SUPREME COURT OF NOVA SCOTIA

Citation: *Sandeson v. Nova Scotia (Attorney General)*, 2022 NSSC 15

Date: 20220110
Docket: Hfx No. 507045
Registry: Halifax

Between:

William Michael Sandeson

Applicant

v.

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

Respondent

Decision

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	August 27, 2021, in Halifax, Nova Scotia
Oral Decision:	January 10, 2022
Counsel:	William Michael Sandeson, self-represented Myles Thompson, for the Respondent

By the Court:

Introduction: The Motion

[1] The moving party, the applicant, Mr. William Sandeson, is a self-represented inmate currently being held at the Central Nova Scotia Correctional Facility (CNSCF) on a warrant for remand pending trial. He has filed a motion for an order to extend the twenty-five-day limitation period under *Civil Procedure Rule* 7.05(1) to bring an application for Judicial Review from the decision of the Executive Director of Correctional Services.

[2] The respondent, the Attorney General of Nova Scotia (AGNS) and the Executive Director of Correctional Services, opposes the motion. The respondent contends that the applicant is out of time for seeking judicial review.

[3] *Civil Procedure Rule* 7.05(1)(a) requires filing of a judicial review application challenging a *decision* within twenty-five days of the decision being communicated to the applicant. 7.05 provides:

> (1) A person may seek judicial review of a decision by filing a notice for judicial review before the earlier of the following:
>
> (a) twenty-five days after the day the decision is communicated to the person,
>
> (b) six months after the day the decision is made.

[4] The decision of the Executive Director was *communicated* to the applicant on February 10, 2021. The applicant filed his application for judicial review on April 26, 2021, which is beyond the time limitation period proscribed in Rule 7.05 (1).

[5] The applicant asks that the Court use its general *discretionary* power under *Civil Procedure Rule* 2.03 to allow an extension to the time limit set out in Rule 7.05(1) for judicial review.

[6] *Civil Procedure Rule* 2.03(1)(c) provides authority to excuse compliance with a Rule and to dispense with notice to a party. It states:

> 2.03 (1) A judge has the discretion, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
> …
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

The Issue

[7] The central issue is whether the applicant should be granted an extension of time to make an application for judicial review.

[8] Before embarking upon an analysis of the issue, I will provide the necessary factual background to understand the context giving rise to this motion by summarizing the evidence and the positions of the parties and will review the

relevant authorities on the guidelines or factors which a Chambers judge should consider in determining whether to exercise the Court's discretion to grant of an extension of time, and then provide my analysis.

Background

[9] The applicant filed an Affidavit, affirmed on June 15, 2021. On August 9, 2021, the applicant, Mr. Sandeson, was cross-examined on his Affidavit.

[10] As previously stated, the respondent moved for an Order to set aside the applicant's motion, and for a declaration that the applicant, Mr. Sandeson, is out of time for seeking judicial review pursuant to *Civil Procedure Rule* 7.05(1). In support of its position, the respondent relies on the Affidavit of Richard Verge, Deputy Superintendent of the CNSCF, affirmed on July 20, 2021.

[11] A summary of both Deputy Superintendent Verge's Affidavit and the applicant's Affidavit provides the factual background and context underlying the circumstances of the motion.

Summary of Deputy Superintendent Verge's Affidavit Evidence

[12] As stated in Deputy Superintendent Verge's Affidavit, Mr. Sandeson was on remand at the CNSCF between August 1, 2020, and February 26, 2021. On August

2, 2020, Mr. Sandeson was being held on the West 1, which is a general population living unit at the CNSCF. On that date, he received a disciplinary report or *Level* for the offence of leaving a cell, place of work or other appointed work without proper authority. Mr. Sandeson received the *Level* for not complying with a direct order after he walked out of the dayroom of West 1. He refused to return despite direct orders from Correctional Officers. As a result of Mr. Sandeson's refusal to comply with a direct order, he was placed in close confinement on the Health Care Unit (HCU) pending adjudication by the Provincial Adjudicator.

[13] On August 5, 2020, Mr. Sandeson was adjudicated for this disciplinary infraction. He refused to attend the adjudication process and the hearing was completed in absentia. Mr. Sandeson was found guilty of the offence and was issued a penalty of two days confined in segregation. As Mr. Sandeson had been held in HCU since August 2, 2020, his sanctions were deemed served as of the date of his adjudication. Mr. Sandeson, however, remained in HCU because he refused placement options on other suitable living units. He threatened to hurt other unidentified inmates if he was returned to a unit.

[14] On August 13, 2020, Mr. Sandeson completed a Notice of Appeal Form to challenge the two-day penalty imposed by the Provincial Adjudicator.

[15] On August 24, 2020, CNSCF staff, including Deputy Superintendent Richard Verge, Assistant Deputy Superintendent Stephanie Pothier, and Captain William Newhook, met with Mr. Sandeson to discuss placement options in suitable living units. Mr. Sandeson claimed to be hearing voices and did not want to leave HCU. He was denied a medical hold by health services and therefore was not permitted to remain in HCU. Upon being told that, he continued to refuse to leave. He was ordered by CNSCF to leave HCU. Mr. Sandeson failed to comply with the direct order. In doing so, he stated to CNSCF staff that he was feeling homicidal, having homicidal thoughts, and stated that if he were placed in a unit with other inmates, he would kill or use violence to harm them. Mr. Sandeson's comments were interpreted by CNSCF staff as threatening towards other inmates. Mr. Sandeson was advised, at that time, that his comments would be documented in the Justice Enterprise Information System (JEIN) case notes. He was also issued a *Level* for disobeying a direct order and for threatening others. His threatening comments were documented. Following that, Mr. Sandeson was removed from HCU and placed in the close confinement unit (CCU) while he awaited adjudication.

