

NOVA SCOTIA COURT OF APPEAL
Citation: *Kelly v. Nova Scotia Police Commission*,
2006 NSCA 27

Date: 20060303
Docket: CA 253468
Registry: Halifax

Between:

Constable Clayton Burt, Nova Scotia Police Commission,
and the Cape Breton Regional Municipality

Appellants

v.

Carleton F. Kelly

Respondent

Judges: Roscoe, Cromwell and Fichaud, JJ.A.

Appeal Heard: January 31, 2006, in Halifax, Nova Scotia

Held: **Appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe and Fichaud, JJ.A. concurring.**

Counsel: David W. Fisher, for the appellant, Constable Clayton Burt
Edward Gores, Q.C., for appellant, Nova Scotia Police
Commission
Demitrius Kachafanas, for the appellant, Cape Breton Regional
Municipality
Carleton F. Kelly, respondent, in person

Reasons for judgment:

I. INTRODUCTION:

[1] The Nova Scotia Police Review Board dismissed Mr. Kelly's complaint against Constable Clayton Burt of the Cape Breton Regional Police Service. The Board's decision, however, was quashed by Edwards, J. because he thought the Board had been unfair to Mr. Kelly. Constable Burt, the Municipality and the Police Commission appeal.

[2] The judge concluded that the hearing before the Board had been unfair for two reasons. First, he thought that the Board had received a good deal of irrelevant and prejudicial evidence and that this had "tainted" the fairness of the hearing. Second, he found that the Board had not sufficiently assisted Mr. Kelly, who represented himself. This, the judge thought, resulted in Mr. Kelly losing some potential tactical advantage in the presentation of his case. The judge added that the Board's reasons for its decision were inadequate, although this was not a basis of his decision.

[3] On appeal, Constable Burt, the Municipality and the Police Commission say the judge was wrong to quash the Board's decision. Respectfully, I agree. Contrary to the judge's view, fairness did not require the Board to exclude irrelevant evidence. It was entitled to receive the evidence and rule on its admissibility and weight later, as it did. As for providing assistance to Mr. Kelly, the Board, in my view, did not fail to provide appropriate assistance. The judge seems to have expected the Board to provide tactical advice to Mr. Kelly, but it was not required to do so. A careful examination of the whole record shows that the Board gave Mr. Kelly a full opportunity and reasonable assistance to allow him to present the case he wished to present. Finally, in my view, the Board's reasons were adequate.

[4] I would allow the appeal and restore the decision of the Board.

II. ISSUES:

[5] The appeal raises four main issues:

1. Did the judge err in selecting or applying the appropriate standard for his review of the Board's decision?
2. Was the hearing unfair because the Board failed to exclude irrelevant evidence?
3. Was the hearing unfair because the Board failed to provide Mr. Kelly with appropriate assistance in presenting his case?
4. Were the Board's reasons inadequate?

III. OVERVIEW OF FACTS AND DECISIONS:

1. Mr. Kelly's complaint:

[6] Mr. Kelly's complaint against Constable Burt related to the officer's handling of two allegations that Mr. Kelly had threatened Ms. H. She eventually admitted that her second threat allegation was a lie and the charges arising from both of her allegations were dropped. Regrettably, Mr. Kelly spent two days in jail and a longer period on restrictive release conditions before he was cleared. Mr. Kelly complained that Constable Burt, as a result of bias and inexperience, failed to conduct a proper investigation of Ms. H's allegations. Mr. Kelly's allegation of bias was based on the fact that Constable Burt was a good friend of Ms. H.'s step-father, L.N.

2. The hearing:

[7] Mr. Kelly's complaint eventually led to a five day hearing before the Nova Scotia Police Review Board. Mr. Kelly represented himself. He called 20 witnesses.

[8] At the end of the day, Mr. Kelly's complaint boiled down to three main things. With respect to the first threat allegation, Mr. Kelly said that Constable Burt failed to follow up with potential witnesses. These included two people who Ms. H. claimed had been in the car with Mr. Kelly shortly before the alleged threat had been made and another person, Ms. M.C.A., who Mr. Kelly claimed had been present at the time of the alleged threat. With respect to the second threat

allegation, Mr. Kelly claimed that Constable Burt failed to check out Mr. Kelly's alibi when told about it by both Mr. Kelly and his brother, Robert. Finally, Mr. Kelly complained about Constable Burt's conduct during an alleged incident in December of 2002 at Hastie's Garage. The officer, who was off duty at the time, allegedly had not prevented his friend, L.N., from threatening Mr. Kelly.

[9] At the end of the five days of evidence before the Board, there was conflicting evidence on nearly every key aspect of Mr. Kelly's complaint.

[10] With respect to the first threat allegation, there was conflicting evidence about whether M.C.A. had been present and about whether anyone had told Constable Burt that she had been. Mr. Kelly's statement in August, 2003 to Staff Sergeant Jobe certainly put in a new light his allegation that Constable Burt had simply refused to listen to him. In that statement, Mr. Kelly indicated that while in custody, and before he had spoken to a lawyer, he told Constable Burt that there had been a third person there and that initially Constable Burt "wasn't listening" to him. Not long afterwards, but after Mr. Kelly had spoken to a lawyer who advised him to remain silent, Constable Burt asked him who the third person was but Mr. Kelly decided to follow his lawyer's advice and remain silent. He said that he never disclosed the name of that third person to Constable Burt.

