Federal Court  Cour fédérale

Date: 20190715

Docket: T-1229-18

Citation: 2019 FC 940

Ottawa, Ontario, July 15, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ALEXANDRE MAKAVITCH

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Makavitch, who is self-represented, applied to join the Canadian Armed Forces [CAF] on October 17, 2017. At that time, he had been employed as a Security Guard with the Commissionaires section of the Department of National Defence since September, 2007.

[2] When he submitted his application, Mr. Makavitch became a candidate to the CAF.

[3] All candidates to the CAF are required to obtain a Reliability Status [RS] clearance before being hired. Mr. Makavitch failed to obtain the clearance and seeks review of that finding.

[4] At the time of his application to the CAF, Mr. Makavitch possessed a Top Secret security clearance. He obtained it on November 15, 2012. It had not expired when he applied to the CAF.

[5] As a result of an event that occurred subsequent to the issuance of his Top Secret security clearance, the RS Board [the "RSB"] and a subsequent Supplemental Review Board [the "SRB"], charged with determining whether to issue the RS clearance, considered information submitted by Mr. Makavitch concerning that event and decided not to grant RS clearance to him.

[6] Mr. Makavitch has now applied to this Court for an "Order to allow [him to] join [the] Canadian Army."

[7] It is not within this Court's power to order the Canadian Army to allow Mr. Makavitch to join it. If convinced by Mr. Makavitch of the merits of his application, what this Court can do is set aside the decision of the SRB dated June 18, 2018 [the Decision] and remit the question of his RS clearance for review by a differently constituted SRB.

[8] However, for the reasons that follow, this application is dismissed, without costs.

[9] The Decision is reasonable and, it was arrived at in a manner that was procedurally fair to Mr. Makavitch.

II. **The Security Clearance Process for CAF Recruits**

A. *Legislation and Policies*

[10] The CAF recruitment process is governed by legislation, regulations, and ministerial policies.

[11] Under sections 15 and 16 of the *National Defence Act*, RSC 1985, c N-5, the Minister of Defence is authorized to enact regulations and policies pertaining to Regular and Special Forces. Relevant to this application by Mr. Makavitch is the security clearance process, specifically the process for awarding an RS clearance.

[12] Sections 7(1)(e) and 11.1(1)(j) of the *Financial Administration Act*, RSC, 1985, c F-11 empower the Treasury Board of Canada [the "Treasury Board"] to enact policies regarding security screening. In light of its authority, the Treasury Board enacted the Standard on Security Screening [the "Standard"]. The objectives of the Standard are to ensure that security screening is effective, efficient, rigorous, consistent and fair.

[13] The Standard provides that, depending on the job requirements, there are three different types of security screening required to secure federal employment: reliability status, secret security clearance, and top secret security clearance.

[14] There are two levels of reliability status: Basic and Enhanced. The minimum security clearance required to join the CAF is Enhanced. The process of granting it includes examining a candidate's reliability and honesty.

B. *CAF RS Clearance Work Instructions*

[15] The CAF recruiting policies are established and administered by the Canadian Forces Recruiting Group through Work Instructions. The process to be followed to grant an RS clearance is found in WI 3-3-4-15 [“WI”] and Annexes F and G thereto which detail:

- Reliability Screening Procedures
- Criteria for Assessing Significance – Criminal Convictions and Adverse Credit
- Protocol for Reliability Status Boards and Board Assessments

[16] A decision to grant RS clearance is made based on a candidate’s criminal record, credit, and personal reference checks. To be considered, the information must be adequate, verifiable and quantitative based on five years of verifiable information.

[17] A negative finding during the background checks is in and of itself not sufficient to deny RS clearance. For example, if a criminal offence was committed and found to be significant, the WI requires that the candidate be given the opportunity to explain the adverse information. To that end, the CAF will issue a fairness letter, outlining the alleged negative finding and setting out the documents that the candidate should provide, within 30 days, to explain the incident in question.

[18] As explained below, Mr. Makavitch received and responded within time to fairness letters from the RSB and the SRB.