[16] On August 26, 2020, Mr. Sandeson was adjudicated. He attended the adjudication hearing and made submissions to the Provincial Adjudicator. Mr. Sandeson admitted the allegation that he disobeyed a direct order and admitted that

he made non-threatening comments to the staff. Having considered the disciplinary report, the comments of the Superintendent, and Mr. Sandeson's submissions during the hearing, the Adjudicator found Mr. Sandeson guilty of both offences, to which he received a penalty of three days confined to CCU. Mr. Sandeson's sanctions were to end on August 27, 2020.

[17] On September 3, 2020, Mr. Sandeson apparently completed a second Notice of Appeal Form to appeal the adjudication from August 26, 2020.

[18] Although Mr. Sandeson's sanctions ended on August 27, 2020, he remained in the CCU despite ongoing attempts by CNSCF staff to place him on a suitable living unit with other inmates. Mr. Sandeson maintained that he would attempt to harm others if placed with other inmates, or that he was not compatible with other inmates and therefore he wanted to remain isolated.

[19] Mr. Sandeson remained in self-imposed administrative close confinement until February 26, 2021, when he was transferred to the North Nova Scotia Correctional Facility (NNSCF).

[20] Mr. Sandeson was denied bail on January 22, 2021. Following that, he began to make inquiries about the status of his appeals filed on August 13, 2020, and on September 3, 2020, respectively. On January 26, 2021, Mr. Sandeson met with

Deputy Superintendent Verge regarding the status of his appeals. Mr. Verge was not aware that the appeals were filed. He suggested to Mr. Sandeson that he submit an official complaint about his concerns.

[21] On January 27, 2021, Deputy Superintendent Verge received Mr. Sandeson's Offender Complaint form coupled with two new Notice of Appeal Forms as well as submissions regarding the merits of his appeals. The forms were submitted to senior management for investigation. Initially, the investigation into the whereabouts of Mr. Sandeson's original Notice of Appeal Forms failed to establish their existence, but after further review, the August 13, 2020, Notice of Appeal Forms were found. They had been overlooked due to an administrative error. The Notice of Appeal, filed on September 3, 2020, was not found.

[22] On January 28, 2021, Superintendent Adam Smith reviewed the Offender Complaint, the new Notice of Appeal Forms, the written submissions and the original Notice of Appeal Form from August 13, 2020.

[23] On January 28, 2021, the Executive Director or Delegate of Correctional Services reviewed Mr. Sandeson's Notice of Appeal Form from August 13, 2020. Upon review, the August 13, 2020 Appeal was denied on the grounds that Mr.

Sandeson's claims regarding mental health were not supported by a decision from health care.

[24] On February 3, 2021, Mr. Sandeson submitted another Notice of Appeal Form and supplemental written submissions dated February 4, 2021, challenging his disciplinary sanction of August 26, 2020.

[25] On February 8, 2021, the Executive Director or Delegate of Correctional Services reviewed Mr. Sandeson's Notice of Appeal Forms from both January 26, 2021 and February 3, 2021 along with the supplemental written submissions provided with each respective appeal. Upon review, the Executive Director ordered "no change" to the original disciplinary penalty imposed on August 26, 2020. This decision was communicated to Mr. Sandeson on February 10, 2021.

[26] On February 26, 2021, Mr. Sandeson was transferred from CNSCF to NNSCF. While at NNSCF, Mr. Sandeson prepared a human rights complaint and sought approval for distance learning through a university in the United Kingdom.

[27] On May 13, 2021, Mr. Sandeson filed a Notice for Judicial review in respect to the decision of February 10, 2021.

[28] In support of his application to extend the time to apply for Judicial Review of the Executive Director's decision, Mr. Sandeson filed an Affidavit, which he

submits provides a timeline of his efforts to have the Executive Director's decision overturned.

[29] Accordingly, there follows a summary of Mr. Sandeson's Affidavit, and of his cross-examination on his affidavit.

Summary of the Applicant's Affidavit Evidence

[30] In his Affidavit Mr. Sandeson explained why he was not able to file his Notice of Appeal within the deadline provided in *Civil Procedure Rule* 7.19. He stated that he received notice of the decision of the Executive Director of Correctional Services Nova Scotia on February 10, 2021. On February 18, 2021, he sent a letter to the Minister of Justice with all relevant documentation seeking intervention in the matter. He had hoped that to avoid the involvement of the Court and was not aware of the deadline for filing a Notice for Judicial Review.

[31] On March 15, 2021, he stated that an employee of the Department of Justice informed him that his letter had not been received. On March 18, 2021, he contacted the office of the Prothonotary to request the documentation to file for judicial review. On March 19, 2021, he asked his legal counsel, his lawyer representing him in his criminal matter, if he could obtain a publication ban for a judicial review. His counsel advised him that she would research the possibility.

[32] On March 24, 2021, Mr. Sandeson received the requested documentation for judicial review from the Prothonotary's office, which included information about Legal Aid. On March 26, 2021, he spoke with an administrative assistant at the Dartmouth office of Nova Scotia Legal Aid. She instructed him to have submit his application for Legal Aid by fax, which he did on the same day.

[33] On April 7, 2021, he called Dartmouth Legal Aid to confirm that they had received his application. An administrative assistant advised him that he had been approved for legal aid, and a lawyer was assigned to his case, who would call him.

[34] On April 7, 2021, he called his lawyer, representing him on the criminal matter, to inform her and ask her about the publication ban. She advised Mr. Sandeson that there was a basis in common law to obtain a publication ban on the judicial review.

[35] Mr. Sandeson called the Dartmouth Legal Aid office on April 12, 2021, because he had not heard anything from the lawyer assigned to his case. The lawyer's assistant informed him that a letter had been sent to him and that he should wait to receive it before calling again.

[36] On April 15, 2021, Mr. Sandeson received a letter from Dartmouth Legal Aid advising him that he did not qualify for legal aid on the judicial review because it is not a service that Nova Scotia Legal Aid provides.

[37] On April 16, 2021, Mr. Sandeson filed a Notice for Habeas Corpus, with a request for a publication ban. On April 19, 2021, he received notice from the Prothonotary that his Habeas Corpus application was filed improperly and information regarding Rule 85 for his benefit.

