Similarly, the trial judge has a discretion to disallow relevant cross-examination as to credibility where the evidence elicited constitutes inadmissible bad character evidence of the accused.*** In addition, regard must be given to a trial judge's discretion, rooted in the common law, to disallow a question which in his or her opinion is merely vexatious. The Supreme Court of Canada, in *Brownell v. Brownell*, held that the trial judge had not erred in refusing to allow the witness to give the names of his wife in a bigamous marriage when this information was sought in cross-examination. As was stated by Anglin J. (As he then was):
>
> > 'No doubt the limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issue of the witness's credibility necessarily enlarges the field. But it does not follow that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or the issues raised in the pleadings is no more admissible in cross-examination than in examination in chief.'" *(Emphasis mine)*

[29] Counsel was permitted to get into highly prejudicial and irrelevant evidence regarding Kelly. The Chair attempted to assert some control over counsel when she advised him that she was not going to permit a "re-hearing" of the sexual

assault allegation (transcript p. 265). Unfortunately, after further argument from Counsel, she permitted him to proceed with the caution that he "be prudent" with his questions (transcript p. 267). Counsel then proceeded to elicit the detail of the sexual assault allegation (p. 268 et seq.).

[30] In its decision, the Board made an apparent reference to the evidence in question:

> "During five days of hearing, the Board heard from 20 witnesses, many of whom were very young, had faced and were facing serious and some cases, tragic personal problems. ***While the troubling details of a large portion of their evidence left the panel disquieted and concerned***, much of their testimony proved of little or no probative value to the matter being adjudicated. Consequently, that aspect of their evidence did not figure into the Board's deliberations and will not be recounted here." *(Emphasis mine)*

[31] At several points during the impugned testimony, Kelly understandably protested that he was not on trial and that the evidence was irrelevant (e.g. transcript p. 258 and 514). When the Board ultimately concluded that Kelly had not proven his case, I doubt that Kelly drew comfort from the Board's above quoted disclaimer. The fairness of the hearing, or at least the appearance of fairness, had been undeniably tainted by this inappropriate cross-examination.

[32] ***Adequacy of the Board's Reasons:*** As I was preparing this decision, I became aware of a problem related to the Board's November 5, 2004 decision. That problem concerns the adequacy of the Board's reasons. At the conclusion of the May 19, 2005 hearing before me, I advised the parties that I would be setting aside the Board's decision (with written reasons to follow) and ordering a re-hearing. Because of that fact, and because the issues which were argued are dispositive of this judicial review, it is too late for me to invite further submissions from the parties. In the interests of preventing a similar mistake in the future, however, I will briefly comment.

[33] As I noted above, there were significant credibility issues between Burt and Kelly that the Board had to resolve. As noted, these primarily related to whether or not Kelly advised Burt on November 14 that he had alibi witnesses. A close examination of the Board's decision reveals that it did not make key findings of credibility on this issue.

[34] On page 7, the Board notes Kelly's claim that he had told Burt that he had witnesses and "one phone call" would clear it all up. The Board noted the both parties agreed that Burt did not make such a phone call.

[35] On page 12, the Board notes Burt's denial that Kelly had advised him there were witnesses (up until the time they met with the prosecutor).

[36] On page 19, the Board said it did not accept (read: did not believe) Kelly's contention that he was too intimidated to advise the remand court that he had witnesses. This finding sheds no light on the evidenciary conflict between Kelly and Burt.

[37] On pages 15 and 16, the Board deals with the evidence of Kelly's brother, Robert Kelly. Robert had testified that on November 14 he told Burt that his brother had alibi witnesses. Burt denied that claim. The Board made no finding on whether it believed Robert or Burt on his central question. The Board notes only (p. 16) that this alleged conversation is not mentioned by Kelly in his lengthy Form 5 complaint.

[38] Finally, on page 22, the Board concludes: "However, the burden is on Kelly to prove his case and after reviewing the evidence in its totality, the Board finds

that he has not met that burden." That is a conclusory statement the Board is entitled to make. But how did it get there?

[39] Did the Board disbelieve Kelly and therefore conclude Burt's investigation was not deficient? Did the Board believe Kelly but nevertheless conclude that Burt's failure to check out the alibi witnesses was not blameworthy? Or, was the Board unable to decide whom it would believe and therefore it resolved the issue against the party bearing the onus (Kelly)? All three scenarios are possible interpretations of the Board's decision. As such the decision is unsatisfactory.