C. *Convening the RSB*

[19] Once the candidate submits further documents, the CAF convenes an RSB to determine whether to award the candidate RS clearance. Annex G indicates the role of the RSB and the factors to be considered when reviewing the supplemental information provided by a candidate:

> The purpose of the board is to examine all of the documentation and determine the person's attitude towards the unpardoned offences/adverse credit/adverse information, the extent to which he or she has changed their behaviour in this regard, and the likely recurrence of similar offences/action and their potential effect upon job reliability and his/her trustworthiness.
>
> WI, Annex G at para 5.

[20] If the RSB decides that the candidate should not be granted RS clearance, the candidate is so notified and is advised that he or she can appeal the decision internally. Other options provided are to lodge a complaint with the Canadian Human Rights Commission ["CHRC"], the CAF Ombudsman, or this Court.

D. *Internal Appeal of an RSB Decision*

[21] To appeal a negative RSB decision internally, the candidate must notify the CAF Recruiting Centre within 30 days of receipt of the RSB decision.

[22] On appeal, the same RSB members form an SRB and conduct a further review. The SRB reweighs the application in light of the stipulated factors, taking into account any additional information provided by the candidate.

III. **Preliminary Issue**

[23] As a preliminary issue, the Respondent objects to the inclusion of Exhibit "U" to the affidavit of Mr. Makavitch found in the Applicant's Record because it was not before the RSB when the first decision was made to deny RS clearance to Mr. Makavitch.

[24] Exhibit "U" is an Equifax Credit Report dated July 21, 2018. It post-dates the Decision by a more than one month. Clearly, it was not before the RSB or the SRB and cannot be considered in this judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19. It also does not fall within any of the limited exceptions identified at paragraph 20 thereof.

[25] Therefore, Exhibit "U" will not be considered.

IV. **Issues and Standard of Review**

[26] Mr. Makavitch has raised issues of procedural fairness, lack of jurisdiction and unreasonable treatment of the evidence he submitted. He challenges the reasonableness of the Decision as well as the fairness of the manner by which it proceeded.

A. *Procedural Fairness Review*

[27] Where an issue of procedural fairness arises, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[28] In reviewing the allegations of procedural unfairness, I am mindful of recent jurisprudence from the Federal Court of Appeal that there is no standard of review for issues of procedural fairness. What is fair in any particular circumstance is highly variable and contextual. In assessing whether a process has been fair, no deference is given to the decision-making tribunal other than with respect to the choice of procedure. The reviewing Court uses the term "correctness" not as a standard of review but rather as the measure to determine whether the requirement to provide procedural fairness has been met: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 40 and 49.

[29] In terms of the level of procedural fairness owed to a decision that denies an initial application for security clearance, as opposed to a revocation of any such existing clearance, it has previously been determined that only a minimal duty of procedural fairness exists: *Russo v Canada (Transport)*, 2011 FC 764 at para 57. However, I am aware that Mr. Justice John Norris has expressed legitimate concern as to the meaning of "minimal" in the context of the refusal to issue an initial security clearance: *Haque v Canada (Attorney General)*, 2018 FC 651 at paras 60 – 63 [*Haque*].

[30] Arguably, as Mr. Makavitch at the time he applied for the Enhanced RS clearance already held a Top Secret clearance – although dated – he could fall into the higher category of revocation of an existing security clearance rather than that of an initial application for RS clearance.

[31] In this case it is not necessary to determine which level of procedural fairness, either initial refusal or existing revocation, is owed to Mr. Makavitch. The procedures and protocols

established by the CAF meet the higher standard of procedural fairness applicable to a revocation of an existing security clearance which is to know the facts alleged against him and have the right to make written representations about those facts: *Haque* at para 62 and cases cited therein.

B. *Reasonableness Review*

[32] The issue in this matter pertains to whether the Decision was reasonable. If the Decision is reasonable but it was arrived at in a manner that was procedurally unfair to Mr. Makavitch, then it cannot stand.

[33] It has been held that "the denial of a fair hearing 'must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision'": *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 201 [*Canada*]. A limited exception may arise where the outcome on the merits would be inevitable given the facts: *Canada* at paras 201 and 203.

[34] Reasonableness review is applied to decisions that involve the assessment of an administrative decision to cancel or withhold a security clearance: *Clue v Canada (Attorney General)*, 2011 FC 323 at para 14.

[35] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[36] If the reasons, when read as a whole, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[37] In other words, the SRB, sitting as an administrative tribunal, is not required to consider and comment in their reasons upon every issue raised by Mr. Makavitch. The issue for this reviewing court is whether the decision when viewed as a whole in the context of the record, is reasonable: *Nfld Nurses* at para 9.

