SUPREME COURT OF NOVA SCOTIA

Citation: *Taylor v. Nova Scotia (Attorney General)*, 2019 NSSC 25

Date: 20190123
Docket: Hfx No. 481177
Registry: Halifax

Between:

Cory J. Taylor

Applicant

v.

The Attorney General of Nova Scotia, Police Complaints Commissioner, Constable Donna Lee Paris, Constable Devon Norris

Respondents

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	December 17, 2018, in Halifax, Nova Scotia
Counsel:	Benjamin Perryman, for the Applicant Sheldon Choo, for the Respondents Kelly McMillan, for the Respondents

By the Court:

Overview

[1] Cory Taylor was arrested for assault in Downtown Halifax by officers of the Halifax Regional Police Department early in the morning of August 12, 2017. He was held in cells for a number of hours and eventually released without charges later that day. Mr. Taylor was 18 years old at the time. He alleges mistreatment by the Halifax Regional Police during the course of his arrest and his time in custody.

[2] Mr. Taylor filed a complaint with the Halifax Regional Police Commissioner on December 12, 2017. The Record, filed by the Commission on November 28, 2018, contains an affidavit sworn by Mr. Taylor on November 28, 2017, and date-stamped as received by the Commission on December 12, 2017.

[3] On March 27, 2018, Sergeant Greg Robertson filed a "Halifax Regional Police Professional Standards Investigator Report" with Superintendent Colleen Kelly, recommending that the complaint against Constable Paris and Constable Norris be dismissed.

[4] On April 27, 2018, Superintendent Colleen Kelly dismissed the complaint and her decision was forwarded to the applicant on May 2, 2018.

[5] On May 28, 2018, the applicant requested a review by Judith A. McPhee, Q.C., the Police Complaints Commissioner, regarding the decision to dismiss his complaint. On June 7, 2018, Ms. McPhee, appointed Fred Sanford to investigate the applicant's complaint, conduct a review and submit a report. Mr. Sanford submitted an updated report to Ms. McPhee recommending the matter be dismissed.

[6] On September 20, 2018, Ms. McPhee dismissed the complaint.

[7] On October 10, 2018, Mr. Taylor filed for judicial review. The judicial review hearing is scheduled for April 18, 2019.

[8] On October 10, 2018, Mr. Taylor also filed the "Further Affidavit of Cory J. Taylor", which details his version of his contact with Fred Sanford and his participation in the investigation.

[9] The responding parties object to some or all of Mr. Taylor's proposed affidavit evidence. If the affidavit evidence is admitted, the Commissioner requests permission to file a rebuttal affidavit from Mr. Sanford.

Legislation

[10] Civil Procedure Rule 7.28 states:

> 7.28 (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.
>
> (2) An applicant for judicial review, or an appellant, must file the affidavit when the notice for judicial review or the notice of appeal is filed, and a respondent must file the affidavit no less than five days before the day the motion for directions is to be heard.
>
> (3) A motion for permission to introduce new evidence must be made at the same time as the motion for directions, unless a judge orders otherwise.

Paragraphs Under Consideration

[11] The judicial review of this matter is scheduled to be heard on April 18, 2019. This decision deals exclusively with the admissibility of certain paragraphs of the further affidavit of Mr. Taylor filed on October 10, 2018. That affidavit is comprised of 18 paragraphs.

[12] During the course of submissions, Mr. Taylor agreed that paragraphs 1-5 and 13-18 of his affidavit should be struck. This leaves paragraphs 6-12 for consideration. The Attorney General and the Commission object to all of the remaining paragraphs. Constable Paris and Constable Norris object to paragraphs 7 and 9 only. The paragraphs in question state:

> 6. On August 2, 2018, the investigator emailed me from his Gmail account to introduce himself. This email went to my "junk mail" on that date. But I did not open and receive the email until September 24, 2018 when my lawyer advised me that the investigator's report mentions emails he sent to me in August 2018. Attached to this affidavit as Exhibit "B" is a copy of the investigator's August 2, 2018 email.
>
> 7. My mother advised me and I do verily believe it to be true that the investigator phoned her on or about August 5-10, 2018 to request my phone number. Shortly thereafter, the investigator phoned me to interview me regarding my complaint.