[38] On April 20, 2021, after repeated unanswered calls to the Prothonotary's office in Halifax, Mr. Sandeson called his lawyer to ask her to contact the Prothonotary's office on his behalf to determine the procedure for obtaining a publication ban.

[39] On April 22, 2021, his lawyer advised him that the Prothonotary suggested faxing the relevant documents, including the Notice for Judicial Review, to their office so that they could determine the appropriate procedure.

[40] The Prothonotary's office continued to assist Mr. Sandeson to file a Notice for Judicial Review. On June 15, 2021, he received a letter, dated June 9, 2021, from the Prothonotary's office informing him that his application would require an extension as it fell outside of the deadline set out in *Civil Procedure Rules* 7.05(1)(a).

[41] Mr. Sandeson stated that he has been relentless in his pursuit of the issue, hampered by his ignorance of the relevant procedural law, a transfer between correctional facilities, restricted access to legal materials, pandemic-related court closures, and a lack of assistance from Nova Scotia Legal Aid. He further stated that his attempt to resolve the matter through a letter to the Minister of Justice is constructive action that he took six business days after receiving the decision he seeks to overturn. The discovery that this letter was lost, after allowing more than three weeks to pass without reply, prompted his pursuit of this alternative mechanism for resolution of the matter. He stated this delay effectively consumed the entirety of the 25 days allowed for filing Notice for Judicial Review.

Summary of Mr. Sandeson's Cross-Examination Evidence

[42] On August 9, 2021, Mr. Sandeson was cross-examined on his Affidavit, affirmed on June 15, 2021. Mr. Sandeson confirmed the information contained in his Affidavit, including two Notice of Appeal Forms, dated January 26, 2021, and February 3, 2021, that he filed with the Court, and clarified some dates, such as the date that he received notice of the decision by the Executive Director, which was on February 10, 2021. He confirmed that was the date that the decision was *communicated* to him.

[43] Mr. Sandeson also confirmed that his Notice for Judicial Review is dated May 12, 2021, which is 63 clear days from the date the Executive Director issued their decision on February 10, 2021. He also agreed that he attempted to file a handwritten Notice for Judicial Review which he provided to the Case Management Officer on or about April 23, 2021, and which was faxed on April 26, 2021. Mr. Sandeson agreed that April 26, 2021, is 50 clear days after February 10, 2021, the date of the Executive Director's decision. He further confirmed that is aware that there is a 25-day limitation period after a decision is *communicated* to a person to seek Judicial Review.

[44] Mr. Sandeson readily agreed that his application for Judicial Review was filed 25 days beyond the limitation period under *Civil Procedure Rule* 7.05(1).

[45] Mr. Sandeson agreed with the suggestion that he attributes the 25-day delay in filing his Judicial Review application on the non-response of his letter he sent to the Minister of Justice. He was asked whether he "honestly believed that the Minister of Justice had the authority to overturn the Executive Director's decision", to which he replied, "I was not certain what authority the Minister of Justice had, but I was not aware of any other avenue I could pursue at that moment to overturn the decision of the Executive Director."

[46] Mr. Sandeson was directed to paragraph 4 of his Affidavit, where he stated that he believed that the Minister was the superior of the Executive Director of Correctional Services in the administration of the Department of Justice and he could overturn the decision of the Executive Director, and was asked to comment, which he did. He stated, “I really wasn’t sure about what the power was to overturn any decision, but I believe that he was situated above the Executive Director in the Department of Justice.”

[47] Mr. Sandeson agreed that there is no provision in the *Correctional Services Act* or the *Regulations* that permits an appeal to the Minister of the Executive Director’s decision. He also agreed that section 73 of the *Correctional Services Act* states that the decision of the Executive Director on appeal is final.

[48] Mr. Sandeson further agreed that notwithstanding that he contends in his written submissions to the Court that “Mr. Verge not only failed to inform the applicant about potential for Judicial Review but affirmed that the decision of the Executive Director was final”, he realizes that Mr. Verge is not a lawyer, nor is he able to provide inmates with legal advice.

[49] Mr. Sandeson confirmed that he spoke to his legal counsel on the criminal matter on March 19, 2021, about the possibility of a publication ban for Judicial

Review. He further agreed that he has access to legal counsel, but it is limited to his criminal matter. He stated that at the time his lawyer was not able to answer legal questions about administrative law or judicial review. She advised him that she would research the possibility of obtaining a Publication Ban for Judicial Review, and it was not until sometime later that he did provide an answer, which was on April 7. He confirmed that was the only time that he contacted his criminal lawyer regarding his consideration for judicial review.

[50] Mr. Sandeson was pressed on why he did not ask his criminal lawyer, for advice in respect to judicial review. He replied, "I didn't because I did have access to the Correctional Services Act and it was quite plain about the Executive Director's decision being final. It made no mention of the availability of Judicial Review."

[51] Mr. Sandeson agreed that he reached out to his criminal lawyer on March 19, 2021, which was one day after the 25-day limitation period for seeking Judicial Review expired.

[52] It was suggested to Mr. Sandeson that other than sending a letter to the Minister on February 18, 2021, and contacting the Prothonotary to obtain forms for filing a Judicial Review on March 18, he took no other steps to file a Judicial Review, to which he responded, "I can confirm there is nothing else in the Affidavit and in

fact, I took no other steps during that period except for between the dates of March 15th and 18th to perform what legal research, if I can qualify it as that, using CANLII access we have here on the tablet system."

[53] After touching on Mr. Sandeson's education, his access to legal counsel, and his ability to file various Court forms for different Judicial Proceedings, it was suggested to him that he waited until March 18 to reach out to the Prothonotary to get the forms for filing his Judicial Review, to which he replied, "No, I did not. And I wouldn't say that I waited until that time to contact the Prothonotary. I was waiting for a response from the Minister of Justice." He added, "I was just waiting and applied a conscious decision making to that effect. I was waiting for a decision from the Minister of Justice when I found out that the letter had not been received or was somehow lost and that is when I took further steps to investigate how I could go about seeking to overturn or attack the decision of the Executive Director."