[11] With respect to the second alleged threat, the main issue was Constable Burt's alleged unwillingness to follow up with Mr. Kelly's "alibi" witnesses. Mr. Kelly said that he and his brother told Constable Burt that there were witnesses who would show that Mr. Kelly was not at the place where the threat was alleged to have been made. However, there was conflicting evidence at the hearing as to whether Constable Burt had, in fact, been informed about the "alibi" witnesses as Mr. Kelly alleged.

[12] As for the Hastie's Garage incident, there was conflicting evidence about whether it had occurred. Even on Mr. Kelly's version of events, there was little to criticize in Constable Burt's alleged actions.

3. The Board's decision:

[13] The Board reserved its decision at the conclusion of the hearing and, five months later, issued a 25 page written decision dismissing the complaint. It found

that Constable Burt had not acted inappropriately towards Mr. Kelly during the December incident at Hastie's garage. It took no exception to Constable Burt's response to Ms. H. when she contacted him at home with her allegation of sexual assault. The Board noted that the officer advised his superiors of the connection through his friendship with her step-father, that he had not "lobbied" to remain involved and that the investigation was turned over to the appropriate section in the police service.

[14] The Board was not persuaded by the evidence of Robert Kelly that he had advised Constable Burt of the alibi witnesses for the threat allegation. The Board did not accept Mr. Kelly's evidence that he was "intimidated by his circumstances while before the court on November 14, and therefore failed to take that opportunity to advise court officials that he had witnesses who could prove that Ms. A.'s allegations about November 12 were untrue."

[15] While expressing concerns about certain aspects of the way the matter had been handled, the Board concluded that Mr. Kelly had not proved his allegations against Constable Burt. It therefore found that Constable Burt had not engaged in discreditable conduct in relation to his investigation of Ms. H.'s complaints.

4. The judge's decision:

[16] The judge quashed the Board's decision because, in his view, the hearing had not been fair to Mr. Kelly. Fairness was denied, the judge thought, for two reasons. First, the Board had received a lot of irrelevant and highly prejudicial evidence. Second, the Board's failure to give Mr. Kelly appropriate assistance resulted in his making unwise tactical decisions about how to present his case. The judge also made extensive comments about what he found to be the inadequacy of the Board's reasons, although this was not a basis of his decision.

IV. ANALYSIS:

1. The standard of review:

(a) The role of this Court:

[17] On appeal, our job is to determine whether the judge selected and applied the appropriate standard of review and in the event he did not, to review the Board's decision on the appropriate standard: **Dr. Q. v. College of Physicians and Surgeons of British Columbia**, [2003] 1 S.C.R. 226 at para. 43.

(b) Determining the standard of review:

[18] The judge touched only briefly on the applicable standard of review. He noted that "...denial of natural justice is measured against a standard of correctness." (Reasons para. 80). However, as I shall explain, this statement on its own does not capture the proper approach to judicial review in this case.

[19] The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see **C.U.P.E. v. Ontario (Minister of Labour)**, [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness – in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: **C.U.P.E.** at para. 102.

[20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.

[21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the

standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.

[22] Turning to the first step of the analysis, what was the content of the Board's duty of fairness?

- (i) determining the content of the duty of fairness:

[23] “[T]he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”: **Knight v. Indian Head School Division No 19**, [1990] 1 S.C.R. 653 *per* L’Heureux-Dubé, J. at 682. The context of each case includes such matters as: (i) the nature of the decision and the decision making process; (ii) the provisions of the relevant statutory scheme; (iii) the importance of the decision to the individuals affected by it; (iv) the legitimate expectations of the party challenging the decision; and. (v) the nature of the deference accorded to the decision-maker: see **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817 at paras. 23-27; **Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)**, [2004] 2 S.C.R. 650.

[24] I will briefly address how these factors apply in the case of the Nova Scotia Police Review Board. There is nothing in the record to suggest that the fourth of these factors is relevant here. I will consider the first three factors together and then turn to the fifth.

[25] A hearing by the Board into a public complaint comes at the end of a detailed statutory procedure. As set out in the Police Regulations, a member of the public may complain about a member of a police force. The complaint is initially made to the complaints officer of the relevant force, the board of police commissioners or the Police Commission. An officer of higher rank is appointed to investigate and a decision as to what action to take, if any, is then made. The complainant may initiate a review by the Police Commission of a decision to take no action. The Commission appoints an investigator who may refer the matter to

the Police Review Board. That is how Mr. Kelly's complaint came before the Board.

[26] At a hearing before the Board, the **Police Act**, R.S. 1989, c 348 as amended contemplated extensive participatory rights for the parties. The **Act** specified that the Board's hearings are to be *de novo* and provided that the parties may appear and be heard, be represented by counsel, and call, examine and cross-examine witnesses: s. 32.

[27] The object of the hearing, however, is not to provide a remedy for the complainant. Although the Board can make recommendations, it has no jurisdiction to give the complainant any remedy aside from an award of costs and the vindication that follows from the complaint being upheld. Thus, from the point of view of a complainant, the hearing before the Board is an opportunity to present his or her complaint in an adversarial setting but with little prospect of any tangible remedy. From the point of view of the officer who is the subject of the complaint, his or her career is on the line. This is not to minimize the importance of the complaints process to a complainant or indeed to the public. But it must be noted that the personal rights and interests of a complainant are not in play in the process to the same extent as the rights and interests of the officer complained against.