[40] Kelly is entitled to know why he lost. Section 33(2) of the ***Police Act*** requires the Board to give reasons. Kelly is entitled to know whether he was believed or disbelieved by the Board. Further, especially if Kelly was disbelieved, Kelly is entitled to know the reasons why the Board preferred Burt's evidence over his. That is emphatically so in this case. The Board stated that it disregarded the prejudicial and irrelevant character evidence regarding Kelly. On what basis then did it believe Burt rather than Kelly (if that is in fact what it did)?

[41] In McWilliams, ***Canadian Criminal Evidence*** (4th Ed.), the authors quote Binnie J. in ***R. v. Sheppard*** (2002) 162 CCC (3d) 298 (S.C.C.) at pp. 319 - 321, the Court said in part:

> "1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
>
> 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
>
> 3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record."

[42] The principles enunciated in ***Sheppard*** are applicable to hearings before administrative tribunals like the Police Review Board. Both the complainant and the accused police officer as well as the public should understand the reasons for the ultimate decision.

[43] ***Failure to Assist Unrepresented Litigant:*** Much of the difficulty with the Board hearing springs from the fact that an unrepresented litigant did not receive appropriate guidance from the Board.

[44] As noted, the ***Act*** provides for a hearing *de novo* regarding, in this case, a citizen's complaint about a police officer. Here, Kelly was alleging that he was the victim of a biased investigation which caused him to spend two nights in jail for a crime he did not commit. As well, Kelly was concerned about damage to his reputation. [Counsel was wrongly permitted to elicit evidence that Kelly already had a bad reputation (transcript pp. 254 - 255).]

[45] The starting point for the Board should have been that an ***unrepresented*** citizen had a complaint which required a hearing. The Board already had significant detail about the nature of the complaint. The Board has full autonomy to adopt its own procedures. The only caveat is that those procedures must be fair. It is within the Board's powers, for example, to relax the strict rules of evidence (as it did here) in order to make the hearing process more user friendly.

[46] Unfortunately, if an unrepresented litigant is permitted to call whatever evidence he wants, whether relevant or not, the effort to be fair to him might have exactly the opposite effect. As noted, Kelly was permitted to call as his own witness the officer about whom he was complaining. He also called several other police witnesses who could hardly be expected to help him build his case. As well, he called several witnesses, including the complainant in the alleged sexual assault, in part to prove what was already a matter of record. The consequences to Kelly were significant. The opposing side received considerable advantage in the presentation of its defence and, as noted, through cross-examination of Kelly's witnesses, was able to elicit prejudicial evidence regarding Kelly's character and lifestyle. The five-day hearing was sidetracked by irrelevant evidence when it should have been focussed squarely upon the quality of Burt's investigation and actions.

[47] The Board had a duty to assist Kelly on some key procedural issues common to all hearings. Much of the difficulty ***may*** have been avoided if the Board had conducted a meaningful pre-hearing conference with the parties. (With unrepresented litigants it is advisable to record such conferences.) This conference would have had the promotion of a fair and expeditious hearing as its goal. At that

time, the chair could have explained in general terms what was meant by a hearing *de novo*. She could have explained, for example, that Kelly would have an opportunity to give evidence and call his witnesses first. Following the presentation of Kelly's case, Counsel for Burt and Counsel for the Police Service would have an opportunity to call their evidence in response.

[48] The Chair could have inquired of Kelly whether he knew what was meant by the onus of proof. If not, she could have explained that principle to him and that it was he who had the onus of proof in this case.

[49] The Chair might then have reviewed with the parties what witnesses they intended to call and the purpose for calling each witness. In a forum that does not provide for the pre-hearing discovery of witnesses, and where unrepresented parties are frequent, such a discussion would be very useful to all concerned. Burt would know in advance the case he has to meet. Kelly might have been spared the consequences of calling unnecessary witnesses.

[50] The Chair could have sought to define and emphasize the issue the Board had to determine, that is, whether or not Burt had conducted a biased investigation.

Kelly therefore did not have to prove that he did not commit a sexual assault or that the complainant and others had admitted they lied. What the Board was interested in was what had happened to Kelly and whether that was the result of an inadequate or biased investigation by Burt.

[51] Generally speaking, the Chair could have told Kelly that it was up to Kelly to lead evidence to prove that Burt had conducted a biased investigation. If he made out a case that required an answer (i.e. could survive a nonsuit motion) on his own evidence and that of his witnesses then she would call upon the opposite parties to call witnesses if they wished to do so.