[54] Mr. Sandeson confirmed that he requested the forms for Judicial Review from the Prothonotary's office on March 18 and received them on March 24. He agreed that he did not fill out the forms on the day that he received them because he also received, with the forms, the information about Legal Aid which he filled out.

[55] It was suggested to Mr. Sandeson that he did not need legal representation by Legal Aid to complete a Notice of Judicial Review and file it with the Court, to which he replied, “I do not require it, but it certainly seemed prudent especially where I was concerned about obtaining a Publication Ban. I have not yet received an answer from my counsel in regard to how that would affect the criminal matter.”

[56] Mr. Sandeson agreed that his concern about the Publication Ban is moot.

[57] Mr. Sandeson was asked, “you could have filed a Judicial Review before you got a Publication Ban?” He answered, “I’m not certain how exactly works, still to this point. It took a lot of correspondence with the Prothonotary to get the right documents and she was very helpful in making sure I filled out what she required on her end. But, as to the sequence, it’s a little jumbled for me as I didn’t quite understand what I was doing and needed a lot of assistance from her and making sure that she had all the documents. And she held everything, I think, until she had all that she needed to file.”

[58] Mr. Sandeson agreed with the suggestion that his concern with the Publication Ban was that if he filed the Notice for Judicial Review, it may prejudice him somehow in his criminal matter.

The Positions of the Parties

The Position of the Applicant

[59] The moving party, the applicant, takes no issue with respect to the respondent's review of the law, but takes issue with respect to how the test and/or the factors should be applied to the circumstances of his case. The applicant contends that he has demonstrated a genuine interest in pursuing an appeal of the decision of the Executive Director upon learning of it and relentlessly pursued the right to appeal, which included writing to the Minister of Justice. He acknowledges that he has missed the limitation period but submits that he missed it because of his ignorance of the law, and his circumstance of being incarcerated which severely limited his ability to respond in a more expeditious manner.

[60] The applicant submits that he has discharged the burden on the balance of probabilities of proving that he has done everything within his abilities to appeal the Executive Director's decision and after a consideration of the relevant factors the Court should exercise its discretion to grant the motion and permit him to apply for judicial review.

The Position of the Respondent

[61] The respondent submits that the applicant is clearly well beyond the 25 -day limitation period for seeking judicial review pursuant to *Civil Procedure Rule* 7.05. The decision regarding his appeal was communicated to him on February 10, 2021. The respondent contends that the applicant waited nearly two months after the 25-day limitation period had expired before he filed for judicial review. The respondent further submits that there is no reasonable excuse for this length of delay, and therefore the motion should be dismissed.

Exercising Judicial Discretion under Civil Procedure Rule 2.03(1)(c)

[62] As stated, the motion for extension to file a notice of motion for judicial review is brought pursuant to *Civil Procedure Rule* 2.03 (1)(c). Whether to grant an extension of time under Rule 2. 03 (1)(c) to file a notice of application for judicial review is a discretionary decision.

[63] In *Jollymore Estate v. Jollymore*, 2001 NSCA 116, at para. 22, Saunders J.A., in delivering the judgment of the Court observed that in Nova Scotia there is a three-part test for an extension of time within which the appeal might be perfected, which requires consideration of these factors:

> (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;

> (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
>
> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

[64] In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, at para. 4, after acknowledging the three-part test in *Jollymore Estate*, Justice Bateman expressed the view that there may be circumstances where justice requires that an application be granted notwithstanding that the three-part test is not strictly met. She stated:

> Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

[65] In *Farrell v. Casavant*, 2010 NSCA 71, at para. 17, Beveridge J.A., noted that the three-part test for determining whether an application to extend time for commencing an appeal should be granted must be a flexible one in which the court considers all the circumstances and determines what would be just. He wrote:

> Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and

> the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

[66] Justice Beveridge identified the following factors considered to be relevant:

> 1. The length of the delay;
> 2. The reason for the delay;
> 3. The presence or absence of prejudice;
> 4. The apparent strength or merit in the proposed appeal and
> 5. The good faith intention of the applicant to exercise their right of appeal within the prescribed time period.

[67] It should be noted that Justice Beveridge stressed that the relative weight to be given to these or other factors may vary. The test is a flexible one, uninhibited by rigid guidelines.

[68] Similarly, in *Raymond v. Brauer*, 2014 NSCA 43, at paras. 10-12, Justice Bryson wrote:

> Justice Bateman described the usual three-part test when exercising discretion to extend time in *Bellefontaine v. Schneiderman*, 2006 NSCA 96:
>
> > [3] A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate *Jollymore Estate Re* (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
> >
> > (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
> >
> > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and

> (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

The three-part test described in *Schneiderman* is not conclusive. Residuary discretion remains in the Court to extend time where it would be just to do so:

> [5] Although courts most commonly allude to the three-part test in *Jollymore, supra*, the ultimate question is whether justice requires that an extension be granted: *Farrell v. Casavant,* 2010 NSCA 71, at para. 17 and *Cummings v. Nova Scotia (Community Services)*, 2011 NSCA 2, at para. 19. Accordingly, the three-part *Jollymore* test is an appropriate guide for the exercise of the court's discretion but it is not an exhaustive description of that discretion. (*Brooks v. Soto*, 2013 NSCA 7)

In *Farrell*, Justice Beveridge carefully considered the history of jurisprudence respecting extensions of time to appeal and emphasized -- as a number of the cases do -- that exercising discretion to extend the time to appeal must ultimately be required in the interests of justice, (paras. 14, 16). The analysis is highly contextual.

[69] As clearly stated in these cases, the analysis is highly contextual, which ultimately requires exercising judicial discretion to extend the time to appeal in the *interest of justice.* The ultimate question is is whether justice requires that an extension be granted: *Farrell v. Casavant*, 2010 NSCA 71 at ¶ 17; *Cummings v. Nova Scotia (Community Services)*, 2011 NSCA 2 at ¶ 19.