[28] The fifth contextual factor is the nature of the deference owed to the decision-maker. What the duty of fairness requires in a particular case "... should ... take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures ...": **Baker, supra** at para. 27 *per* L'Heureux-Dubé, J.; **Knight, supra** at p. 685 *per* L'Heureux-Dubé, J. Subject to the applicable statutes and regulations, an administrative body is the "... master of its own procedure and need not assume the trappings of a court . The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair." *per* L'Heureux-Dubé, J. in **Knight** at p. 685.

[29] The Board in this case has been left with considerable flexibility to fashion its own procedures. It is not restricted to admitting or acting on evidence that

would be admissible in court. Section 33 of the **Act** empowered the Board to make findings of fact and provides that the decision of the Board is final. As noted, there is a statutory right to call and cross-examine witnesses. The Regulations specify that the burden of proof is to be on the balance of probabilities, that the evidence at a hearing is to be recorded and that the Board has all the powers of a commissioner under the **Public Inquiries Act**, R.S.N.S. 1989, c. 372: Police Reg. 101/88 as amended, ss. 28G and I. Apart from these provisions (and a few others not directly relevant here) there are no explicit directives about how the Board should conduct a hearing or what evidence it should admit. It follows that, subject to the statutory directives and the duty to be fair, the Board has wide discretion as to how it conducts its proceedings.

[30] This Board has traditionally been accorded deference on other than jurisdictional issues: see, e.g., **Blakeney v. Nova Scotia (Police Review Board)** (1995), 137 N.S.R. (2d) 372; N.S.J. No. 30 (Q.L.)(C.A.); **White v. Dartmouth (City)** (1991), 106 N.S.R. (2d) 45; N.S.J. No. 337 (Q.L.)(S.C.); **Halifax (Regional Municipality) Police Service v. Wilms** (1999), 177 N.S.R. (2d) 320; N.S.J. No. 247 (Q.L.)(S.C.); **Symington v. Halifax (Regional Municipality) Police Service** (2002), 202 N.S.R. (2d) 296; N.S.J. No. 112 (Q.L.)(S.C.).

[31] Taking these factors into account, my conclusion about the Board's duty of fairness is this. The Board is obliged to provide a complainant with a fair opportunity to prove his or her complaint. The complainant has a statutory right to call, examine and cross-examine witnesses for that purpose. These procedural rights, however, must be defined and applied bearing in mind that a very high level of fairness is owed to the officer who is the subject of the complaint. Moreover, the Board has considerable discretion to fashion its own procedures so as to strike a proper balance between providing the complainant a fair opportunity to present the complaint while at the same time affording the officer full procedural protection for the important interests he or she has at stake. The Board's exercise of that discretion must be assessed in the specific context of the facts of the particular hearing.

(c) Did the judge correctly apply the appropriate standard of review?

[32] The judge acknowledged the Board's right to set its own procedure. However, in finding that the hearing had been unfair on account of hearing

irrelevant evidence, he did not accord any deference to the Board's procedural discretion. Moreover, he did not adequately consider the specific challenges of this hearing or the Board's ability to disabuse itself of irrelevant evidence. In finding that the Board had not provided Mr. Kelly with appropriate assistance, the judge did not adequately assess the proper extent of the Board's obligation to provide such assistance or the extent to which Mr. Kelly had, in fact, been able to fully present the case he wished to present. In short, the judge did not adequately address the necessary first step in the review of the Board's exercise of discretion. He did not define the content of the duty of fairness in light of the relevant contextual factors or recognize the deference due to the Board's exercise of its considerable discretion with respect to procedure. Moreover, he did not adequately take account of the particular circumstances of this hearing in his review of the Board's procedural discretion.

[33] I will, therefore, apply what I take to be the proper approach to the judicial review of the Board's procedural discretion in this case.

2. The "tainting" of the hearing by receipt of irrelevant evidence:

[34] The judge thought that the Board ought to have exerted more control over the proceedings and to have prevented evidence from being adduced that dealt with various allegations of impropriety against Mr. Kelly. With respect, the judge erred by intervening on this basis. I say this for four reasons.

[35] First, the Board afforded to Mr. Kelly a full measure of his procedural rights to call, examine and cross-examine witnesses. He called 20 witnesses. He was permitted enormous leeway in being able to cross-examine witnesses whom he called but who were obviously not sympathetic to his position. He was extended that same leeway in conducting re-examinations that went far beyond the scope of what would be permitted in court.

[36] Second, the Board was within its discretion as to procedure to receive evidence of doubtful relevance and admissibility and to consider its admissibility and weight during its deliberations after the hearing. This is a common practice in administrative tribunal hearings and it is rarely objectionable and often wise. From a practical perspective, it will be often difficult to take any other approach. Finely tuned judgments about relevance early in an administrative tribunal hearing

are often difficult and sometimes impossible to make. As a general rule, the approach the Board took here was one that would be within its discretion and in accordance with common practice and good sense.

[37] Third, there is no suggestion that the Board was, in fact, influenced in its ultimate decision by irrelevant evidence. The Board repeatedly made this point during the hearing. The Board's reasons specifically note that the evidence which was of concern to the judge did not figure in its decision: Board decision page 5. Its reasons were focussed on relevant matters. In short, the Board was acting within its discretion with respect to procedure and did not permit irrelevant, prejudicial material to interfere with its duty.

