SUPREME COURT OF NOVA SCOTIA

Citation: *Sandeson v. Nova Scotia (Attorney General)*, 2022 NSSC 170

Date: 20220615
Docket: Halifax No. 507045
Registry: Halifax

Between:

William Michael Sandeson

Applicant

v.

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

Respondents

Decision

Judge: The Honourable Justice Darlene A. Jamieson

Heard: June 7, 2022, in Halifax, Nova Scotia

Decision: June 15, 2022

Counsel: Mr. William Michael Sandeson, Self Represented
Mr. Myles Thompson, for the Respondents

By the Court:

Background

[1] The Respondents have brought this motion seeking an order permitting the filing of fresh evidence in this judicial review. The Respondents seek leave to supplement the Record for judicial review with the affidavit of Mr. Scott Keefe, Chief Superintendent for Correctional Services.

[2] The Applicant, Mr. Sandeson's Notice for Judicial Review is of a decision by the Executive Director of Correctional Services Nova Scotia dated February 8, 2021. I understand this to be a reference to the decision of Mr. Scott Keefe, which is found at Tab 8 of the Record. The Respondents are seeking to supplement the Record by way of an affidavit of the decision-maker, Mr. Keefe ("Keefe affidavit"), sworn on May 12, 2022.

[3] Mr. Sandeson is self represented and consents to the addition of the Keefe affidavit to the Record.

[4] The grounds for review in the Notice for Judicial Review filed by Mr. Sandeson are as follows:

1. The decision failed to consider the reasonableness of the finding of guilt on the disciplinary report at the adjudication level.

2. The decision responds exclusively to an argument that was not raised by the applicant and ignores all of the arguments that were raised.

3. The decision-maker failed to examine relevant material in coming to his decision, contrary to *Correctional Services Act* ("*CSA")* ss. 99(1)(a), 99(1)(d), and 99(1)(e).

4. The decision failed to address any of the grounds of appeal. The Applicant tenders these grounds again for the purpose of this review:
    a. Procedural fairness: The decision-maker did not even read the material submitted.

b. Procedural fairness: The Applicant was not provided a copy of the disciplinary report prior to his adjudication, contrary to *Correctional Services Regulations ("CSR")* s. 90(1)(a), nor did the applicant receive a copy of the results of the investigation at any point, contrary to *CSR* s. 90(1)(b).

c. Procedural fairness: The disciplinary report was neither signed nor initialed by the reporting Officer.

d. Procedural fairness: The Applicant was not made aware of the adjudication decision until he made a specific request for a copy of the report on September 3, 2020.

e. Procedural fairness: The report improperly indicates that the Applicant pleaded guilty. The contrary is corroborated by the Adjudicator's notes.

f. Procedural fairness: The original Inmate Appeal document was lost.

g. Procedural fairness: The Applicant was neither informed of his right nor provided the opportunity to hear and cross-examine witnesses, contrary to *CSR* ss. 93(1)(d) and 93(1)(e).

h. Correctness/reasonableness: The Applicant's request to be placed in remain in segregation was refused, contrary to *CSA* s. 74(d).

[5] A Motion for Directions was held before Justice Richard Coughlan on March 17, 2022. Justice Coughlan gave all parties until May 12, 2022 to file any motions for fresh evidence. He also directed that after the hearing of this motion a further Motion for Directions is to be scheduled to set the dates for the judicial review.

Parties' Positions

Respondents

[6] The Respondents say that Mr. Sandeson raises several grounds of alleged breaches of procedural fairness in his notice for judicial review. They say the Keefe affidavit is relevant because it provides the court with background

information and procedural context in relation to the use of the Justice Enterprise Information System (JEIN) within Nova Scotia's correctional facilities and in the adjudication and appeal processes, how decisions related to physical and mental health are made with the Nova Scotia's correctional facilities, and how the adjudication and appeal processes are undertaken within Nova Scotia's correctional facilities pursuant to the *Correctional Services Act* ("*the Act*"), 2005, c. 37, the *Correctional Services Regulations ("the Regulations"),* NS Reg 99/2006, and departmental policy.