[70] In the present case, the respondent's written submission references the relevant Nova Scotia cases that have considered a motion to extend the limitation period set out in Rule 7.05 (1), which were of assistance. They include the following:

Eco Awareness Society v. Antigonish (Municipality), 2010 NSSC 461; *Rockwood Community Association v. Halifax (Regional Municipality)*, 2011 NSSC 91; *Tupper v. Nova Scotia Barristers' Society*, 2013 NSSC 290, affirmed 2014 NSCA 90, leave to appeal refused 2015 CarswellNS 134 (SCC); *Dicks v. Nova Scotia (Elevators and Lifts)*, 2015 NSSC 362; *Yates v. Nova Scotia Board of Examiners in Psychology*, 2016 NSSC 152; *Paulin v. Nova Scotia (Human Rights Commission)*, 2016 NSSC 363; *Bridgewater (Town) v. South Shore Regional School Board*, 2017 NSSC 25; and *Bancroft v. Nova Scotia (Lands and Forestry)*, 2020 NSSC 214.

[71] The respondent contends that these authorities indicate that the following factors should be considered in this motion:

a. Did the applicant have a *bona fide* intention to seek judicial review within the time limitation period?

b. What was the length of the applicant's delay before taking steps to apply for judicial review?

c. Did the applicant have a reasonable excuse for their delay?

d. To what extent will the applicant suffer prejudice if they are denied an extension?

e. What is the strength or merit of the applicant's proposed grounds for judicial review?

[72] The respondent acknowledge that theses factors are guidelines, which may be of varying importance on the facts of a particular case. The respondent further submits that the factors should be weighed in light of the overarching object and purpose of Rule 7.05 as noted in the decisions of *Eco Awareness*, at para. 34, and *Tupper*, at para. 22, which have held that:

> The new Rule 7.05 contemplates judicial review in a (sic) expeditious manner on a prescribed short timeline that should not easily be ignored without very significant excuse or delay.

[73] In addition to the authorities submitted by the respondent, I also raised the question of whether there are any authorities in Canada where an inmate had missed a filing deadline for judicial review (or even statutory appeal) of a disciplinary decision by prison authorities and has applied to have a deadline extended. I raised the issue because I was mindful of the comments of Justice Van den Eynden in *Pratt*, at para. 56, where she stressed that it is important to recognize the additional challenges self-represented prisoners face in advancing their *habeas corpus* applications. She wrote:

> … It cannot be seriously disputed that, as a general statement, prisoners face challenges in advancing litigation. These challenges are particularly pronounced for prisoners in restricted detention, such as solitary confinement. There are added challenges if the prisoner has underlying literacy and/or mental health issues.

[74] Justice Van den Eynden also recognized the challenges self-represented prisoners face in getting legal documentation and filed, gaining access to legal research, and even receiving or sending mail pertaining to active matters.

[75] It is within this context, that I have considered and applied the instructive factors or guidelines for exercising judicial discretion to grant an extension of time to file a judicial review under Rule 2.03(1)(c), which provides authority to excuse compliance with Rule 7. 05(1).

[76] Before embarking on my analysis, it should be noted that I have considered several cases where prison inmates have missed their deadline to apply for judicial review in the context of the Federal Court Rules, including the following: *Myre v. R* [1992] F.C.J. No. 301; *Bullock v. R.* [1997] F.C. J. No. 1661; *Latham v. Canada (Attorney General)* 2020 FC 239; *Muckle v. Canada (Attorney General)* 2020 FC 1088; and *MacDonald v. Canada (Attorney General),* [2017] F.C.J. No. 37.

[77] In these cases, the courts apply the same established factors or guidelines as required by the Nova Scotia cases for determining whether an extension of time should be granted, but also consider how the inmate's circumstances of being incarcerated have impacted their ability to satisfy and/or demonstrate those factors.

[78] While it is difficult to locate any cases identical to the case at bar, several of the cases above, involving inmates applying for a time extension to file for judicial review of other matters were helpful in applying the relevant factors.

[79] In *Muckle,* A.D. Little J., writing for the Federal Court, at para. 5, set out the four questions that guide the Court's inquiry in the exercise of its discretion under s. 18.1 (2) of the *Federal Courts Act*, for an extension of time and leave to file an application for judicial review, at para. 5. They are as follows:

1. Did the moving party have a continuing intention to pursue the application?
2. Is there some potential merit to the application?
3. Has the respondent been prejudiced from the delay?
4. Does the moving party have a reasonable excuse for the delay?

[80] A.D. Little J., at para. 5, noted that the importance of each of these four questions depends upon the circumstances of each case and stressed, at para. 5, that "the overriding consideration is that the interest of justice be served." In *Canada (Attorney General) v. Larkman,* [2012] F.C.J. No. 880, at para. 62, Justice Stratas emphasized that the overriding consideration is that the interests of justice be served. He wrote:

> These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, *supra* at pages 277-278.

> The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.

[81] The only notable difference between the factors listed in the Nova Scotia decisions as noted above and the test that is applied by the Federal Court is the inclusion of the question - *what was the length of the applicant's delay before taking steps to apply for judicial review* – as a factor on its own. The Federal Court seems to have treated this question as merely supplemental. If the entire period of the delay is satisfactorily accounted for regarding a demonstrated *ongoing intention* and an *excuse* for the delay, the length of the delay itself will not serve to negate that. However, it is to be expected that the longer a delay is, the harder it will be to provide justification for the entire delay and show an ongoing intent, such as was the case in *Muckle*, where the Court found that although the applicant demonstrated an initial intention to file an application, it was not sufficient to account for the entire length of a delay that was over eight months.

[82] Obviously, the length of the delay is a significant factor, but it is not determinative of the issue as all the factors must be considered, keeping in mind that - the overriding consideration is that the interest of justice be served.

[83] It is interesting to note that the issue of whether the respondent was prejudiced by the delay was not generally a persuasive factor in most cases involving inmate applicants, and in some cases, prejudice was not mentioned, such as in *Latham*, *Kelly*, and *Cartier*. In my view this is understandable considering that most respondents in cases against inmates, such as the case at bar, will not have much of a basis to make a strong argument that they are more prejudiced than the inmate applicant.