> 8. The investigator's interview of me lasted less than five (5) minutes. After introducing himself, the investigator questions were focused on what was going on at the Argyle Bar & Grill (the "Argyle") on the evening in question and how I gained access to the venue. I answered that I did not know what event was happening at the Argyle that evening. I also answered that I did not need identification to get into the Argyle and that I did not use my brother's ID.
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> 9. The investigator asked if the friends who were with me that night, who are all listed in my original complaint affidavit, would have anything different to add to my story. I answered that I thought they would support my story, but explained that none saw the HRP arrest me or put me in the police car.
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> 10. The investigator verified that he had my correct email address, but did not advise me that he had previously sent me an email to which I did not reply. He then said he would call me if he had any further questions.
>
> 11. During the interview, the investigator never asked for the contact information of my friends. He never advised me that he had concerns about my credibility. He never advised me that he believed the HRP's version of events over mine. He did not ask me any questions about the HRP arrest and detention. He did not ask about my injuries or the source of those injuries.
>
> 12. On August 13, 2018, the investigator sent me a follow-up email, again from his Gmail account. This email also went to my "junk mail" on that date. Again, I did not open and receive this email until September 24, 2018 for the same reasons described in paragraph 6 (above). Attached to this affidavit as Exhibit "C" is a copy of the investigator's August 13, 2018 email.

Standard of Review for Judicial Review

[13] Generally, the standard of review on judicial review is reasonableness unless dealing with a question of law or procedural fairness. Some legal questions will attract a correctness standard, as will questions of jurisdiction. Procedural fairness is not subject to a specific standard of review. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, Bastarache and LeBel JJ., for the majority, described the reasonableness standard (paras. 47-49) and went on to add that some issues will be reviewed on a correctness standard:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision

> maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct. (emphasis added)

[14] In *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65, LeBlanc J. explained the standard of correctness when determining a question of procedural fairness in the context of a human rights investigation:

> [34] The Commission serves a screening or gate‑keeping function in determining which complaints to dismiss and which complaints to refer to a Board of Inquiry: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 (CanLII), at para 20. A decision by the Commission to dismiss a complaint under section 29(4) of the *Act* is an administrative decision to which specific rules of procedural fairness apply: *Grover v. Canada*, 2001 FCT 687 (CanLII), at para 52.
>
> [35] Questions of procedural fairness are questions of law that are to be reviewed on a standard of correctness. No deference is due to the decision‑maker. The task of this Court is to isolate specific requirements of procedural fairness and determine whether they have been met in the circumstances of the case at bar. The decision‑maker will either be found to have complied with the content of the duty of fairness applicable in the circumstances, or to have breached this duty: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 (CanLII), at para. 53.
>
> [36] In the context of human rights investigations, complainants are owed a duty of procedural fairness by both the investigator gathering the evidence and crafting a report, and by the Commission in reaching its decision

[15] The screening function of the Human Rights Commission investigation process is somewhat analogous to the investigation by Mr. Sanford.

Fresh Evidence on Judicial Review on a Question of Procedural Fairness

[16] In *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, Fichaud J.A. explained that a reviewing court may receive fresh evidence to assess the exercise of procedural fairness at a tribunal:

> [73] On the judicial review from a decision of an administrative tribunal, the reviewing court may receive fresh evidence to assess the exercise of procedural fairness at the tribunal ... Similarly, an appeal court may receive fresh evidence respecting the regularity of the trial court’s process ...