V. **The Criminal Offence and Punishment**

[38] The record shows, and Mr. Makavitch admits, that on October 11, 2016 he received a conditional discharge for the charge of assault causing bodily harm upon his former wife. The assault occurred on New Year's Eve of January 1, 2016 when she returned home. Mr. Makavitch was intoxicated and an altercation ensued. He later said that he "kicked her backside."

[39] Mr. Makavitch received a period of 12 months' probation with the conditional discharge. He was also required to attend the Partner Assault Response ["PAR"] program for domestic violence counselling. The Certified Tribunal Record ["CTR"] contains a summary report of his participation in the PAR program.

[40] On February 9, 2017, less than four months after his sentence was imposed, Mr. Makavitch obtained a termination of his original 12 months' Probation Order. In support of the termination of probation a letter was written by his former wife in which she agreed with

removing Mr. Makavitch from probation "because it creates serious delay from [him] joining the Canadian Armed Forces."

[41] Mr. Makavitch states that as a result of the conditional discharge, he did not receive a conviction. He alleges that considering his conviction when assessing his security clearance was procedurally unfair and exceeded the jurisdiction of the RSB and SRB.

VI. **The Fairness Letters Sent to Mr. Makavitch**

[42] Mr. Makavitch has made several allegations of procedural unfairness that will be discussed in the analysis portion of this judgment and reasons.

[43] The provisions in Annex G establish protocols that RSB's are required to follow. The stated purpose of the Protocol is to provide "a fair, transparent and defensible set of practices that will reduce legitimate challenges to non-selection employment hiring decisions. Any time that RS clearance may be denied due to adverse information the candidate must be afforded the opportunity to provide further information and an RS Board must be held."

[44] The Protocol requires that the candidate be notified in writing of the adverse information received during the background checks and given the opportunity to respond. A standard template to be used for the fairness letter to a candidate is provided in Appendix 1 to Annex G.

[45] The Protocol was followed. Mr. Makavitch received fairness letters and responded to them.

A. *The Reserve Force letter*

[46] Mr. Makavitch completed a CAF Employment Application for the Reserve Force on May 24, 2016.

[47] On January 23, 2017, he received an email from the Recruiting Centre that they had received his Criminal Record Name check and would like to discuss some information. No details were provided in the email.

[48] On January 24, 2017, Mr. Makavitch replied with two short emails. The first stated his security clearance remained Top Secret. The second stated he had a clean criminal record and treatment of him in a special way was not lawful. He "must be treated according to law as a person with a clean criminal record."

[49] Mr. Makavitch then received a fairness letter dated February 21, 2017 [the "Reserve Force letter"]. The letter outlined his criminal conviction and noted that on February 9, 2017 his probation order had been terminated. The letter detailed specific information that Mr. Makavitch should provide to explain his criminal conviction before a reliability decision was reached.

[50] Mr. Makavitch replied by email on February 28, 2017 to the CAF Recruiting Centre. In that reply he said he did not have a conviction. It was a charge and date of charge after which he was discharged and not found guilty. He said his criminal record was "clean" and if a request is made it will "come up with nothing". He went on to say the conviction should be removed from his file or he would be forced to take legal action to defend his reputation.

B. *The Regular Force letter*

[51] Ultimately, Mr. Makavitch abandoned his application to the Reserve Force and applied to the Regular Force in October, 2017. At that time, although he disagreed with the validity of it, Mr. Makavitch was fully aware of the CAF requirement that he provide information about his criminal conviction.

[52] The Regular Force fairness letter of March 20, 2018 requested essentially the same information as the Reserve Force letter had previously required.

[53] The Regular Force fairness letter set out that the results of the reliability check for Criminal Record Names and Credit Checks revealed a conviction under the *Criminal Code*, R.S.C., 1985, c. C-46 [*Code*]. It set out the following details:

> Date and Place: 2016-10-11 OTTAWA ONT ADULT COURT
>
> Conviction: ASSULT CBH SEC 267(B) CC; AND
>
> Disposition: CONDITIONAL DISCHARGE & PROBATION
> 12 MO(S) & SURCHARGE $100 I-D 60 DAY(S)

[54] The letter requested that Mr. Makavitch provide the following:

- All available legal documentation related to his conviction;
- A minimum of three letters of reference, addressing his maturity, responsibility and conduct in his professional life;
- Assessment letters from his probation officer detailing his progress while on probation;
- Letters from counselors detailing the nature of any treatment he underwent; and,
- A letter in his own words describing in full detail the circumstances surrounding his conviction and any lessons he learned from this experience.