[7] The Respondents say the information in the Keefe affidavit is not readily apparent in the Record and could not have been produced within the Record. They say the Keefe affidavit not only supplements the Record by providing the court with additional context on these relevant processes and procedures, but it also directly addresses the grounds of alleged procedural fairness raised by the Applicant.

[8] They say the information is credible and reliable and could reasonably affect the result of this judicial review particularly as it relates to allegations of breach of procedural fairness. They say admitting the affidavit of Mr. Keefe will provide a better context for the reviewing judge and help the judge better understand the real-world application of the processes and procedures under review.

Mr. Sandeson

[9] Mr. Sandeson, who is self represented, says he consents to the entirety of the Keefe affidavit being introduced as evidence on the judicial review. He agrees with the Respondents that the areas of most importance in the affidavit are those that address the issues of alleged breaches of procedural fairness, the background information regarding medical holds and the paragraphs explaining the use of the JEIN in the correctional facility context. Mr. Sandeson says he did not file a motion seeking fresh evidence because he was relying on Mr. Keefe's affidavit and having the opportunity to cross examine him. His focus is on his ability to cross examine Mr. Keefe and particularly in relation to the procedural fairness allegations. For example, he points to the procedural fairness evidence contained in paragraph 84 of the affidavit. He believes the entire affidavit is of contextual value for the court.

[10] Despite Mr. Sandeson consenting to the admission of the Keefe affidavit, the court has a gatekeeper role to determine whether the affidavit evidence is admissible to supplement the Record for judicial review.

Law and Analysis

[11] *Civil Procedure Rule* 7 deals with the record on a judicial review. It gives the court the discretion to decide what should be in the record. This is referred to in *Rule* 7.10 as the discretion to settle the record. There is no definition of "record" in the *Civil Procedure Rules*. *Rule* 7.09 simply says it must be complete.

[12] The relevant *Civil Procedure Rules* are as follows:

> **7.10 Directions for judicial review**
> A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:
>
> *(a)* settles what will make up the record and whether something is part of the record;
>
> …
>
> *(c)* directs the format in which the record will be produced, and whether a party must receive a paper copy of a record that is in electronic format;
>
> …
>
> (g) rules on the admissibility of evidence sought to be introduced at the review hearing;
>
> (h) provides for the introduction of admissible evidence by affidavit or otherwise, and provides for any reply affidavits, cross-examination at the hearing, or cross-examination outside court with a transcript;

[13] *Civil Procedure Rule* 7.28 states:

> **7.28 Evidence on judicial review or appeal**
> **(1)** A party <u>who proposes to introduce evidence beyond the record</u> 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.
>
> [Emphasis added]

[14] The proposed Keefe affidavit was not before the initial decision-maker and, therefore, in order for it to be introduced at the judicial review leave of this court is necessary.

[15] Generally speaking, evidence that was not before the initial decision-maker is not permitted to be filed on a judicial review. The record that goes before the reviewing court should be the material that was before the decision-maker at the time the decision was being made. In their text *Judicial Review of Administrative Action in Canada*, (Carswell: loose-leaf) Vol.1 6.52, Brown and Evans comment that "affidavit evidence will only be permitted to supplement the administrative record in limited circumstances." They further state:

> 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.

[16] There are limited exceptions to the general rule prohibiting fresh evidence on a judicial review. The exceptions, although not a closed list, are general background information of assistance to the court in understanding the issues relevant to the judicial review; affidavit evidence of procedural defects that cannot be found in the evidentiary Record and affidavit evidence highlighting a complete absence of evidence before the administrative decision-maker when it made a particular finding. (Justice Stratus in ***Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency***, 2012 FCA 22 (F.C.A.)) However, the exceptions are narrow and best understood as circumstances where the rationale behind the general rule is not offended. As Justice Stratas said in ***Association of Universities****, supra*, at paragraph 20:

> 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 (described in paragraphs 17-18, above). 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.