[17] Although dealing with a unique type of judicial review in that case, Fichaud J.A. discussed the scope of material that would reflect the basic norms on such an application:

> [74] The principles that govern admissibility in this case are like those that apply to a typical administrative judicial review and to an appeal, but they operate independently. The Government, when considering its reply to the Tribunal Report, was a political actor constrained by constitutional responsibilities. It functioned as neither a typical administrative tribunal nor a lower court. The Government neither received "evidence", nor conducted a "hearing", nor were its sources confined to a particular "record". Consequently, the appropriate scope of the material for this unique type of judicial review should reflect basic norms: the reviewing court may receive evidence that is relevant to an arguable submission of either party. [emphasis added]

[18] At the trial level of that proceeding, in *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13, Smith J. conducted a thorough review of the law as to when evidence beyond the record can be admitted on a judicial review and stated:

> [212] To state the obvious, a judicial review is not a trial. In general terms, it is not an opportunity to present new evidence that was not before the decision-maker below. However, while Courts once took a fairly strict approach to prohibit the introduction of new affidavit evidence on judicial review, in more recent years Courts have recognized a number of exceptions to the general rule that new evidence cannot be put before the reviewing Court.
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> [213] Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada and The University of Manitoba and The Canadian Copyright Licensing Agency*, 2012 FCA 22 (CanLII) outlines the categories or types of additional evidence that can be permitted on judicial review and states that the list of exceptions is not closed:
>
> > There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker ... In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
> >
> > > (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in determining the issues relevant to the judicial review...

> Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider...
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness: e.g. *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 1980 CanLII 1877 (ON CA), 1980 CanLII 1877 (OCA), 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite, supra*. (paragraph 20)

[214] Decisions of the Nova Scotia Supreme Court have permitted evidence on judicial review beyond what was before the decision-maker in order to allow an applicant to make out, broadly speaking, an argument of lack of fairness.

[215] Stewart J. in *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332 (CanLII) referred to the general rule that new evidence is usually not considered on judicial review. Her Ladyship also referred to exceptions to the general rule, quoting from Blake in Administrative Law in Canada, 5th 3d., (LexisNexis, 2011) at paragraph 21 of the Court's decision:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the courts is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible…If the applicant alleges bias, use of statutory power for an improper purpose, fraud on the tribunal, absence of evidence to support a material finding of fact or failure to follow fair procedure, the court may grant leave to file evidence proving these allegations...
>
> [Emphasis in original]

[216] Stewart J. also reviewed secondary authorities addressing the introduction of new evidence on judicial review at paragraph 22 of the Court's decision:

> [22] In an article on "The Record on Judicial Review" Freya Kristjanson writes that alleged failures of procedural fairness or natural justice, she notes, "may properly be the subject of affidavit evidence where the failure is not visible on the face of the record", and evidence demonstrating such errors "will generally be permitted to form part of the record on judicial review. Key areas of concern are bias and use of statutory powers for an improper purpose". Freya Kristjanson, "The Record on Judicial Review", Adv Q 41:4 (September 2013) 387 at 397.
>
> [Emphasis in original]
>
> [23] In their text *Judicial Review of Administrative Action in Canada*, (Canvasback: loose-leaf) at s. 6:5300, Brown and Evans comment that "affidavit evidence will only be permitted to supplement the administrative record in limited circumstances, "adding that:
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> > where the basis for judicial review involves bias or fraud, it will almost always be necessary to have evidence which is not part of the administrative record…On the other hand, where the alleged error is not jurisdictional, nor one of adjudicative or procedural fairness,
> >
> > the applicant will…usually be confined to the record of the tribunal's proceedings, without augmentation.
> >
> > [Emphasis in original]

[217] Counsel for the Applicants referred this Court to the decision of Arnold J. in *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2016 NSSC 260 (CanLII). In that case Arnold J. allowed new evidence on a statutory appeal, which he noted, in the circumstances before him, was "very similar to a judicial review." At paragraph 13 he stated:

> [13] In *Scotian Materials Ltd. v. Nova Scotia (Environment)*, 2016 NSSC 62 (CanLII), Murray J. dealt with an application for fresh evidence on a s. 138 appeal:
>
> > 14 The jurisprudence is clear that where a breach of natural justice is alleged in the grounds, fresh evidence can be admissible to demonstrate a denial of natural justice. Such evidence must be relevant and is admissible for the limited purpose of showing for example a lack of jurisdiction or a denial of natural justice.
> >
> > …
> >
> > 37 In *IMP* at paragraph 46 the court in referring to the case of *Brar v. College of Veterinarians of British Columbia*, 2011 BCSC

> 215 (CanLII), cited its own decision in *Nechako Environmental Coalition v. British Columbia (Minister of Environment, Lands and Parks)*, [1997] BCJ No. 1790 (SC), stating at para. 46:
>
> > [w]here the existence of relevant documents is known, the Court will not deprive itself of access thereto if there is no other bar to their production.
>
> [Emphasis in original]

[218] Arnold J. also referred at paragraph 14 to the decision of the New Brunswick Court of Appeal in *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69 (CanLII), quoting from that Court's decision at paragraph 64:

> In my view, affidavit evidence in a case of this nature may be allowed to the extent that it is relevant with respect to an alleged nominate defect causing a loss of jurisdiction such as an allegation that a discretionary decision was made for an improper purpose. No one can seriously suggest that if evidence existed that the discretionary decisions of the Minister in this case were only motivated by partisan politics, rather than by the objects of the legislation, that affidavit evidence to prove it could not be brought before the reviewing judge.
>
> [Emphasis in original]

[219] The affidavits sought to be admitted in *Sipekne'katik* were relevant to the question of whether the Crown had met its duty to consult with Aboriginal people.

Arnold J. addressed this at paragraphs 28 and 29 of his decision:

> 28 When the honour of the Crown is raised as an issue, the reviewing court requires relevant information in order to determine whether the Minister's decision should be interfered with because the Crown failed to meet its constitutional obligations.
>
> 29 Merely because the honour of the Crown is raised as an issue does not mean that any and all affidavit evidence will be admissible. To be admitted under this exception, the evidence must be relevant to determining whether the honour of the Crown is a real issue, the scope and content of the duty to consult and whether such a duty has been fulfilled. Such evidence is only admissible to assist in determining whether procedural fairness was denied.
>
> [Emphasis in original]

Analysis

[19] Each of the proposed paragraphs must therefore be examined in order to determine if the contents are relevant and admissible for the limited purpose of showing a denial of procedural fairness.

Paragraph 6

[20] Paragraph 6 states:

> 6. On August 2, 2018, the investigator emailed me from his Gmail account to introduce himself. This email went to my "junk mail" on that date. But I did not open and receive the email until September 24, 2018 when my lawyer advised me that the investigator's report mentions emails he sent to me in August 2018. Attached to this affidavit as Exhibit "B" is a copy of the investigator's August 2, 2018 email.

[21] The applicant says paragraph 6 provides general background information. It also could assist in the applicant showing that Fred Sanford, the Commission's investigator, did not undertake a reasonable, thorough, and neutral investigation.

[22] Justice Leblanc explained in *Tessier* that while human rights investigators have broad discretion in conducting their investigation, such investigations must be neutral and thorough:

> [37] It is well established that human rights Investigators are masters of their own procedure and are afforded broad discretion in choosing who they interview and how they gather information: *Slattery v. Canada (Human Rights Commission)*, (1994) 1994 CanLII 3463 (FC), 73 FTR 161, [1994] 2 FC 574, at para. 69, affirmed (1996) 205 NR 383 (CA). That broad discretion, however, must be exercised in accordance with the duty of procedural fairness owed to the complainant.
>
> [38] In *Slattery, supra*, Justice Nadon, as he then was, held that the duty of procedural fairness requires that human rights investigations satisfy two criteria: neutrality and thoroughness: para. 49. He recognized that in determining the degree of thoroughness required, one must balance the rights of individual parties to procedural fairness with the Commission's interests in maintaining a workable and effective system. Justice Nadon concluded as follows:
>
> > 56 Deference must be given to administrative decision‑makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact‑finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554.

