Federal Court  Cour fédérale

Date: 20130125

Docket: T-889-11

Citation: 2013 FC 71

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SHAWN P. ELHATTON

Applicant

and

ATTORNEY GENERAL OF CANADA
and APPROPRIATE OFFICER "J"
DIVISION OF THE ROYAL CANADIAN
MOUNTED POLICE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a member of the Royal Canadian Mounted Police (RCMP), holding the rank of Corporal. Following a disciplinary hearing regarding allegations of misconduct, the Commissioner of the RCMP exercising his authority under section 45.16 of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (*Act*), terminated the applicant's employment for disgraceful conduct. The applicant seeks judicial review of that decision. For the reasons that follow the application is granted.

The Allegations

[2] On November 10, 2003, the applicant was served with a notice of disciplinary hearing regarding three allegations of misconduct said to have occurred on December 13, 2002 and July 7, 2003. Fifteen months later, he was served with a second notice on February 28, 2005 regarding three additional allegations said to have occurred between 1993 and 1998.

[3] The allegations were as follows:

(1) Mitten Incident: The applicant acted in an aggressive and intimidating manner towards his former spouse, Constable (Cst.) Elhatton, and her fiancé while they were picking up the applicant's son outside of his residence. The applicant yelled offensive, insulting and vulgar language, made an obscene gesture, shook his finger, and threw mittens. There was a marked RCMP vehicle at the end of his driveway. Cst. Elhatton's fiancé is a member of another police force and reported the applicant's conduct.

(2) Office Incident: The applicant used offensive and insulting language towards a member superior in rank, calling him "spineless" and "gutless", while pointing his finger in the superior-ranking member's face.

(3) Disobeying a Lawful Order: The applicant failed to obey a lawful order of a superior ranking member. The applicant was ordered to attend an appointment with a psychologist following a Health Services Officer's recommendation that he receive anger management counselling. He did not attend.

(4) Car Wash Incident: The applicant struck Cst. Elhatton with a closed fist.

(5) Gun Incident: The applicant put Cst. Elhatton's hand around his service firearm and pointed it at his head during an argument. He said, "If you hate me so much, just shoot me, shoot me now." Cst. Elhatton told him to put it down and he did.

(6) Vacation Incident: The applicant grabbed Cst. Elhatton by the arm and hit her forearm four or five times.

[4] Failure to obey a lawful order is a disciplinary offence contrary to section 40 of the *Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361 (*Regulations*). The remaining allegations constitute disgraceful conduct contrary to subsection 39(1) of the *Regulations*.

Legislative Scheme

[5] The *Act* provides for both formal and informal disciplinary processes. Under section 43 of the *Act*, an Appropriate Officer may initiate a hearing when it appears that a member has contravened the Code of Conduct and the Appropriate Officer is of the opinion that informal disciplinary action would be insufficient.

[6] The *Act* creates a three-stage process for formal disciplinary action. The process begins with a written notice of the allegation(s), and disclosure of evidence. The allegations are heard by a three member Adjudication Board (the Board). The Board decides if the allegations are established on a balance of probabilities and imposes a sanction. There are progressively severe sanctions under the *Act*: forfeiture of up to ten days pay, demotion, a direction to resign, and dismissal.

[7] Parties can appeal from the Board's decision to the Commissioner of the RCMP (the Commissioner). Before considering the appeal, the Commissioner must refer the case to the

External Review Committee (ERC), an independent civilian body. The ERC reviews the Board's decision and provides a non-binding recommendation to the Commissioner.

[8] The Commissioner's power on appeal is set out in section 45.16 of the *Act*. The Commissioner must consider the record of the hearing before the Board, the statement of appeal and any written submissions. The Commissioner must also consider the ERC recommendation. The Commissioner, under subsection 45.16(6) of the *Act*, is not bound by the findings and recommendations of the Board and the ERC, but where he departs from them, he must give reasons.

[9] The Commissioner may dispose of an appeal in one of three ways: (a) dismissing the appeal and confirming the decision; (b) allowing the appeal and ordering a new hearing; or (c) in the case of an appeal by the member, allowing the appeal and making the finding that the Board should have made. It should be noted that the Commissioner does not have the power to dismiss an appeal by a member and make the finding that the Board should have made.

[10] With respect to the sanction, under subsection 45.16(3) of the *Act* the Commissioner may dismiss the appeal from a sanction and confirm the sanction, or allow the appeal and either vary or rescind the sanction.

The Adjudication Board's Decision

[11] On September 6, 2005, the Board decided that all six allegations were substantiated. The Board found that the applicant's conduct had brought discredit to the RCMP. The Board found that the order to attend counselling had been lawful.

[12] The applicant denied the allegations and argued that Cst. Elhatton had brought the complaints in order to obtain sole custody of their children. The Board rejected this and found that Cst. Elhatton "…withstood the scrutiny of cross-examination and did not falter on crucial points."

[13] The Board found that the applicant lacked credibility. He denied having a criminal record before being confronted with his conviction for assaulting a prisoner in 1998. He claimed to be unaware that this had resulted in a criminal record. The Board found that he minimized the conviction to the point of misleading the Board. He had also been disciplined for that incident.

[14] Additionally, the Board noted that four witnesses, the District Commander, a potential supervisor, Cst. Elhatton and her fiancé, all described incidents of the applicant's loss of control or anger. The applicant's mother also testified that she admonished him for raising his voice to Cst. Elhatton. However, the applicant's mother denied that the applicant struck Cst. Elhatton. The Board found that she was lying to protect him. The Board noted there were discrepancies between her testimony and that of the applicant.

[15] The District Commander testified that he did not have confidence in the applicant's ability "to control his emotions to be able to do the kind of things that we expect our members to do on a day-to-day basis". The District Commander recommended that he be dismissed.