[84] In the context of the cases involving inmate applicants, it seems that the three most relevant factors for the court to consider will be the inmate's *excuse* for the delay, if they have had an *ongoing intention* to pursue the application and if there is *any merit* to their proposed grounds for review. The unique challenges and disadvantages faced by the inmate by virtue of them being incarcerated, are typically raised as an aspect of the inmate's explanation for their delay in filing, as it was, in part, in the case at bar. In *Latham*, the court granted an extension to the appellant, whose reasons for the delay were almost entirely related to him being an inmate with

limited resources. Zinn J., in delivering the judgment for the Federal Court, at paras. 10 to 12, wrote:

> The Respondents observe that Mr. Latham's appeal is well out of time as Rule 51 of the *Federal Courts Rules* provides the appeal of a Prothonotary's Order must be served and filed within 10 days after the date on which the Order was issued. The Respondents acknowledge, however, that the Court has jurisdiction under Rule 55 to consider appeals filed outside that period should it decide to do so; however, "the moving party must demonstrate special circumstances justifying the issuance of such an order:" *Haque v Canada (Citizenship and Immigration)*, [1998] F.C.J. No. 1623, 157 FTR 51, at paragraph 26.
>
> In his Notice of Motion, Mr. Latham accounts for the significant delay, stating that the "extra time it has taken to produce this motion as a result of the applicant's age and medical condition, that he is an inmate with limited resources, the excessive lock downs over the past few months, and the holidays of the CSC staff have taken in the past few months, which makes it impossible to even get access to a computer and printer during those times." He further states that he has had issues with the computer and improperly working floppy disks.
>
> I acknowledge the unusual difficulties inmates have when making or responding to applications in this Court. Therefore, and notwithstanding the serious delay here, the Court shall grant the extension of time to file this appeal, noting as well that the Respondents did not raise any objection to the extension being granted.

[85] Similarly, in *Bullock*, the Federal Court acknowledged that difficulties encountered by an unrepresented inmate in getting proper and meaningful access to the courts. An inmate's limited circumstances also warranted a flexible approach from the court when assessing whether there was a *continued intention* to challenge the decision in question. In *Myre,* Cullen J., at para. 4, commented that "it is apparent to me that throughout this time frame the applicant, in his limited circumstances, showed a continuing intention to bring the proceeding." In *Bullock*, at para. 17, the

court justified its conclusion that the inmate did intend to challenge the decision throughout the 8-month delay by asserting that "concept of time, due diligence and justice" take on a different meaning in such circumstances. In *Bullock,* the Federal Court of Appeal commented on the likelihood that the impugned decision would continue to adversely affect the inmate in the future. Justice Letourneau, at para. 26, stated, "In my view, for all these reasons and because the transfer decision 'would continue to affect the future rights of the parties *inter se,* justice requires that an extension be granted to have the legality of the transfer reviewed." Again, in *Cartier,* Justice Létourneau, commented on the difficulties of communication between the inmate and his counsel, the fact that the delay in filing the application for judicial review was only 11 days, that there was a serious question to be determined, and that the impugned decision may affect him adversely, allowed the application for an extension of the time in which to file an application for judicial review.

[86] It should be noted, however, that in *Muckle*, and in *MacDonald*, the Federal Court recognized that difficulties associated with being incarcerated warranted their consideration but denied their respective inmates an extension of time to apply for judicial review on the basis that they had failed to provide an adequate explanation for their respective delay and failed to establish that there was any merit to their claim. In *MacDonald,* at para. 26, Justice Gascon commented on the difficulties

associated with the inmate in his delay in filing his motion for an extension of time and his failure to do so for more than six months. He stated:

> I am also not convinced that there is a reasonable explanation for Mr. MacDonald's delay in filing his motion for an extension of time and his failure to do so for more than six months. The reasons invoked by Mr. MacDonald are the fact that he has no education, that he is unfamiliar with the Court's proceedings, that he is not represented by legal counsel and that he has inadequate access to computers, photocopies and other resources in his correctional institution.

[87] Justice Gascon further noted, at para. 29, that:

> The fact that Mr. MacDonald is self-represented does not justify a departure from the applicable legal principles. Litigants who choose to represent themselves must accept the consequences of their choice (*Wagg v Canada*, 2003 FCA 303 at para 25). This is not to say that the Court cannot provide some assistance to an unrepresented litigant like Mr. MacDonald or factor his lack of experience or legal training in its assessment. However, the Court cannot abandon the rule of law and ignore the legal precedents it is bound to apply.

[88] Lastly, Justice Gascon concluded, at para. 32, that:

> As stated by Justice Gagné in *Cotirta*, "[t]he jurisprudence consistently refuses to consider a party's lack of legal training or understanding of the Rules as constituting a reasonable justification for delay" (*Cotirta* at para 13). Therefore, Mr. MacDonald's alleged lack of knowledge of the procedural issues and his inability to pay legal counsel cannot serve to rescue his motion. I am also not persuaded that Mr. MacDonald's more difficult access to computers, photocopies and other resources in his correctional facility institution are enough to amount to a reasonable explanation for his delay in filing his application.

[89] In view of all the foregoing, while the factors to be considered in a motion for an order to extend the limitation period to bring an application for judicial review

are generally the same for non-inmate and inmate applicants, the circumstances of the inmate will, to varying degrees, impact how the court applies and considers the factors. Most significantly, the inmate's circumstances will be considered when assessing the reason for the delay, and if they had a *continued intention*. Given the limited circumstances of being incarcerated, a *continued intention* may appear different for an inmate applicant than a non-inmate applicant, therefore a flexible approach is warranted.

[90] As previously mentioned, the prejudice to the parties is a relevant factor to be considered. It seems, however, that in the context of inmate applicants, the prejudicial effects to the respondent are usually not significant or given much weight compared to other non-inmate applications.