[17] Justice Stratus provided further insight into the exceptions in ***Bernard v. Canada Revenue Agency,*** 2015 FCA 263:

> 19 The first recognized exception is the background information exception. Sometimes on judicial review parties will file an affidavit that contains summaries and background aimed at assisting the reviewing court in understanding the record before it. For example, where there is a large record consisting of many thousands of documents, it is permissible for a party to file an affidavit identifying, summarizing and highlighting, without argumentation, the documents that are key to the reviewing court's understanding of the record.
>
> 20 In *Delios*, above, I put it this way (at paragraph 45):
>
>> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy — that is the role of the memorandum of fact and law — it is admissible as an exception to the general rule.
>
> 21 But "[c]are must be taken to ensure that the affidavit does not go further and provide [fresh] 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": *Access Copyright*, above at paragraph 20; *Delios*, above at paragraph 46.
>
> 22 The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision- maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.

24 The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, the affidavit tells the reviewing court not what is in the record — which is the first exception — but rather what cannot be found in the record: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.) and *Access Copyright*, above at paragraph 20. This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all. This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.

25 The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment & Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (N.B. C.A.) (improper purpose); *St. John's Transportation Commission, Re* (1998), 161 Nfld. & P.E.I.R. 199 (Nfld. T.D.) (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

26 I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)* (2000), 195 D.L.R. (4th) 399, 264 N.R. 174 (Fed. C.A.); *E.C.W.U., Local 916 v. Atomic Energy of Canada Ltd.* (1985), [1986] 1 F.C. 103 (Fed. C.A.).

27 The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. <u>The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider.</u> <u>It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).</u>

[Emphasis added]

[18] In relation to the procedural fairness exception, the Nova Scotia Court of Appeal said in ***Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia,*** 2018 NSCA 83:

> 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: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.), para. 20(b), per Stratas J.A; *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.), leave to appeal refused [1980] 2 S.C.R. viii (note) (S.C.C.). Similarly, an appeal court may receive fresh evidence respecting the regularity of the trial court's process: *R. v. Wolkins*, 2005 NSCA 2 (N.S. C.A.), paras. 58 and 61, per Cromwell J.A. for the Court; *R. v. Assoun*, 2006 NSCA 47 (N.S. C.A.), paras. 297 and 316, and authorities there cited, leave to appeal refused [2006] 2 S.C.R. iv (note) (S.C.C.).

[19] For the factual background exception, the affidavit cannot contain new evidence, legal arguments, opinions etc. that would prejudice the Applicant. In ***Association of Universities,*** *supra*, Justice Stratas cautioned that 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. … (at paragraph 20)

[20] The Federal Court of Appeal in ***Delios v. Canada (Attorney General),*** 2015 FCA 117 said the following in relation to the background information exception:

> 44 Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the review court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).
>
> 45 The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law - it is admissible as an exception to the general rule.

[21] The submission of affidavits from administrative tribunals in the context of applications for judicial review has been met with considerable caution by the courts. Certainly, affidavit evidence submitted by an administrative decision-maker to buttress or bootstrap its decision is not permitted. In ***Stemijon Investments Ltd. v. Canada (Attorney General),*** 2011 FCA 299, Justice Stratus writing for the court stated that no weight would be given to an affidavit filed by a decision-maker that supplements the decision:

> 41 The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.). After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27 (N.B. C.A.) at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267 (S.C.C.).
>
> 42 In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.
>
> [Emphasis added]

The exceptions are not automatically applicable in all judicial reviews. Evidence sought to be permitted under one of the exceptions will depend on the circumstances and must be decided on a case by case basis.

Do any of the Exceptions to the general rule apply here so as to permit new evidence (Keefe Affidavit) to be included as part of the Record?

[22] The exceptions to the general rule include circumstances where additional evidence is necessary to assist the court by highlighting or summarizing background information; or evidence is necessary to explain the absence of evidence on a certain subject matter; or where such evidence is necessary to explain an improper purpose or fraud or issues of procedural fairness. This burden falls to the moving party to establish the new evidence is necessary.