> 57 In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.
>
> [39] Although *Slattery, supra,* was decided prior to the Supreme Court of Canada's decision in *Baker v. Minister of Citizenship and Immigration*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, the Federal Court of Appeal had the opportunity to revisit the content of procedural fairness required in the context of human rights investigations in *Sketchley, supra*. After weighing the *Baker* factors, the Court confirmed that Justice Nadon's decision in *Slattery, supra,* appropriately described the content of procedural fairness in this context: para. 121.

[23] The Police Complaints Commissioner argues that the evidence contained in paragraphs 6-12 do not meet any of the exceptions for fresh evidence on a judicial review:

> 8) This court will need to examine whether or not the proposed evidence meets one of the exceptions which allow fresh evidence to be introduced in a judicial review. It does not appear that the Applicant is challenging the jurisdiction of the decision-maker but is rather arguing that the Affidavit either provides general background information or information concerning breaches of natural justice. It is submitted that the Affidavit does not meet the exceptions set out in the jurisprudence.
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> *Much of the information included in the affidavit is redundant and not necessary*
>
> 9) Much of the Affidavit is a recitation of facts that will be included in the Record. These paragraphs are redundant and not necessary and should not be admitted.

[24] I am satisfied that paragraph 6 is relevant to the argument the applicant wishes to make and is admissible to provide general background information. It can also be relied on by the applicant in his effort to make full argument that Fred

Sanford, the Commission's investigator, did not undertake a reasonable, thorough and neutral investigation, and therefore, breached the duty of procedural fairness.

Paragraph 7

[25] Paragraph 7 of the affidavit states:

> 7. My mother advised me and I do verily believe it to be true that the investigator phoned her on or about August 5-10, 2018 to request my phone number. Shortly thereafter, the investigator phoned me to interview me regarding my complaint.

[26] Constable Paris and Constable Norris argue that paragraph 7 (among other paragraphs) is inadmissible for the following reasons:

> 6. Paragraphs 2-5, 7, 9 and 13-18 of the Taylor Affidavit should not be admitted, as they are not necessary for the Court to decide any of the grounds of review raised by the Applicant.
>
> 7. This evidence (with the exception of paragraph 9) simply describes the decision-making process that led to the decision under review. All of this information is apparent on the face of the record.
>
> 8. Nor should any of these paragraphs be admitted as general "background." Affidavit evidence providing general background may be admitted "in circumstances where that information may assist it in understanding the issues relevant to the judicial review". Such circumstances may include "judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents". No such circumstances exist in the case at bar given the small size of the record and straightforward factual and procedural background.

[27] In relation to its specific objection to paragraph 7, the Police Complaints Commissioner argues:

> 16) Paragraph 7 is not necessary as it simply contains the facts that Mr. Taylor's mother provided his contact information to the Investigator and that the Investigator spoke to him over the phone shortly afterwards. The fact that Mr. Taylor was interviewed by the Investigator is evident in the Investigator's report and notes which will be included in the Record.

[28] The applicant argues that paragraph 7 is admissible as general background information that could be of assistance to the judge hearing the judicial review. I agree.

[29] Additionally, while not critical information, paragraph 7 could also have some limited relevance to the thoroughness of the investigation. The investigator obtained the applicant's telephone number through his mother and then telephoned him. He sent two emails to the applicant from his personal Gmail account which were not answered by the applicant. The applicant says those emails went into his junk mail file. Whether the investigator did or did not follow up via telephone when he did not receive a reply to his emails could have some impact on a determination of thoroughness, reasonableness and neutrality.