[55] Mr. Makavitch provided some, but not all of the requested information. He provided:

- A brief letter which provided no details regarding the incident that led to the criminal charge nor how he had overcome his shortcomings which led to the incident;
- Two letters from his security guard co-workers attesting to his reliability; and,
- A letter from his ex-wife saying that he is a "good man."

[56] By letter dated May 24, 2018 to Mr. Makavitch, the RSB advised him that they were unable to grant him RS clearance.

VII. **The RSB Decision**

[57] The RSB reviewed the documents, criminal and credit record checks on May 15, 2018. In a letter dated May 24, 2018, the RSB set out the reasons for denying RS clearance to Mr. Makavitch:

- the explanation provided by Mr. Makavitch regarding his conviction did not address the concerns regarding the related incident nor provided any detail as to how he had overcome his personal shortcomings that led to the charge;
- Mr. Makavitch did not demonstrate that he had taken responsibility for his actions or had learned from the experience; and
- Mr. Makavitch had provided only two acceptable letters of reference rather than the requested three letters.

[58] The RSB concluded that Mr. Makavitch had not built a strong enough case to demonstrate his reliability and trustworthiness. While the RSB found that Mr. Makavitch should be denied RS clearance, the letter to him confirmed that he could reapply in a minimum of one year — provided he made improvements with respect to his personal accountability and, when eligible, he applies for a record suspension.

[59] The notes in the Record of Decision of the RSB indicate that in June, 2017 during a fact-finding interview Mr. Makavitch "was very demanding and insistent that he had a 'perfect background'". It was also noted that while he acknowledged the criminal charges and admitted to assaulting his wife Mr. Makavitch said she was "100% to blame" and that it was "no big deal." The interviewer's conclusion from that conversation was that Mr. Makavitch "took no responsibility for his actions."

[60] The notes of the RSB meeting indicate additional factors were taken into consideration including that (1) Mr. Makavitch has a history of threatening and intimidating e-mails to recruiters; (2) Mr. Makavitch did not describe in full detail the circumstances surrounding his criminal charges and any lessons he learned. He replied with a one sentence answer "I do not remember details, that was over 3 years ago and according to law, after 3 years from conditional discharge I must be clean from it."

[61] The conclusion drawn by the RSB was that the responses by Mr. Makavitch did not address the very serious concerns stemming from his criminal charges and conditional discharge nor any details of how he had overcome the deficiencies of character that led to the charges in the first place.

[62] The RSB recommendation was that RS clearance be denied for a period of one year.

[63] Mr. Makavitch was advised that he had the option to file an appeal or lodge a complaint with the CHRC, the CAF Ombudsman, or this Court.

[64] Mr. Makavitch chose to appeal to the SRB.

VIII. **The Decision under Review: Appeal to the SRB**

[65] Mr. Makavitch appealed the RSB finding to the SRB on June 5, 2018 by email. At that time, by way of explanation, he submitted further information:

> To accept responsibility for my action WAS PRE-CONDITION and I accepted it in court, that's why I was discharged, discharge are pardon in delay. It is not a conviction, but still evidence of gilt, [*sic*] it going to appear on my record for 3 years from February 2017. I do not need to apply for pardon it will be removed without it. She asked me Do you accept responsibility and willing to learn? I agreed to complete program New direction and behave in good way. I studied in university of Sport culture in Minsk Belalarus [*sic*] from 1989 to 1992, and learn psychology as well, so I had good knowledge, issue was how diminish anger, that's why I bought Anger management and several other self-development programs on line from www.uncommon-knowledge.co.uk.
>
> I using Anger management when I notice, [*sic*] that I get irritated inside, then I listen to diminish trigger, I have it on my walk-man.

[66] Mr. Makavitch also submitted to the SRB the report dated January 16, 2017 from his time in the PAR program [the PAR Report]. The PAR Report outlined his participation and made observations about his success, or lack thereof, in each of nine mandatory segments of instruction over twelve sessions.