[23] The exceptions must be read in light of our *Civil Procedure Rules* which state that a party seeking to introduce affidavit evidence on a judicial review must make a motion seeking permission to do so. It is not automatic that background information affidavits or other exception affidavit evidence will be permitted. Affidavits setting out background information should not become the norm. If this was intended the *Rules* would say so. They do not. Rather the *Rules* require a motion. The motion judge is called upon to determine if the evidence is truly evidence that falls within an exception and if it is necessary and appropriate in the circumstances of the particular judicial review.

[24] I now turn to the affidavit in issue. The Keefe affidavit contains 84 paragraphs divided into the following headings:

> Judicial Review,
>
> Background,
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> Medical Holds in Correctional Facilities,
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> The Sandeson Adjudication,
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> The Offender Disciplinary Process,
>
> Notification of Decision,
>
> The Appeal Process, and
>
> Mr. Sandeson's Appeals to the Executive Director.

General Background Information Exception

[25] The Respondents contend firstly that much of the Keefe affidavit falls within the general background information exception. Their rationale is simply that it provides context. They say it is necessary for flow and the affidavit would be disjointed and hard to read without the contextual background.

[26] With reference to much of the background information contained in the Keefe affidavit, I am not persuaded it is necessary or appropriate in the current circumstances. For example, paragraphs 37 to 44 and 49 to 55 of the Keefe affidavit speak to the *Act* and the *Regulations* and provide an overview of the

disciplinary process and appeal processes set out in the *Act* and *Regulations* by highlighting the relevant sections of each. The Respondents say these paragraphs also fall under the procedural fairness exception. The paragraphs both summarize and quote directly from the *Act* and *Regulations*. This is not appropriate content for an affidavit nor is there a need for an affidavit of the decision-maker to provide an overview of the legislation for the Court. I find these paragraphs to be inappropriate for an affidavit, unnecessary and not properly admissible under the background exception in the current circumstances. In addition, I would add generally that any comments about how legislation should be interpreted would not be appropriate for a decision-maker to comment on after his or her decision is rendered.

[27] Further, seeking the courts leave through a motion to file a fresh evidence affidavit to simply set out an overview of the applicable legislation is not an appropriate use of court resources. This can most efficiently be done through written legal submission. Affidavit evidence relating to the provisions of the *Act* and *Regulations* is clearly not appropriate nor necessary content for an affidavit.

[28] The affidavit contains many paragraphs summarizing the Record, which the Respondents say fall under the background information exception. They say it is to provide context for the hearing judge, to provide a more fulsome overview than the documents in the Record provide. Again, this exception is meant for circumstances where it is necessary to have background information to assist the court. At paragraphs 10 to 16, 19 to 26 and 32 to 36, the Keefe affidavit simply summarizes the information contained in the Record in relation to events leading to the disciplinary reports addressing the incidents of August 2 and August 24, 2020. In addition, the Keefe affidavit at paragraph 36 contains an overview of the Record at Tab 1 that stretches from August 27, 2020 to February 26, 2021. The decision-maker's one paragraph summary of these records spanning many months is not necessary or helpful.

[29] The Record consists of one small volume of documents containing 9 tabs and 56 pages in total. In these circumstances of a brief Record, additional evidence is not necessary to highlight or summarize the background information contained in the Record for the hearing judge. The Respondents have not argued that this judicial review will involve particularly complex issues that require this background information to assist the court. As Justice Stratas said in ***Delios**, supra,* where there are complex administrative decisions with procedural and factual complexity and a Record comprised of hundreds or thousands of documents,

reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. That is not the situation here and these paragraphs are not necessary and, in the circumstances of this judicial review and brief Record, do not warrant utilizing the background information exception. They are simply not needed for the reviewing court to better understand the Record or the issues relevant to this judicial review.