[38] Fourth, in the context of this hearing, the Board could not reasonably have been expected to take more control sooner over the evidence the parties wished to present. A careful examination of the record shows, in my view, that the Board was confronted with a difficult challenge in deciding what was and was not relevant and that, after the first of the five days of hearing, it succeeded in keeping the hearing focussed on relevant matters.

[39] This is not a point I can illustrate in general terms. I will set out more of the evidence than might otherwise be necessary because only in light of a full review of the relevant parts of the record may the fairness of the Board's approach be assessed.

[40] I start with the observation that the Board initially faced a challenge in being able to know what the parties thought was relevant and irrelevant in this hearing. The relevance of evidence, of course, depends on what is in issue in the proceeding. What precisely was in issue in this proceeding was not easy to determine as the evidence started to unfold. Several factors contributed to this difficulty.

[41] Mr. Kelly had not fully described in his written complaint some of the matters which he ultimately asserted were of most concern to him. He had filed a four and half page, typed, single spaced document with his complaint entitled "Details of My Complaint and the Circumstances Surrounding It". It provided some focus for the hearing before the Board but it did not provide clear guidance about what was and what was not in issue. Two aspects of his complaint – two

that he described in his testimony as two of the most significant aspects – are not referred to in that document.

[42] Moreover, Mr. Kelly's approach to the hearing made it difficult, at times, to determine what he considered to be relevant to his case. He seemed intent on a hearing almost in the nature of a public inquiry. As he stated at one point in the hearing: "...from day one, I wanted a hearing for everything to come out and that's where my brother and the rest of my family and other witnesses would come and testify ...".

[43] Mr. Kelly, for example, wanted to show that Ms.H. had lied about the sexual assault allegation even though he had not been charged and had no complaint about Constable Burt's part in the investigation of that allegation. Mr. Kelly was also insistent, and wanted to prove, that Ms. H. had lied about the first threat allegation. Although he had been acquitted of it, she had never retracted it. Mr. Kelly also wanted to air his concerns about a traffic stop by another officer (Constable Halliday) who was Constable Burt's uncle. This, Mr. Kelly claimed, showed police harassment, even though he conceded that he had not complained against Constable Halliday and had no evidence that Constable Burt was in any way implicated in these events or that they had anything to do with his investigation of Ms H's allegations. Mr. Kelly led evidence about an incident on Christmas Day involving Ms. H.'s biological father that seemed to have little to do with the complaint against Constable Burt.

[44] Mr. Kelly was not alone in taking a broad approach to relevance. Counsel for Constable Burt was the one who, in his cross-examination of some of Mr. Kelly's witnesses, elicited most of the evidence which was of concern to the judge. Counsel stressed the importance of cross-examination and assured the Board that the evidence was relevant and that this would become apparent as the hearing progressed.

[45] To top it off, at the outset of the hearing, counsel for Constable Burt alleged that Mr. Kelly had in effect been tampering with some of the witnesses by suggesting answers to them and by misleading one of them about the nature of witness immunity.

[46] In summary, the Board was faced with a self-represented complainant who had a very broad understanding of what was in issue, a written complaint that did not mention some of what was of most concern to him, counsel for Constable Burt who pressed his right to cross-examine and gave assurances that the relevance of the evidence would become apparent and, finally, with allegations of witness tampering adding to the mix. In the context of this hearing, it is not surprising that the Board was initially reluctant to close off areas of inquiry.

[47] It will be helpful to outline the course of the evidence in the early stages of the hearing to place the Board's handling of this difficult situation in its proper perspective. While the judge focussed on some questions to three witnesses on the first day of the hearing, he ought to have assessed the fairness of the hearing in its full context.

[48] The breadth of Mr. Kelly's focus was apparent from his first witness. He called a Ms. Brown, who was a protection worker with the Children's Aid Society. He asked her whether she had ever made a statement that people should keep children away from Mr. Kelly's place because he was an undesirable person. She denied having done so. The Board could not have helped but wonder why Mr. Kelly had asked his very first witness questions about alleged statements concerning his own character.

[49] Mr. Kelly then called K.K. and S.G., apparently to show that Constable Burt had not followed up with possible witnesses in relation to Ms. H's first threat allegation. Ms. H., in her initial statement to Constable Burt, indicated that Mr. Kelly had two kids (K.K. and S.G.) in his car but that he dropped them off and then came back around before he made the alleged threat. Both testified that they had not been in the car as Ms. H. said in her statement they had been and that Constable Burt had not interviewed them.

[50] In cross-examination by Constable Burt's counsel, S.G. was asked about young people drinking at Mr. Kelly's residence and about an incident in which S.G. had reported to the police that when she was 14, Mr. Kelly had "pinned [her] down and put [her] hands behind [her] head carrying on and put hickeys on [her] neck. (230)" She also testified about being offered drugs by Mr. Kelly. He did not object to this evidence.

[51] Mr. Kelly then called Constable Burt's uncle, Constable Halliday, apparently for two reasons. First, Mr. Kelly wanted Constable Halliday to verify that Mr. Kelly's car windows were not working. This, Mr. Kelly claimed, would show that Ms. H.'s statement in November to the effect that he had rolled down his window to talk to her could not be true. Of course, Ms. H. had already indicated that her November statement was not true, so it is difficult to see how Mr. Kelly thought the hoped for evidence from Constable Halliday would further his position. Second, Mr. Kelly wanted information about Constable Halliday stopping him and running his plates in March and April of 2004, nearly two years after the events relevant to his complaint against Constable Burt. Mr. Kelly submitted in his closing arguments that Constable Halliday's actions had been "a deliberate attempt to intimidate or bother [him]." However, Mr. Kelly conceded that, to the best of his knowledge, Constable Burt had done nothing wrong as regards the traffic stops by Constable Halliday.