[67] On June 8, 2018, the members of the RSB reconvened as the SRB and met to consider the information provided by Mr. Makavitch. By way of letter dated June 18, 2018, the SRB advised Mr. Makavitch that it had decided the original determination should stand.

[68] In the Decision, the SRB acknowledged receipt and review of the additional evidence Mr. Makavitch submitted as part of the appeal. The Decision specifically mentioned that while

Mr. Makavitch completed the PAR Program, the comments in the PAR Report he submitted were not entirely positive and supported the original reliability status determination.

[69] The RSB decision dated June 8, 2018 provides the underlying analysis and additional reasons for the SRB findings. It is discussed in the following analysis.

IX. **Analysis of Mr. Makavitch's Arguments**

[70] In stating the grounds for his review application, Mr. Makavitch alleged that an error of law was committed when his discharge was treated as a conviction. He also alleged that principles of procedural fairness and natural justice were violated when the Decision relied on the "domestic incident" and ignored his completion of the PAR program.

A. *The Decision does not contain an Error of Law*

[71] One of the grounds Mr. Makavitch puts forward to show that the Decision should be set aside is that it is founded on an error of law because it is "based on nothing."

[72] As I understand it, his logic is that because he was conditionally discharged, he does not have a criminal conviction. Without a criminal conviction, there is nothing to answer and there is no evidence to support the Decision – it is therefore "based on nothing."

[73] Essentially, the question raised by Mr. Makavitch is whether the RSB and the SRB are entitled to consider the underlying actions that led to his conditional discharge and, if so, take them into account in assessing whether to grant him RS clearance.

(1) The Effect of a Conditional Discharge and Probation

[74] Mr. Makavitch is right that by law he does not have a prior conviction. Under subsection 730(3) of the *Code*, on receipt of a discharge, whether absolute or conditional, an offender is deemed not to have been convicted of the offence.

[75] Mr. Makavitch is not right in concluding that the fact of his conditional discharge and the underlying facts of it could not be considered by the RSB or the SRB.

[76] Under section 6.1 of the *Criminal Records Act, RSC 1985, c. C-47,* [*CRA*] the fact of Mr. Makavitch's conditional discharge may not be disclosed when more than three years have passed since he was sentenced to probation:

Discharges	**Absolutions**
6.1 (1) No record of a discharge under section 730 of the Criminal Code that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if	6.1 (1) Nul ne peut communiquer tout dossier ou relevé attestant d'une absolution que garde le commissaire ou un ministère ou organisme fédéral, en révéler l'existence ou révéler le fait de l'absolution sans l'autorisation préalable du ministre, suivant l'écoulement de la période suivante :
(a) more than one year has elapsed since the offender was discharged absolutely; or	a) un an suivant la date de l'ordonnance inconditionnelle;
(b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.	b) trois ans suivant la date de l'ordonnance sous conditions.
Purging C.P.I.C.	**Retrait des relevés d'absolution**
(2) The Commissioner shall remove all references to a	(2) Le commissaire retire du fichier automatisé des relevés de condamnations criminelles géré par la Gendarmerie royale du Canada toute mention d'un

discharge under section 730 of the Criminal Code from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1).	dossier ou relevé attestant d'une absolution à l'expiration des délais visés au paragraphe (1).

[Emphasis added]

[77] For Mr. Makavitch, the three year period is calculated from October 12, 2016 – the day after his sentence of conditional discharge with probation was imposed. This means that until October 12, 2019, section 6.1 of the *CRA* is not applicable. The fact of his conditional discharge, as well as the specific charge to which he pled guilty and the sentence he received were legally disclosed during the Criminal Name Record check.

[78] Contrary to his statement, the criminal record information confirms that Mr. Makavitch did not have a "clean record" on June 18, 2018 when the Decision was rendered by the RSB.

[79] Nor did Mr. Makavitch have a clean record when the RSB deliberated and found that he had not provided "any details of how [he] has overcome the deficiencies of his character that lead to the charges in the first place".

(2) There was no Error of Law by the SRB

[80] Until the three year period expires, Mr. Makavitch will continue to have a record of discharge in the automated criminal conviction records retrieval system [CPIC] maintained by the Royal Canadian Mounted Police.