[91] While, ultimately, it is with the discretion of the court to decide how to apply the standard factors considering the inmate's circumstances. The difficult circumstances of being incarcerated alone are not enough to meet the test for an extension. It is, however, a relevant factor that weighs into the mix of factors that the court must consider.

Analysis

[92] As stated, determining whether a motion for an extension of time should be granted involves an exercise of discretion which must be guided by the criteria identified by the Nova Scotia Court of Appeal. These factors are:

1. Did the applicant have a *bona fide* intention to seek judicial review within the time limitation period?

2. What was the length of the applicants' delay before taking steps to apply for judicial review?

3. Does the applicant have a reasonable excuse for his delay?

4. To what extent will the applicant or respondent suffer prejudice?

5. What is the strength or merit of the applicant's proposed grounds for judicial review?

[93] Again, it is important to stressed that these factors or guidelines should be considered in determining the ultimate question of whether justice requires that an extension be granted. The analysis is highly contextual.

1. Did the applicant have a bona fide intention to seek judicial review within the time limitation period?

[94] The first factor requires the applicant to demonstrate a continuing intention to pursue his application for judicial review for the entire period expired since the decision of the Executive Director was communicated to him on February 10, 2021.

Put differently, the applicant must show that he had a *bond fide* intention to seek judicial review within the time limitation period.

[95] Having considered the totality of the evidence proffered in this motion, including the affidavit evidence and the *viva voce* evidence of the applicant, wherein he was thoroughly cross-examined, I find that the applicant has demonstrated a *continuing intention* or a *bona fide* intention to pursue an appeal from the decision of the Executive Director of Correctional Services after the decision was communicated to him on February 10, 2021, which is borne out by his actions before and after February 10, 2012.

[96] The applicant's persistence in pursuing his appeals prior to February 10, 2021, is entirely consistent with his persistence in pursuing his appeal of the Executive Director's decision after February 10, 2021. For example, on January 27, 2021, Deputy Superintendent Verge received an offender's complaint form coupled with two notices of appeal forms from the applicant as well as submissions regarding the merits of his appeals. The forms were submitted to senior management for investigation. Initially, the investigation into the whereabouts of Mr. Sandeson's original Notice of Appeal Forms failed to establish their existence, but after further review the August 13, 2020, the notice of appeal was found. They were overlooked due to administrative error. The Notice of Appeal, however, filed on September 3,

2020, was not found. On January 28, 2021, Superintendent Adam Smith reviewed the applicant's Offender Complaint, the new Notice of Appeal Forms, the written submissions, and the original Notice of Appeal Form from August 13, 2020.

[97] In the applicant's Affidavit he explained why he was not able to file his Notice of Appeal within the deadline provided in Rule 7.19. After he received notice of the decision of the Executive Director on February 10, 2021, he wrote a letter to the Minister of Justice on February 18, 2021, which demonstrates his intent to seek to overturn the Executive Director's decision. The applicant stressed that he had hoped to avoid Court and was not aware of the deadline for filing a Notice for Judicial Review, which is consistent with the indisputable evidence that he was only advised by Deputy Superintendent Verge that the Executive Director's decision was "final." In other words, it is indisputable that the applicant was not informed of the process for judicial review.

[98] As the respondent correctly pointed out, Deputy Superintendent Verge fulfilled his responsibility by complying with his statutory obligation to inform the applicant that the decision of the Executive Director was final.

[99] The applicant waited for a response from the Minister's office until March 15, 2021. On that date, an employee of the Department of Justice informed him that his

letter to the Minister was not received. There is insufficient evidence to infer that the applicant did not send a letter to the Minister's office.

[100] On March 18, 2021, he contacted the Prothonotary's Office to request the documentation to file for judicial review. On March 19, 2021, he asked his legal counsel, his lawyer representing him on his criminal matter, if he could obtain a publication ban for a judicial review. He was advised by his criminal lawyer that she would have to research the issue.

[101] On March 24, 2021, the applicant received the requested documentation from the Prothonotary's office for a judicial review, which is consistent with his stated intention to overturn or appeal the Executive Director's decision. The applicant reviewed the documentation, including the information about contacting Nova Scotia Legal Aid, which was included in the documents. He explained rather than immediately file his judicial review application, he thought it would be prudent to obtain legal advice before filing the application in court. I accept the applicant's explanation because it makes sense that it would be prudent to contact Legal Aid before making a court application.

[102] The applicant contacted the Dartmouth Legal Aid office on April 7, 2021, and spoke to an administrative assistant, who advised him that he would be contacted.

On the same date, the applicant contacted his criminal lawyer, and was advised that he could request a common law publication ban on the judicial review. On April 12, 2021, the applicant contacted Dartmouth Legal Aid because he had not heard from them. On April 15, 2021, he received a letter from Legal Aid advising that him that he did not qualify for legal aid. On April 20, 2021, he repeatedly called the Prothonotary's office for advice on how to apply for a publication ban. He did not speak to anyone from the Prothonotary's office. On April 22, 2021, his criminal lawyer advised him that he should fax his documents including the Notice for Judicial Review. The applicant stressed that the Prothonotary's Office continued to provide him assistance in preparing his judicial review application. On June 15, 2021, the applicant received a letter, dated June 9, 2021, from the Prothonotary's Office informing him that his application would require an extension of time to file it.

[103] Considering the timeline, coupled with the applicant's persistent actions, as described in the evidence, to have the Executive Director's decision appealed or overturned clearly demonstrates a *continuing intention* to pursue his application for judicial review for the entire period expired since the decision of the Executive Director was communicated to him on February 10, 2021.

[104] With respect to the next two questions, what was the length of the applicants' delay before taking steps to apply for judicial review and whether he has a reasonable excuse for the delay, the applicant addressed these questions in his evidence.

[105] The applicant states that he has been relentless in his pursuit to appeal or overturn the Executive Director's decision, but his efforts were impeded by his ignorance of the law; a transfer between correctional facilities; restricted access to legal materials; pandemic-related court closures; and a lack of assistance from Nova Scotia Legal Aid.