[30] To arrive at this conclusion, I have read the Record and compared it line by line to the affidavit to determine if the paragraphs were solely background information from the record, whether the paragraphs were nuanced in favour of the party and if there was any new evidence or additional information being proffered by this decision-maker to supplement the Record. This has taken considerable time. Putting before the Court for consideration, in a motion for fresh evidence, such unnecessary background information and legislative overview is a waste of court resources. I say this only to highlight that background information must be necessary in the circumstances of the judicial review to assist the court due to, for example, a voluminous record that needs a roadmap to orient the issues and where there are complex administrative decisions for review.

[31] Summarizing the record for the sake of convenience to orient the reader, rather than out of necessity, invites problems. This cannot become the norm. Background information affidavits as of right would potentially mean receipt of such overview summaries of the record from all of the parties and then possible reply affidavits. Competing summaries of the record in affidavits serve no useful purpose and invite advocacy affidavits. The exceptions must remain exceptions to the general rule that fresh evidence is not allowed to supplement the record. In the majority of cases such overview affidavits will not be necessary to assist the court. The materials that were before the decision-maker represent the record and only in exceptional circumstances should evidence be admitted to supplement this record. In short, seeking to supplement the record by filing an affidavit of the decision-maker or anyone else to simply set out his or her summary or overview of the record must be discouraged. If the background information in a proposed affidavit simply summarizes a brief record with no apparent complexity, and can be readily set out in legal submissions, based on the contents of the record, then it should not be proffered in a separate affidavit.

[32] The Respondents in their brief directed me to the trial level decision in ***Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General***), 2018

NSSC 13. There, Justice Ann Smith, was addressing a request to file affidavit evidence of background information in a unique judicial review involving a provincial tribunal on judges' salaries and a variation of its decision by the Governor in Council. Justice Smith commented on the uniqueness of the judicial review before her and said that there would be many difficult issues before the court on the judicial review. In the circumstances of that case she allowed certain background information. The circumstances of the present case are not the same.

[33] Paragraphs 45 to 48 of the Keefe affidavit appear to be unnecessary background information, submissions and duplication of information found elsewhere. Paragraph 46 says in part "the adjudicator made a conclusion on information in the disciplinary report that, on the (sic) balance of probabilities the comments were threatening in manner". This is an opinion of the decision-maker looking back at the documents from the disciplinary process and has no place in an affidavit for a judicial review. The decision-maker's after the fact opinion on a prior disciplinary process and decision is completely inappropriate and falls under none of the exceptions. It is a submission. I note that paragraph 48 duplicates paragraph 84(b) and is not necessary. For the above reasons, I see no reason for any of paragraphs 45 through 48 to be allowed.

[34] Paragraph 66 sets out what the decision-maker understands Mr. Sandeson to believe regarding a bail review and is highly inappropriate, not evidence contained in the Record and not within the knowledge of Mr. Keefe. Speculation by the decision-maker has no place in an affidavit. Affidavits must adhere to the rules clearly enunciated in ***Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)***, 1993 NSSC 71.

[35] The affidavit contains a number of the usual introductory affidavit paragraphs being 1 through 9. I wish to comment on paragraph 2. It states "I have conducted many (hundreds) disciplinary hearings with persons in custody." It is unnecessary to have an affidavit lay out the experience of a particular decision-maker whose decision is subject to challenge on judicial review. I agree with the reasoning in ***Shahzad v. Canada (Citizenship and Immigration),*** 2017 FC 999, where the court said (at para 26):

> However, there is no need for an affidavit from the decision-maker to establish or reassert such expertise or experience. In the context of judicial reviews, an administrative tribunal's expertise or experience are not measured against each individual officer's own knowledge and background. True, officers always bring their own experience and expertise in their respective decision-making, but deference is an acknowledgment of the

> *institutional* expertise and experience held by an administrative tribunal. It would be strange if the deference to be shown to a decision-maker by a reviewing court were to fluctuate with the identity and specific level of experience of each particular officer involved, or with the exposure that an officer may have had to the particular issue raised before him or her. It is worth citing again the Supreme Court on this point: "as with judges, expertise is not a matter of the qualifications and experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution" (*City of Edmonton* at para 33).