[52] At the conclusion of Constable Halliday's evidence, Mr. Kelly objected to the scope of cross-examination engaged in by Constable Burt's counsel. He indicated that "Mr. Fisher [counsel for Burt] has gone into matters that I feel are irrelevant." The Board observed that everyone was being allowed a fair bit of latitude but that his objections would be noted and taken into account in weighing the evidence. Mr. Kelly sought advice about when he could object and was given appropriate assistance by the Board.

[53] Mr. Kelly then called his mother, brother and father. His mother and brother were questioned in relation to Constable Burt's knowledge of potential alibi witnesses for the November threat allegation.

[54] Mr. Kelly then called M.C.A. It was Mr. Kelly's position that she had been present at the time of the first alleged threat. In other words, she was the "third person" who Mr. Kelly claimed to have told Constable Burt about and who Constable Burt failed to interview. M.C.A., however, testified that she had no recollection of anything back from that time but that if another person testified that she was there she would have no problem accepting that evidence because she simply did not remember (396).

[55] Counsel for Constable Burt had indicated at the opening of the hearing that Mr. Kelly had, in effect, been tampering with a witness or witnesses. Counsel

pursued this allegation in his cross-examination of M.C.A. She said that when Mr. Kelly had served her with a subpoena, he had told her he would be asking some questions and, in two cases, suggested the answers to her. She indicated that she was afraid of Mr. Kelly.

[56] At this point, Mr. Kelly objected that the question had been answered previously. The chair indicated that, on cross-examination, counsel is allowed a little more latitude. Mr. Kelly intervened “Well I think he’s had that latitude but he keeps persisting on going further.” The chair ruled in favour of the question (p. 408).

[57] Not long after this, the cross-examination of M.C.A. turned to who was hanging around Mr. Kelly’s place and, in particular, the presence of a number of young girls. Mr. Kelly objected to this evidence on the basis that it was not relevant to the case against Constable Burt. After hearing from counsel, the chair ruled that Constable Burt’s counsel would be allowed to “go down this road a little bit”, but counsel was cautioned not to stray too far from matters relevant to the complaint before the Review Board .

[58] There were lengthy exchanges among counsel, the chair and Mr. Kelly in which counsel for Constable Burt attempted to justify the relevance of the evidence he was proposing to lead. The chair indicated that she was “not going to permit [the Board] to have a rehearing of the facts of allegations of sexual assault.” However, she indicated that counsel for Mr. Burt could continue with his questioning but said that she should be “very mindful ... that we are not a criminal forum and we have no desire to retry matters that have been resolved before the hearing this morning”. The chair also cautioned counsel for Constable Burt “to be prudent with [his] questioning and to keep in mind the issue that’s before the Board.”

[59] Counsel then proceeded to cross-examine M.C.A. about incidents involving sex and drugs implicating Mr. Kelly and Ms. H. During the course of some of this evidence, Mr. Kelly objected to hearsay evidence and his objection was upheld by the chair. In his re-examination, Mr. Kelly put it to the witness that she herself had had a sexual relationship with Ms. H. along with other “under aged” girls. He also re-examined the witness at some considerable length about drug use. The

chair intervened to attempt to get the hearing back “to something that’s a little more relevant to the issues at hand”.

[60] Mr. Kelly then called K.A. She was the person whom Ms. H. said had been coming along the street when Mr. Kelly threatened her in November. K.A. had been interviewed by Constable Burt. According to the materials in the record, she had indicated that she had seen Mr. Kelly’s car in the location indicated by Ms. H., but by the time she reached her, Mr. Kelly had left. K.A. did not know what Mr. Kelly had said to Ms. H. until Ms. H. told her.

[61] In her testimony before the Board, K.A. acknowledged that her statement to Constable Burt had been false. Mr. Kelly also established through K.A. that while Constable Burt had spoken to her, he never took a formal statement. Mr. Kelly attempted to show through K.A., although without much success, that there was an inconsistency between what K.A. told Constable Burt and what Ms. H. had said in her statement.

[62] Mr. Kelly himself then raised with K.A. a previous incident in which she made a sexual assault allegation which, at the time, Mr. Kelly thought was in relation to him. After this area was addressed for some time, the chair intervened. Mr. Kelly then engaged the witness in discussion about Constable Burt’s involvement until, once again, the chair intervened indicating “I’m just going to stop you there because that really isn’t helping us and that’s what everybody wants to be doing, helping us to understand this ...”.

[63] In cross-examination, Constable Burt’s counsel returned to an alleged sexual incident involving Mr. Kelly and the witness. The chair intervened and asked counsel whether this was really necessary. Mr. Fisher assured the Board that it was and that the Board would understand why as the hearing progressed. There followed considerable discussion of whether this was an appropriate topic. This led to questions about K.A. being raped at Mr. Kelly’s home. Mr. Kelly objected and the chair indicated that his objection was well-founded. As the witness persisted in getting into some of these matters, the chair once again upheld Mr. Kelly’s objection (p. 492).