[52] Counsel for Burt argued before me that he may have opted not to call Burt at the Board hearing. Kelly would thereby have lost any opportunity to question Burt. Counsel is theoretically correct. But that assertion is simply not realistic in the circumstances of this case. Given the anticipated evidence from Kelly and the undeniable friendship between Burt and the Complainant's father, a nonsuit, or option to not call Burt, was not on.

[53] If such a pre-hearing conference had taken place, Kelly may still have persisted in proceeding as he did. In that event, he would now have little cause to complain. The difference is that he would have made an informed decision with some appreciation of the consequences.

[54] Counsel argued that giving an unrepresented litigant such advice colours the tribunal's impartiality. I do not agree. This is ensuring that every one understands the rules and where the focus of the hearing should lie. It is not tactical advice. Kelly would still have had the opportunity to call what witnesses he wished provided they had ***relevant*** evidence to give.

[55] As I have said, the Board is free to adopt its own procedures. I am simply suggesting that this case illustrates that a meaningful pre-hearing conference can avoid a lot of grief. At some point in the process the unrepresented litigant has to know some basic rules. The sooner the Board acquaints him with those rules, the better.

[56] The Board can retain its impartiality and still ensure that Counsel does not gain an unfair advantage over the unrepresented. As noted earlier, for example, the

Chair could have moved decisively and correctly to cut off inappropriate cross-examination.

[57] ***Law:*** The Supreme Court of Canada has affirmed that there is, as a general common law principle, a duty of procedural fairness. This duty lies on every public authority making an administrative decision which is not of legislative nature and which affects the rights, privileges or interests of an individual (***Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police***, [1979] 1 S.C.R. 311). The question in each case is what the duty of procedural fairness may reasonably require of an authority, such as specific procedural rights in a particular legislative and administrative context and what should be considered to be a breach of fairness in particular circumstances (***Cardinal v. Kent Institution***, [1985] 2 S.C.R. 643). The Supreme Court of Canada recently affirmed these principles in ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1990] 2 S.C.R. 817.

[58] Justice Davison, in ***Cusack v. Nova Scotia (Superintendent of Insurance)***, [2000] N.S.J. No. 93 (S.C.) referred to ***R.D.R. Construction v. Rent Review Commission*** (1982), 55 N.S.R. (2d) 71, when he said that natural justice is nothing

more than fair play. At paragraph 30, Davison, J. stated that the duty of fairness is normally fulfilled by a tribunal if the applicant is sufficiently informed of the case that he has to meet and is given a full opportunity to be heard.

[59] As set out by Brown and Evans in ***Judicial Review of Administrative Action in Canada***, at 10:5110, the duty of procedural fairness entitles a party to administrative proceedings of an adjudicative nature to present relevant evidence, either through calling witnesses or introducing other evidence. Each party is responsible for introducing whatever evidence the party believes best advances its case.

[60] Administrative tribunals are free to determine their own procedures. Provided the procedures are reasonable and fair, the court should not interfere. In ***R. v. Hull Prison Board of Visitors***, [1979] 1 All. E.R. 701 (C.A.), Megaw, L.J, cautioned as follows (at p. 713):

> "It is certainly not any breach of any procedural rule which would justify or require interference by the courts. Such interference, in my judgment, would only be required, and would only be justified, if there were some failure to act fairly, having regard to all relevant circumstances, and such unfairness could reasonably by regarded as having caused a substantial, as distinct from a trivial or merely technical, injustice which was capable of remedy."

[61] Similarly, the words of Justice Wilson in ***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653 at 685, were adopted by the Court in ***Vanton v. British Columbia Council of Human Rights***, [1994] B.C.J. No. 497 (S.C.), at paragraph 55:

> "... every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather, to allow administrative bodies to work out a system that is flexible, adapted to their needs, and fair... the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome..."

[62] There is no question that the Board, as a statutory body carrying on quasi-judicial functions, is governed by the principles of natural justice. A party appearing before the Board is entitled to be heard and to present his case (Section 32 of the ***Police Act***). In the process of presenting his own case, he is entitled to test the case that is made against him.

[63] In proceedings where there is an unrepresented party, a trier of fact is required to provide some measure of assistance in order to ensure the hearing is

fair. However, a trier of fact must not be an advocate for the unrepresented party and cannot be an advocate while maintaining impartiality.