[106] The applicant readily acknowledged that his application for judicial review was filed 25 days beyond the limitation period under Rule 7.05(1). He agreed in cross-examination that he attributes the 25-day delay in filing his judicial review application on the non-response of his letter he sent to the Minister of Justice. He was asked whether he honestly believed that the Minister of Justice had the authority to overturn the Executive Director's decision. As I intently listened and observed him answered that question, he struck me as being sincere. He replied, "I was not certain what the authority the Minister of Justice had, but I was not aware of any other avenue I could pursue at that moment to overturn the decision of the Executive Director." He further stated, "I really wasn't sure about what the power was to overturn any decision, but I believe that he was situated above the Executive Director

in the Department of Justice." In my view, the applicant's response is understandable given that he is a reasonably intelligent, educated person, with a rudimentary or limited knowledge of the legal system. Thus, I find that it is reasonable to infer that he honestly held that belief that the Minister of Justice had the authority to overturn the Executive Director's decision.

[107] The applicant also agreed during cross-examination that he reached out to his criminal lawyer on March 19, 2021, one day after the limitation period for filing an application for judicial review. He explained the scope of his retainer with his criminal lawyer, and her limited knowledge of administrative law, which would require her to research the issue regarding the publication ban.

[108] The applicant confirmed on cross-examination that after sending the letter to the Minister on February 18, 2021, which has not been refuted, he waited for a response, and conducted research between March 15 and 18, 2021, by accessing CanL11 on the tablet system.

[109] It was suggested to the applicant on cross-examination that he waited until March 18 to reach out to the Prothonotary Office to get the forms for filing his judicial review, to which he replied, "No, I did not. And I wouldn't say that I waited until that time to contact the Prothonotary. I was waiting for a response from the

Minister of Justice. I was just waiting and applied a conscious decision making that to that effect. I was waiting for a decision from the Minister of Justice when I found out that the letter had not been received or was somehow lost and that is when I took further steps to investigate how I could go about seeking to overturn or attack the decision of the Executive Director." This does explain his reasons for taking the actions that he did after becoming aware that the Minister did not receive his letter. The applicant stated in his affidavit sworn on June 15, 2021, that an employee of the Department of Justice informed him that his letter had not been received, which was not refuted.

[110] In my view, the applicant's evidence demonstrates a *continuing intention* to pursue an appeal or overturn the decision of the Executive Director after it was communicated to him on February 10, 2021 and provides an explanation or reasonable excuse for the length of the delay before filing his application for judicial review. I say that mindful that the applicant is an inmate incarcerated with limited resources and means to readily access assistance or guidance. As he stated in his Affidavit, "it is my hope that the Court takes notice of my relentless pursuit of this issue, hampered by my ignorance of the relevant procedural law, a transfer between correctional facilities, restricted access to legal materials, pandemic-related court closures, and a lack of assistance from Nova Scotia Legal Aid."

[111] As stated in *Pratt*, and in the aforementioned Federal Court cases, it cannot be seriously disputed that, as a general statement, prisoners face challenges in advancing litigation. Thus, it is within this context that the court should consider the length of the delay and whether the inmate applicant, the moving party, has a reasonable explanation or excuse for the delay in filing his motion for a judicial review.

[112] With respect to the absence or presence of *prejudice*, it is reasonable to infer from the evidence that the applicant will suffer prejudice, if the motion is not granted. There is no evidence to suggest that the respondent will suffer prejudice from granting the motion. The respondent acknowledges that if the applicant's motion is denied, it would result in some measure of prejudice.

[113] The next question is – what is the strength or merit of the applicant's proposed grounds for judicial review? While the applicant is not required to convince the Court that their application for judicial review will necessarily succeed, the Court is required to consider the strength or merit of the applicant's proposed grounds for the judicial review. In this case, the applicant alleges numerous grounds relating to procedural fairness as well as to unreasonableness of the decisions. It is difficult to assess these allegations at this juncture given that the focus of his motion was not on the grounds for judicial review, but rather the relevant factors in respect to whether

the time limitation period should be set aside. The respondent "acknowledges the difficulty in assessing the relative strength of the parties' respective cases.' In this case, other than the alleged grounds for judicial review, it is difficult for the court assess whether the application has any merits.

[114] In my view, the difficulty of assessing whether there is any merit to the proposed application for judicial review is not dispositive of the central issue because it is only one factor among several others that must be considered in determining the ultimate issue whether justice requires that an extension of time be granted. As previously mentioned, the other factors include, the length of the delay, the reason for the relay, the presence or absence of prejudice, and the good faith intention of the applicant to exercise their right of appeal within the prescribed time.

[115] Moreover, as Justice Stratas emphasized in *Canada (Attorney General) v. Larkman,* the overriding consideration is that the interests of justice be served. The factors or guidelines provide the Court guidance in determining whether the granting of an extension of time is in the interest of justice. The importance of each factor or question depends on the circumstances of each case. Further, not all the factors or guidelines need to be resolved in the moving party's favour, as noted by Justice Stratas wherein he provided the example that a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak,

and equally a strong case may counterbalance a less satisfactory justification for the delay.

[116] Having considered all the relevant factors or guidelines, as earlier discussed in these reasons, it is my view that the applicant, the moving party, has demonstrated a compelling case for granting the motion to extend the time to file his application for judicial review. Therefore, for all theses reasons, justice requires that an extension be granted to provide the applicant with the opportunity to file his application for judicial review.

[117] Having reached that decision, I must consider Rule 2.03 (2), which provides that when excising judicial discretion to excuse compliance with a Rule must consider doing each of the following:

> (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set out by a Rule;
>
> (b) require an excused person to do anything in substitution for compliance;
>
> (c) order an excused person to indemnify another person for the expenses that result in the failure to comply with a Rule.

[118] Accordingly, by virtue of Rule 2. 03(2) (a), the time for filing the application for judicial review will be extended to January 31, 2022.

Hoskins, J.