[64] Mr. Kelly then recalled his brother and M.C.A. in relation to an alleged exchange outside the hearing room.

[65] As the end of the first day approached, Constable Burt's counsel suggested that he call one short witness who was present. Mr. Kelly, however, preferred that the witness be called as part of Constable Burt's case "because she wasn't subpoenaed by me." Mr. Kelly indicated that he had ten and possibly eleven witnesses arranged for the next day.

[66] From the outset of day 2 of the hearing, the Board exerted much more control over the scope of evidence. Mr. Kelly renewed his objections about the cross-examinations conducted by Constable Burt's counsel. The chair indicated that the Board was concerned about the relevance of matters that had been raised and indicated "we realize that the allegation of a breach of a code of conduct as set out in the **Police Act** is what we're here to consider." She added:

The difficulty is that because the rules of evidence are somewhat relaxed in these hearings, you do end up getting information that is not relevant to the proceedings, and clearly that will go to weight at the time that we come to make our decision. But certainly, your objections are noted [that is Mr. Kelly's objection], and I did caution Mr. Fisher [Constable Burt's counsel] yesterday. His argument was with respect to the credibility issues and evidence that may be coming. It was a bit of a stretch, quite frankly, but nevertheless there was some merit to the argument he was making with respect to the evidence as it was coming before him. And so consequently we did go down that road. Today I hope we are almost at the end of that road. ... (p. 526-27)

[67] In interchanges with Mr. Kelly, the Board indicated as follows:

... I caution everyone to be addressing evidence that's relevant to the Board because that's all we are going to be considering. The rest of it, as far as we are concerned, unless it impinges on what we're considering today, will not come into our decision-making. (p. 529).

[68] The Chair added shortly afterwards:

The difficulty, is on cross-examination everybody has to be allowed latitude and I've also shown all the parties the latitude in cross-examination and that's the difficulty. But I would ask again, Mr. Fisher, to be as circumspect as possible in the questions that he's asking and address what would appear to be issues that are relevant to the Board." (p. 530-31).

[69] Following further exchanges, the chair said this:

Mr. Kelly you're presuming that that's what the Board is going to do. The Board has the discretion to make the decision based on all the evidence it hears yesterday, today and if we're going tomorrow, which it appears very likely we are. So that would presume that Mr. Fisher or yourself has more influence than, I would respectfully submit, either of you have. We're an independent tribunal. We're going to hear the evidence. We're going to weigh the evidence and we're going to focus at the issue that's at hand, and there will be a lot of the evidence that is not relevant to what we're here to decide and if it were a court of law, things would be sifted out far more specifically than they are in this particular forum but, of course, the rules are supposed to be somewhat relaxed because in your case, of course, you are an unrepresented plaintiff - - complainant, and we're very aware of that and there's no obligation on your part to go out and hire a lawyer. That's not the process. So consequently sometimes the lines are somewhat blurred in terms of the strict rules that are applied. And sometimes strict rules are very nice and comforting when you're in our position. However, we have allowed both parties latitude but I would ask that, clearly, dignity and respect for all witnesses who are here before us. We're addressing a civil matter under the Police Act of Nova Scotia involving an allegation of discreditable conduct or other infractions of the Code of Discipline and Conduct and that's what we're here about, and other matters we're not (p. 535).

[70] From this point on – that is, from early in the second day of a five day hearing – there were was very little, if any, evidence of the kind which was of concern to the judge. Four more days of evidence followed.

[71] On this record, the judge found that the Board's reception of irrelevant evidence tainted the fairness of the hearing. I respectfully disagree.

[72] No doubt, several matters were canvassed in evidence during the first day which would have been better excluded. As a review of the record shows, however, the Board exerted much more control beginning on the second day of the hearing and the difficulties encountered the first day were largely avoided thereafter.

[73] Hindsight is always 20:20. With the benefit of hindsight, a different and better approach might have been taken. However, the fairness of what the Board did must be assessed in the context of how the hearing unfolded and with the Board's considerable procedural discretion in mind. In all of the circumstances, I

cannot fault the Board for failing to have exerted more control sooner. It would not have been easy to disallow evidence on the grounds of irrelevance for the simple reason that it was hard to say at the early stages of the hearing what was and was not relevant. I have already reviewed the combination of factors which made that determination especially challenging at this hearing.

[74] The Board had considerable discretion as to its procedure. It was not obliged to follow the strict rules of evidence that apply in court. In the context of this hearing, I respectfully cannot agree with the judge that the Board committed reviewable error by permitting evidence to be called which, in retrospect and with the benefit of hindsight, might better have not been received. The Board's reception of some irrelevant evidence on the first day of a five day hearing – evidence which the Board repeatedly indicated was not relevant or helpful and which clearly played no part in the decision – did not so seriously compromise the fairness of the hearing that the Board's decision must be quashed. In my respectful view, the judge erred in doing so.