[64] The Board's duty is to ensure that the hearing is fair in all the circumstances. The fairness of the hearing is not to be measured by comparing one party's conduct of his own case with the conduct of that case by a competent lawyer. At paragraph 36, the Court in ***Davids v. Davids***, [1999] O.J. No. 3930 (C.A.) explained:

> "Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. ***It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge, must of course, respect the rights of the other party.***"
> *(Emphasis mine)*

[65] In that case, the Court was satisfied that the husband, who was unrepresented, understood the issues to be litigated. The husband was provided with a full opportunity to present his case and challenge the case presented for the wife and therefore the appeal was dismissed. In concluding, the Court stated the following at paragraph 40:

> "He presented the case he chose to present. It may have been very different from the case a competent lawyer would have presented, but that does not make the trial unfair."

[66] The Court in ***Manitoba (Director and Family Services) v. J.A.***, [2004] M.J. No. 451 (C.A.), was also faced with the issue of whether a mother and child were deprived of their right to a fair trial because they were not represented by counsel. The mother argued that the trial judge had failed to adequately assist her thereby demonstrating "judicial bias". The Court considered the appropriate balance that must be struck by the trial judge between the competing imperatives of helping a litigant who is in need of assistance while maintaining impartiality.

[67] Beginning at paragraph 33, the Appeal Court outlined the jurisprudence relating to this issue. The focus in all of the cases was fairness. The decision of ***Platana, J. in Baziuk v. BDO Dunwoody Ward Mallette*** (1997), 13 C.P.C. (4th) 156 (Ont. C.J.), which was referred to with approval in ***Smith v. Heron***, [2003] N.S.J. No. 377 (C.A.), was quoted at paragraph 34:

> "The problem of unrepresented parties, who may not be familiar with law and procedure, is one which is facing courts today with an ever increasing frequency. Courts are mindful of a degree of understanding and appreciation which should appropriately be extended to such parties. However, notwithstanding the difficulty with such parties attempting to properly represent themselves, courts must also balance the

> issues of fairness and be mindful of both, or [sic] all parties. Issues of course must always be determined in accordance with accepted legal principles and the law which has developed. A sense of fairness and understanding granted to unrepresented parties ought never to extend to the degree where courts do not give effect to the existing law, or where the issue of fairness to an unrepresented litigant is permitted to over ride the rights of a defendant party."

[68] The Court pointed out that the judge cannot assume the role of counsel for the unrepresented party. In conclusion, the Court stated at paragraph 40:

> "What the mother in reality is complaining about is not the failure of the trial judge to assist her in an understanding and even-handed way, but rather the fact that he did not provide her during the course of the lengthy trial with substantive legal advice and guidance to advance her position. The authorities just reviewed all support the conclusion that no judge can assist an unrepresented litigant in this way and at the same time maintain the essential appearance and reality of impartiality that is a core precept of the judicial function."

[69] The words of ***Eberhard, J. in R. v. Laycock***, [1996] O.J. No. 3846 (G.D.), albeit in a criminal context, are relevant nonetheless (paragraphs 21-23):

> "The duty of the trial judge is to preside in such a way that the proceedings are fair. Often, this will require an extraordinary amount of patience. Unrepresented accused must be made aware of the basic trial process. ***The judge must heighten vigilance for evidentiary and procedural improprieties by opposing counsel. Demonstrably inadmissible evidence and unfair conduct must be prevented by the trial judge, if it appears, notwithstanding the failure of the unrepresented litigant to object.*** However, in my view it is both contrary to

> our legal traditions and dangerous for a trial judge to enter the forum in an attempt to assist an unrepresented litigant.
> *(Emphasis mine)*
>
> A trial judge should not be required to instruct a litigant on the nuances and subtleties of an extremely complicated body of knowledge. Nor should the trial judge be suggesting theories or weaknesses that ought to be pursued. That would be patently unfair to the opposing party and so onerous a duty as to be impossible.
>
> That a litigant does not possess the skills of an advocate, is not to say they (sic) do not have a theory or strategy for their case. An interfering judge may well inadvertently derail a strategy or force the hand of the litigant. The results could be just as unfair as failure to lend assistance to a litigant who is clearly intimidated by the process and the challenge of advocacy."

[70] Adjudicators must not cross the line between adjudication and advocacy. Procedural fairness does not, and cannot require the Board to intervene in the tactical and strategic elements of the case made by the parties.

[71] The cases in which the trial judges were held to have committed an error are those related to points of procedure. For example, in ***Clayton v. Earthcraft Landscape Ltd.*** (2002), 210 N.S.R. (2d) 101 (S.C.), the Nova Scotia Supreme Court overturned the decision of a small claims court adjudicator who did not draw to the litigant's attention that his documentary evidence would be entitled to more

weight if he called the author of the document as a witness. That was information relating to the procedure not that of legal advice.