[81] As the three year period has not expired, it was not an error of law for either the RSB or the SRB to have received and considered the information provided about Mr. Makavitch in response to the Criminal Names Record check.

[82] It should also to be noted that what constitutes a "criminal record" when conducting a reliability check is more broadly defined in WI 3.3.4.15 than it is in the *CRA*. Article 2.10 of WI 3.3.4.15 states:

> A criminal record is any information on file pertaining to a person that is related to a criminal charge, that resulted in a conviction, stay of proceedings, withdrawn, conviction, discharge or that was dealt with by way of alternative measures that may negatively reflect upon their character. For so long as there is any kind of information on record which is associated with a name and date of birth, it could by definition constitute a type of criminal record, even though no criminal conviction may have resulted (ref K) . . .

(3) The Appropriate Process was followed

[83] The RSB was required to consider the criminal record information by virtue of the Standard and the protocol set out in Annex G which establishes what is required to be followed by the RSB.

[84] The Annex G protocol establishes at paragraph 4 that the purpose of the RSB is to examine all of the documentation provided to it and determine the person's attitude toward any unpardoned offences and the extent to which a candidate has changed their behaviour in that regard. The RSB is also to determine the likely recurrence of similar offences or actions and their potential effect upon job reliability and the candidate's trustworthiness.

[85] Annex G contains two tables. Paragraph 5 of Annex G states that those tables "must be considered by the RSB in reaching a decision on the conferral of RS." Only Table 1 applies here.

[86] Table 1 is titled "Anchor Questions for the Gathering and Assessment of Criminal Conviction Record Information". It contains six factors to be considered and provides commentary as to how they are to be considered.

[87] Under the factor "Sentencing," the commentary sets out a graduated list of five typical criminal sentences. The most serious sentence is "jail followed by parole." The second most serious sentence is "probation," which Mr. Makavitch received.

[88] Under the factor "Nature of the Offence," the commentary sets out examples of serious and/or violent offences under the Code. It contains a list of "Sexual Offences, Public Morals and Disorderly Conduct." The most serious enumerated offence is "aggravated sexual assault." The second most serious offence is "sexual interference," with which Mr. Makavitch was charged, pled guilty to and was sentenced.

[89] The other factors to be considered address the following: the "[f]requency of the incidents"; "[p]ossibility of only a portion of the activity has been reported"; "[a]ny indication that the individual has reformed"; and "[t]he nature of duties and probable access to designated information and assets."

[90] With respect to the consideration of the conditional discharge, the SRB considered the relevant factors.

[91] The Protocol established that on a five point scale, the offence for which Mr. Makavitch was sentenced was the second most serious sexual offence and the sentence he received was the second most serious level of punishment.

[92] In addition to the circumstances and severity of the offence, the SRB consulted the background information of interview notes, emails from Mr. Makavitch, his submissions and the PAR Report, which is discussed later.

[93] Mr. Makavitch in effect is asking the Court to re-weigh the evidence considered by the SRB. Not only is deference owed to the SRB, the evidence in the record fully supports the factual findings and statements made in the context of his application for an enhanced RS clearance.

B. *Mr. Makavitch knew the case he had to meet*

[94] It also appears that Mr. Makavitch alleges he was denied notice of the specific regulation or basis upon which the authorities intended to refuse his RS clearance, thereby denying him a reasonable opportunity to make meaningful submissions.

[95] There is no evidence to support this allegation.

[96] Mr. Makavitch received two fairness letters from the Regular Force and one from the Reserve Force. As discussed earlier, each letter set out the concerns he was to answer and stipulated the nature of the evidence and submissions Mr. Makavitch should make in reply. Mr. Makavitch was not precluded from submitting any other evidence he considered relevant.

[97] As set out in the Decision, he failed to submit most of the requested information. In his submissions, he continued to argue that he had no conviction. He also submitted an extract from a Government of Canada website answering the question "I have a criminal record. Am I eligible to join the Forces?" The website answer was "you may still apply to the Forces, as long as you have served your sentence and no longer have any legal obligations."

[98] It is true that under the *Code* the conditional discharge means Mr. Makavitch was not convicted of a criminal offence. The RSB and SRB did not dwell on either the conviction, which was information received from the Criminal Record Name check, or on the sentence of a conditional discharge with probation. They were aware of the underlying domestic violence facts and were concerned that they received no explanatory evidence from Mr. Makavitch to indicate that he had learned from his experience or taken any responsibility for his actions.