3. Did the Board provide sufficient assistance to Mr. Kelly?

[75] The judge concluded that the Board failed in its duty to assist Mr. Kelly as a self-represented litigant. The focus of the judge's concern was that Mr. Kelly "was permitted" to call as his own witnesses several persons who did not support his position. For example, he called Ms. H. and others who supported her allegations and several police officers, including the officer about whom he was complaining. The judge found that the consequences of this for Mr. Kelly were "significant" because the opposing side received "considerable advantage in the presentation of the defence." (Decision para. 46)

[76] Although the judge said that the Board should have acquainted Mr. Kelly with "basic rules", his more serious concern was that Mr. Kelly called witnesses he did not have to call and as a result lost tactical advantage. This, to my way of thinking, amounts to saying that the Board ought to have reviewed the evidence Mr. Kelly intended to call and given him advice about whether his plan was tactically sound. The judge concluded that the absence of such advice had given the defence a "tactical advantage" and that if "direct and cross-examination had taken place in the usual order" the result might have been different. In my respectful view, this places too high a duty on the Board, overlooks the very

considerable leeway and assistance which the Board, in fact, gave to Mr. Kelly and gives insufficient weight to the full opportunity Mr. Kelly had to present the case he wished to present.

(i) The nature of the duty to assist :

[77] I accept that, in general, a tribunal should provide reasonable assistance to a self-represented person. This statement by the Ontario Court of Appeal in the context of a family law case in court seems to me to aptly set out the duty on a tribunal as well:

36 ... The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party. (**Dauids v. Dauids**, [1999] O.J. No. 3930 (Q.L.)(C.A.))

[78] Failure to provide reasonable assistance is not a free-standing basis of intervention on judicial review. Rather, it is an aspect of the Board's duty to act fairly. It is through the lens of that duty that an alleged failure to provide assistance must be examined.

[79] Mr. Kelly attended before the Board with a well-prepared plan about how he would present his case. He had subpoenaed a score of witnesses. He knew that the order in which they were to be called was up to him, saying to the Board at one point; "I'm the Plaintiff. Don't I get to set my schedule?" He did not want to interrupt the flow of his evidence by allowing another witness whom he had not subpoenaed to be called out of order.

[80] The Board provided considerable help to Mr. Kelly by assisting him with examining witnesses, proving documents and, perhaps most importantly, by its

own questioning of the witnesses to ensure that the relevant matters had been covered. At the outset of the hearing, it outlined the process to be followed. Early in the hearing, the Board asked Mr. Kelly if he wished to have the advice of counsel, a question he quickly and definitively answered in the negative. On innumerable occasions during the hearing the Board gave Mr. Kelly appropriate guidance, either in response to specific questions from him or of its own motion. The Board also did a good deal to accommodate Mr. Kelly, permitting him to cross-examine his own witnesses and re-examine them broadly. In general, the Board did a great deal to accommodate and assist him.

[81] During the examination of Constable MacDonald, for example, the chair gave Mr. Kelly some helpful advice as to how to proceed, which he accepted. At the conclusion of Mr. Kelly's examination, the Board asked questions and heard answers covering several pages of transcript clarifying and making more precise the information Constable MacDonald had that was pertinent to the hearing. Following that, Mr. Kelly was permitted to ask further questions, including eliciting opinion evidence from the Constable about what constitutes reasonable and probable grounds for arrest. Once again, during this examination, the chair gave Mr. Kelly helpful information about the sorts of questions he could ask the witness and intervened on numerous occasions to help clarify the information Mr. Kelly was attempting to elicit.

[82] An issue arose as to whether Constable MacDonald was the acting supervisor on one of the relevant dates. Mr. Kelly appeared to think this was important. The chair, therefore, requested that the witness obtain something that could refresh his memory over the lunch break and also took an adjournment to permit the witness to call headquarters to clarify his role.

[83] The chair asked several questions of the officer trying to clarify matters pertinent to the hearing. The other members of the Board also asked pertinent questions about the processes for review and investigation within the Department and protocols in relation to interviewing witnesses by the investigating officer.

[84] During cross-examination, counsel for Constable Burt attempted to put into evidence the Incident Report relating to Ms. H.'s sexual assault complaint. Mr. Kelly objected. Counsel for Constable Burt indicated that the focus of his interest was on what Constable Burt had been told to do by his superiors. After

discussion, the chair suggested that the document be edited so that only those relevant matters would be included and both Mr. Kelly and counsel for Constable Burt indicated their satisfaction and agreement with that suggestion. Mr. Kelly engaged in lengthy redirect examination.

[85] During the examination of his witness, Mr. Henry, Mr. Kelly sought and received assistance from the chair. As was the case with virtually every witness he called, Mr. Kelly effectively was permitted to cross-examine Mr. Henry both on direct and in re-examination. The chair also attempted to prevent Mr. Kelly from opening up areas that were not relevant to his complaint.

[86] Mr. Kelly called Staff Sergeant Paul Jobe who had investigated his complaint. During his examination, Mr. Kelly indicated that he wanted to see further documentation. The chair proposed, and counsel for the Municipality readily agreed, that there could be an adjournment to permit Mr. Kelly to look at these materials. The chair proposed 15 minutes but Mr. Kelly indicated he would only need five. At another point during his examination of Staff Sergeant Jobe, Mr. Kelly sought, and was once again given, assistance by the Board concerning how to proceed. At the conclusion of the examination by Mr. Kelly and counsel, the chair posed a series of questions, all of which were pertinent to the issues properly before the Board.

[87] During Mr. Kelly's examination of Associate Chief David Wilson, the chair attempted to keep Mr. Kelly focused on Constable Burt's investigation. For reasons that are unclear to me, Mr. Kelly asked the Associate Chief what his reaction was as to whether Ms. H. and some of the other witnesses had been credible witnesses. The chair intervened. Board members asked pertinent questions about the conflict of interest issue and about whether alibi witnesses ought to have been interviewed.