[72] ***Conclusion:*** Dealing with unrepresented litigants poses a challenge for any judge, adjudicator or member of an administrative tribunal. The above quoted law recognizes the obligation on the trier to provide assistance to the unrepresented litigant. At the same time it recognizes the limits of such assistance.

[73] In this case, the Chair provided Kelly with no assistance by way of explaining basic principles of procedure. While the Board has the right to determine its own procedures, those procedures must be fair. Here, it was not fair to allow Kelly to present his case without giving him an explanation of the format of the hearing and the basic principles of direct and cross-examination.

[74] This unfairness was compounded by the Chair's failure to prevent the admission of highly prejudicial and clearly inadmissible evidence against Kelly. Counsel have argued that Kelly was given a full opportunity to present his case. In support of that argument they point to the latitude the Chair permitted Kelly and the sheer volume of his questions. That argument does not address the tactical

advantage accorded opposing Counsel. Implicit in their argument also is the suggestion that the result would have been the same even if direct and cross-examination had taken place in the usual order. The answer is that we cannot know that.

[75] In Mullan, ***Administrative Law*** (2001), the author quotes the Supreme Court of Canada in ***Cardinal v. Director of Kent Institution***, [1985] 2 S.C.R. 643:

> "'***The denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.*** The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.' *(Emphasis mine)*

> Indeed, in most instances, for the reviewing court to even speculate as to the outcome would be to compound the denial of procedural fairness. In a judicial review application that has as its focus the denial of procedural fairness, not the merits of the matter under consideration, the reviewing court is in an even worse position than the original decision maker as to the merits of the case. The court not only lacks the benefit of whatever might be produced by the participation of the applicant for relief, but it also comes to know the material on which the decision maker acted only indirectly." (Chapter 12, pp 227-228).

[76] Before me, Counsel made the novel argument that the right to a fair hearing extends only to the accused and not to the complainant. Counsel for Burt submitted the following at paragraph 80 of his brief:

> "A careful review of the cases provided by the Supreme Court discloses that in each and every case involving professional discipline, the Court was concerned with the rights of the individual facing disciplinary action. In none of these cases was the Court concerned with the rights of he individual lodging the complaint against the professional."

[77] Counsel later compared the complainant Kelly to a private prosecutor. At paragraph 101 of his brief Counsel noted:

> "I also feel compelled to note that it is highly doubtful that any trial judge would be criticized for failing to provide assistance to an unrepresented prosecutor (i.e. a private prosecution). The fundamental purpose of the assistance is to protect the accused and ensure he gets a fair trial. In the case before this court, the accused was Constable Burt. If the Police Review Board is required to take extra steps to protect an individual, it should be the accused who is owed a 'high standard of justice'."

[78] The above argument is simply not tenable. Kelly was as entitled as Burt to a fair hearing. The hearing was set up pursuant to Sections 29 to 33 of the ***Police Act***. The purpose of the Act is described by Saunders, J. in ***White v Dartmouth (City) et al.*** (1991), 106 N.S.R. (2d) 45 (S.C.), at p. 6 (QL), as follows:

> "The Police Act does not expressly set out its purpose. However, it is obvious from its broad scope that the Act clearly

> covers both public protection from abuse of police power, and protection of police officers from unwarranted disciplinary action. While this dual purpose offers no clear guidance to the interpretive issue facing me, it does suggest that a fair and proper balance be maintained between these two laudable objectives."

[79] While Burt had a lot at stake, so did Kelly. Kelly had been wrongly incarcerated for two days because of what he alleged amounted to an abuse of police power. He was entitled to have the complaint fairly heard and, if substantiated, to have someone held accountable.

[80] In short, I am satisfied that Kelly was entitled to but did not receive procedural fairness during the hearing of his complaint before the Board. A denial of procedural fairness amounts to a denial of natural justice. Denial of natural justice is measured against a standard of correctness.

[81] I am therefore setting aside the decision of the Board and ordering a re-hearing before a differently constituted Board.

[82] As the successful litigant, Kelly is entitled to costs. The hearing extended over two one-half day periods. The case involved substantial preparation on some

complicated issues. Although Kelly did not have to pay a lawyer, he is entitled to some compensation for the time and effort he obviously expended. The Respondent and the Intervenors shall be jointly and severally liable to pay costs to Kelly forthwith in the amount of $1,000.00 total.

Order accordingly.

J.