[99] That is an entirely reasonable approach to a consideration of the events of January 1, 2016. The RSB and SRB were aware that under the WI a negative background check does not itself result in a denial of RS clearance. The WI requires that Mr. Makavitch be given the opportunity to explain the adverse information. This was done when the fairness letters were issued. His answers were considered and found wanting because those answers did not address how he had learned from the event or the defect in his personal characteristics that allowed it to occur.

[100] There was no procedural unfairness in the process of arriving at the Decision. The established protocol was followed. Mr. Makavitch knew the case he had to meet and he provided

submissions. The fact that his submissions were not fulsome is not a result of the process followed by the RSB or the SRB.

C. *The SRB consideration of the PAR Program Report*

[101] Mr. Makavitch has alleged that the Decision ignored his successful completion of the PAR program.

[102] The PAR program is an initiative of the Domestic Violence Court. It is designed to deliver specialized community-based group education and counselling to domestic violence offenders when mandated by the court to attend. Offenders are provided with an opportunity to examine their beliefs and attitudes towards domestic abuse. The purpose of the program is to help offenders learn non-abusive ways of resolving conflict.

[103] The statement in the Decision that the comments in the PAR Report were "not entirely positive" is kind to Mr. Makavitch. The PAR Report rates Mr. Makavitch on a scale of 0 to 5, with respect to aspects of his participation. Mr. Makavitch twice received a rating of 1 (unsatisfactory), twice received a 2 (met minimum standards), and once received a 3 (satisfactory). He did not receive a rating of 4 which equates to excellent.

[104] Two areas were found to be unsatisfactory.

[105] The first was under the heading "self-disclosure." It was stated that "Mr. Makavitch was not able to focus on his own behaviour and blamed his former partner for the difficulties in their relationship." In addition, an example is provided that "after watching the video he would

regularly state that the male in the video did nothing wrong and that any conflict that was being portrayed was the fault of the female."

[106] The second unsatisfactory area was under the heading "homework completion." It seems that Mr. Makavitch refused to do the homework until he was informed that it was a requirement and he would be discharged from the program if he did not complete it. After that, he agreed to complete the homework.

[107] Overall, the comments in the PAR Report amount to Mr. Makavitch not accepting responsibility for his actions and indicating that men were unfairly targeted or women were to blame.

X. **Conclusion: the Decision is Reasonable**

[108] The PAR Report alone provides a reasonable basis for the Decision. It states that Mr. Makavitch did not accept responsibility for his actions and had not changed his attitude toward the domestic assault.

[109] In addition to the PAR Report, the Decision identified and commented upon several factors that the SRB took into account: the nature of the incident; the time which had elapsed; and the lack of additional evidence Mr. Makavitch provided to support that he had changed his behaviour and/or his attitude toward the domestic violence incident.

[110] In addition to the PAR Report, the SRB had before it the RSB record of decision and notes as well as notes of interviews with Mr. Makavitch and the threatening emails he sent as

part of the RS clearance process. This evidence supported the SRB findings as it confirmed and elaborated upon the anger management issues displayed by Mr. Makavitch.

[111] The importance of a change in attitude by Mr. Makavitch is underscored in the Decision. It sets out that Mr. Makavitch is ineligible to apply to the CAF until May 15, 2019 being one year from the date of the RSB decision. It also advises Mr. Makavitch that should he reapply, he "will have to present substantiation on how your circumstances and views differ from those you have expressed during this Canadian Armed Forces application and your participation in the PAR Program."

[112] Altogether, Mr. Makavitch received a detailed, thorough and fair process. The SRB reasonably considered the evidence. The result is an outcome that is defensible on the facts and the law. The reasons given allow Mr. Makavitch to understand why his application was denied. The Decision is reasonable as it meets the *Dunsmuir* criteria.

[113] For all of the foregoing reasons, this application is dismissed.

[114] Considering the circumstances, this is not an appropriate case in which to award costs.

JUDGMENT in T-1229-18

THIS COURT'S JUDGMENT is that the application is dismissed, without costs.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1229-18
STYLE OF CAUSE:	ALEXANDRE MAKAVITCH v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 18, 2019
JUDGMENT AND REASONS:	ELLIOTT J.
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APPEARANCES:

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