Procedural Fairness Exception

[36] Mr. Sandeson in his Notice for Judicial Review alleges numerous breaches of procedural fairness. One of the exceptions to the admissibility of affidavit evidence from decision-makers in a judicial review is when the Applicant claims a breach of procedural fairness. The Respondents say that certain background information is necessary for context in relation to the allegations of breach of procedural fairness. These include paragraphs 17 and 18 which explain JEIN and how it is used by Correctional Services staff. These paragraphs, while I question their relevance, can remain as background information to the responses to the allegations of procedural fairness. It does not appear to be new information that would prejudice the case of the Applicant. In addition, paragraphs 27 to 31 explain the use of Medical Holds in Correctional Facilities. On the same basis as above, I will allow this new background information on medical holds to remain in the affidavit. Again, it does not appear to be new information that would prejudice the case of the Applicant.

[37] Paragraphs 60 to 62 respond directly to the Grounds in the Notice for Judicial Review which include "the decision-maker did not even read the material submitted, the Applicant was not provided a copy of the disciplinary report prior to his adjudication." I am prepared to allow an affidavit that includes these paragraphs under the exception relating to alleged breaches of procedural fairness. I also allow paragraph 84 under the same exception. Although Mr. Sandeson has not put forward an affidavit setting out evidence in support of his claims of breach of procedural fairness, the Keefe evidence in relation to the procedural fairness allegations can stand (paragraphs 60 to 62 and paragraph 84). It will be up to the hearing judge as to what weight, if any, to give this evidence.

[38] Although paragraphs 56 to 59, 63 to 65 and 67 to 83 are largely summaries of the documents contained in the Record, the Respondents argue the paragraphs are necessary as they provide context for the responses to the breach of procedural

fairness allegations. They describe the actions of Mr. Keefe, the decision-maker, in relation to his February 8, 2021 decision which is the subject of this judicial review. The paragraphs in large part address the allegation of breach of procedural fairness relating to lost appeal forms. The Respondents say removing the summaries, while leaving the few parts directly speaking to the allegations, would be disjunctive. I am not convinced. However, given that they do speak to the actions of the decision-maker whose decision is under review, that there are many allegations of breach of procedural fairness, that Mr. Sandeson, who is self represented, says the paragraphs represent helpful context from his perspective in relation to the various procedural fairness issues and that they do not appear to prejudice Mr. Sandeson's position, I am prepared to allow them to remain under the procedural fairness exception.

[39] As noted above, it is not for me to decide what weight, if any, is ultimately given to the evidence contained in the remaining paragraphs of the Keefe affidavit, that is a matter for the hearing judge. Whether the evidence remaining in the Keefe affidavit is persuasive and the weight to be given to it, or parts of it (if any), are matters yet to be decided.

[40] In conclusion, the paragraphs remaining are the usual introductory paragraphs for an affidavit minus paragraph 2, plus paragraphs 17, 18, 27 to 31, 60 to 65 and 67 to 84. The Respondents are permitted to introduce the Keefe affidavit, with the exception of the paragraphs noted. The revised affidavit should be filed with the Court and provided to Mr. Sandeson within 15 calendar days from today. In addition, in the circumstances of this matter, I will allow an affidavit of Mr. Sandeson in response to the evidence contained in the paragraphs I am allowing, should he wish to file one. If he intends to file a response affidavit it is to be filed within 30 days of receipt of the revised affidavit of Mr. Keefe. This is not an invitation for open-ended fresh evidence, but simply a reply affidavit, specifically and only, addressing the paragraphs contained in the Keefe affidavit.

[41] I ask Mr. Thompson, counsel for the Respondents, to prepare the Order. In addition, Mr. Thompson will contact court administration to schedule a further Motion for Directions.

Jamieson, J.