Paragraphs 8-12

[30] Paragraphs 8-12 state:

> 8. The investigator's interview of me lasted less than five (5) minutes. After introducing himself, the investigator questions were focused on what was going on at the Argyle Bar & Grill (the "Argyle") on the evening in question and how I gained access to the venue. I answered that I did not know what event was happening at the Argyle that evening. I also answered that I did not need identification to get into the Argyle and that I did not use my brother's ID.
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> 9. The investigator asked if the friends who were with me that night, who are all listed in my original complaint affidavit, would have anything different to add to my story. I answered that I thought they would support my story, but explained that none saw the HRP arrest me or put me in the police car.
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> 10. The investigator verified that he had my correct email address, but did not advice me that he had previously sent me an email to which I did not reply. He then said he would call me if he had any further questions.
>
> 11. During the interview, the investigator never asked for the contact information of my friends. He never advised me that he had concerns about my credibility. He never advised me that he believed the HRP's version of events over mine. He did not ask me any questions about the HRP arrest and detention. He did not ask about my injuries or the source of those injuries.
>
> 12. On August 13, 2018, the investigator sent me a follow-up email, again from his Gmail account. This email also went to my "junk mail" on that date. Again, I did not open and receive this email until September 24, 2018 for the same reasons described in paragraph 6 (above). Attached to this affidavit as Exhibit "C" is a copy of the investigator's August 13, 2018 email.

[31] Constables Paris and Norris object to paragraph 9 on the following grounds:

> 9. Paragraph 9 summarizes the Applicant's conversation with the investigator, and should also be excluded. This information is already summarized in the report of Fred Sanford contained in the record. This paragraph

> is [sic] does not add anything new, and is accordingly not necessary for the Court to assess the Applicant's grounds of review.

[32] The Commissioner argues that these paragraphs are objectionable for the following reasons:

> 17) Paragraphs 8-11 concern the actual telephone interview between Mr. Taylor and the Investigator. These paragraphs appear to go towards the thoroughness of the investigation and the types of questions that were asked. This evidence is Mr. Taylor's account of the interview, and while the Investigator's notes and report will form part of the record, if these paragraphs are admitted, the Investigator will have no opportunity to respond to Mr. Taylor's characterization of the interview. In fairness to the Respondent, an affidavit of the Investigator, Fred Sanford would be required to respond directly to the evidence. And where the two accounts of the interview differ, the Hearing Judge will need to make findings of credibility. This is a slippery slope, where the judicial review starts to take on more characteristics of a trial *de novo*. Particularly if Parties seek to cross-examine Mr. Taylor and/or Mr. Sanford at the Hearing. The Investigator's notes and report will cover what was discussed in the interview. If there are gaps and issues that are not covered in the report and notes, the Applicant can point them out and still make his arguments concerning the thoroughness of the investigation. Should this evidence be admitted, the Respondent will be seeking leave from the Court to file an affidavit of Fred Sanford in response.

[33] The applicant says without these paragraphs the decision maker would be unaware that he did not receive Mr. Sanford's emails because they went into his junk mail account. Otherwise, the inference from the Record would be that the applicant was disinterested in pursuing or assisting with the investigation. Mr. Sanford's failure to follow up by telephone when he did not receive a reply to those emails could go to the thoroughness of the investigation.

[34] The thoroughness, reasonableness and neutrality of the investigation are factors to consider in determining whether there has been a breach of the duty of procedural fairness. Paragraphs 8-12 are all relevant to the applicant's arguments in this regard. These paragraphs are admissible.

Conclusion

[35] Paragraphs 6-12 of the applicant's affidavit are admissible to provide general background information that is relevant and not contained in the Record. Such information is also necessary for applicant to make a full argument regarding a lack of procedural fairness, as he wishes to show that Mr. Sanford's investigation

was not thorough, reasonable and neutral. These paragraphs are brief. They are admitted for limited and defined purposes and do not convert this hearing to a trial *de novo.*

[36] Because I am allowing the admission of these paragraphs, Mr. Sanford will be allowed to file a brief and relevant rebuttal affidavit as requested by counsel for the Commission.

Arnold, J.