[88] When Mr. Kelly testified, the chair helpfully elicited further detail and precision from him but otherwise allowed him to cover the areas which he was obviously prepared to deal with. When Mr. Kelly asked to place into evidence the Information charging him, his undertaking and promise to appear, the Board assisted him to ensure there were adequate copies of all the documents he wished to put before the Board. The Board also assisted him in putting those documents

into evidence. Mr. Kelly sought and was given guidance and assistance from the Board concerning the scope of his evidence.

[89] During cross-examination by counsel, Mr. Kelly was confronted with a letter from a lawyer, Mr. Iannetti. Although Mr. Kelly seemed unconcerned about the letter going into evidence, both the chair and opposing counsel took care to ensure that he understood the significance of his agreeing to its admission.

[90] During his examination of Constable Burt, Mr. Kelly sought or was given appropriate assistance and direction by the Board on at least six occasions. Mr. Kelly raised matters in his questions to Constable Burt that seem quite peripheral to his main complaints. The Board at times questioned the relevance of some of his questions and tried to keep the focus on the complaint, but it quite understandably gave Mr. Kelly a lot of latitude to conduct his own case. On occasion, Mr. Kelly was reluctant to take assistance from the Board when it questioned the relevance of some of his proposed evidence. For example, he asked scores of questions about the Constable's reaction to hearsay information that Mr. Kelly had a gun in his house.

[91] The Board questioned Constable Burt extensively. Its questions show that the Board was attempting to understand, clarify and evaluate the testimony which it had heard.

[92] During the evidence called on behalf of Constable Burt, the Board intervened to question the relevance of the evidence and directed counsel to move on to other areas. The Board continued to provide assistance to Mr. Kelly.

[93] Having carefully reviewed the entire record, I do not agree with the judge that there was any failure to provide appropriate assistance to Mr. Kelly. As the Court said in **Dauids** , he presented the case he chose to present: para. 40

[94] The obligation envisaged by the judge in this case goes far beyond that outlined in **Dauids**. While the judge criticized the Board for what he took to be its failure to provide "basic rules" about the examination of witnesses, the real basis of the judge's intervention was, in essence, that the Board failed to give Mr. Kelly tactical advice about which witnesses to call and which not to call based on its views of the likelihood of particular witnesses being called by the defence. This,

in my respectful view, required the Board to go far beyond the duty to provide reasonable assistance to a self-represented litigant to present his case to the best of his ability.

[95] I think there is no doubt that a competent lawyer would have advised Mr. Kelly to present his complaint in a very different manner. However, Mr. Kelly, as he was entitled to do, made his own decisions about the scope of what he wanted to present to the Board. As he himself said during the hearing, he sought a full airing of the matter and called 19 witnesses, in addition to himself, to ensure that occurred. He seemed intent on proving that all the earlier allegations had been false, a decision which may not have been wise but was his to make. He wished to lead evidence on matters of marginal, if any, relevance to the complaint as he had originally framed it. He was entitled to assistance from the Board about the rules relating to how he could present the case he wished to present. He was not, with respect, entitled to assistance from the Board about what case he ought to present or advice about hearing tactics.

[96] I, therefore, respectfully differ from the judge's conclusion that the Board had a duty to assist Mr. Kelly to the extent of giving him advice about the tactical choices he faced in presenting his case.

[97] I further do not agree with the judge's assessment that the hearing was unfair because of Mr. Kelly's lack of knowledge of some "basic rules" about the examination of witnesses. The judge acknowledged that the Board gave Mr. Kelly "a great deal of latitude in questioning his own witnesses." (para. 13). This is an understatement, particularly with respect to the police witnesses. Mr. Kelly was permitted to cross-examine his witnesses. He was allowed tremendous latitude as well in the area of re-examination, not only in asking leading and challenging questions but also in raising areas that had not been touched on in cross-examination or indeed in examination-in-chief. More fundamentally, it is clear from his conduct of the hearing and particularly from his closing submissions, that Mr. Kelly had a careful plan concerning what he wanted to present and a clear picture of how he thought each witness fitted into it.

[98] There may well, as the judge thought, have been tactical advantage had Mr. Kelly chosen to proceed differently. But given the uncertainties involved about who the defence might and might not call and the great latitude Mr. Kelly was

extended in effectively cross-examining his own witnesses, I cannot agree that the Board failed in its duty to afford Mr. Kelly a fundamentally fair hearing.

4. Adequacy of the board's reasons

[99] After hearing from the parties with respect to his concerns about the scope of the hearing and the assistance which the Board had provided to Mr. Kelly, the judge announced his decision to quash the Board's decision with reasons to follow. After further deliberation, the judge added to his reasons his concerns about the adequacy of the Board's reasons. In the circumstances, these concerns were not a basis of his decision. We have addressed this point recently in **Nova Scotia Community College v. Nova Scotia Teachers Union**, 2006 NSCA 22 at paras. 41-48. Allow me simply to record that I respectfully differ from the judge on this point as well. I would conclude that the form of the Board's reasons would not justify intervention on judicial review.

V. DISPOSITION:

[100] I would allow the appeal, set aside the order of Edwards, J., direct the return of any costs paid under that order and restore the decision of the Board. The appellants Constable Burt and the Cape Breton Regional Municipality are entitled to costs, if demanded, both in this Court and before Edwards, J. to be taxed as one bill. I would make no order as to costs in relation to the Nova Scotia Police Commission.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.