[16] A social worker testified that the applicant had taken six to seven hours of anger management counselling. The applicant's representative submitted that the applicant had experienced stress and tragedies in his personal life.

[17] The Board decided that the applicant had displayed a pattern of inappropriate behaviour. He had not taken responsibility for his actions and was not honest and forthright. His behaviour towards his spouse, including dangerous misuse of a weapon, demonstrated lack of self-control and judgment, basic requirements for peace officers. The Board directed the applicant to resign within fourteen days, or be dismissed.

[18] The applicant accepted the Board's decision in respect of the first two allegations but appealed the Board's decision regarding the remaining four allegations. He also appealed from the decision with respect to the sanction.

External Review Committee

[19] At the ERC, the applicant submitted new evidence, including evidence that Cst. Elhatton had committed perjury before the Board. Cst. Elhatton had testified that she met her fiancé after separating from the applicant. However, another RCMP member stated that he saw them together on two occasions prior to the separation.

[20] The applicant's representative asked the Board to allow this witness to testify. The representative did not tell the Board about the nature and purpose of the testimony. The

Appropriate Officer's representative objected because the proposed witness had observed some of the testimony of witnesses at the hearing. The Board did not permit the witness to testify.

[21] The ERC considered the test for allowing new evidence and concluded that the perjury allegation should be taken into account. The ERC found errors with the Board decision but determined that the errors were minor when considered in context. For example, the Board should not have considered the applicant's comment "why now?" regarding the timing of the allegations to be an admission of guilt.

[22] The ERC issued its recommendations on February 10, 2009. It recommended that the Commissioner find that Allegation 3 was not established because the RCMP may only order that a member attend a health assessment, not treatment. The ERC also recommended that the Commissioner order a new hearing regarding Allegations 4, 5 and 6, in light of the alleged perjury.

[23] The ERC recommended a reprimand and forfeiture of pay as the sanction for Allegations 1 and 2. If the Commissioner did not allow the appeal on the merits, the ERC recommended he find that the Board erred in ordering the applicant's resignation or dismissal.

The Commissioner's Decision

[24] The Commissioner issued his decision on April 29, 2011. The Commissioner agreed with the ERC that there was credible, relevant evidence regarding Cst. Elhatton's alleged perjury and decided to consider this additional evidence.

[25] The Commissioner also decided he could consider the outcome of the perjury investigation. The Fredericton Police Force had investigated Cst. Elhatton and the alleged perjury and determined that there was no case which could be taken to the Crown Attorney for consideration. Another police force reviewed the investigation and agreed.

[26] Based on the outcome of that investigation the Commissioner found that the perjury allegation would not have altered the Board's decision. He thus found that Cst. Elhatton was credible and that her testimony established Allegations 4, 5 and 6.

[27] The Commissioner upheld the sanction of dismissal, for the following reasons:

> … although I am satisfied that only five of the six allegations against Corporal Elhatton are established, I still consider that a sanction of dismissal is reasonable considering all of the factors, including the serious nature of the contraventions, the related prior discipline, the Appellant's lack of sincere remorse, the testimony of the [District Commander] that the Appellant was unable to control his emotions or take responsibility for his actions, the [District Commander]'s lack of confidence in the Appellant and belief that he is not suitable for the RCMP, the absence of support from the [Appropriate Officer], and the Appellant's poor rehabilitative potential. Corporal Elhatton's misconduct demonstrates a severe lack of the core values of professionalism, respect, accountability, integrity and honesty and the character it reveals has seriously impaired the essential trust and confidence this organization is entitled to place on him as an employee. I find that the mitigating factors are clearly outweighed by the aggravating factors in this case.

Issue

[28] The applicant raises a single issue, namely whether the Commissioner erred in failing to find that the allegations of perjury required a new hearing before the Board. The applicant did not pursue the argument in respect of the reasonableness of the sanction.

[29] The standard of review of the Commissioner is reasonableness. The Commissioner is entitled to considerable deference for both his determination on the Code of Conduct allegations and the appropriate sanction. The Commissioner has specialized expertise on the realities of policing and what is required to maintain the integrity and professionalism of the RCMP: *Gill v Canada (Attorney General)*, 2007 FCA 305.

[30] The Commissioner has vast experience in assessing the exigencies of policing, including the appropriate use of force and what behaviour in officers' personal and professional lives may reflect on the professionalism of the RCMP. It is the Commissioner who is accountable for the reputation of the RCMP – not the Court. Thus, in assessing whether behaviour constitutes disgraceful conduct, for example, the Court would invariably approach the Commissioner's decision with the Supreme Court of Canada's instructions in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 48 as a guiding principle:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

[31] It is also to be noted that subsection 45.16(7) of the *Act* includes a privative clause. In this context the Attorney General of Canada contends for a reasonableness standard of review, arguing that if the Commissioner has the discretion to accept fresh evidence, he has the discretion to weigh that same evidence. I agree.

Situating the Evidence

[32] The Commissioner determined that Cst. Elhatton's credibility "was the foundation of the Board's decision."

[33] The *gravamen* of the error, as urged by the applicant, is that the Commissioner made his own decision as to credibility, without the benefit of a hearing. The witness was not fully cross-examined and in consequence the Board, the ERC and the Commissioner were deprived of the assurance of truthfulness that falls from cross-examination. It is contended that this was either a breach of procedural fairness, engaging a correctness standard of review, or an unreasonable decision.

[34] The Commissioner was faced with a situation where relevant evidence pertaining to the credibility of the key witness was not brought before the Board. The Commissioner found the evidence to be relevant:

> After reviewing the Appellant's additional submissions, as well as the Respondent's reply, I agree with the ERC that information that an observer who witnessed Cst. X and her fiancé testifying about when they had first met was of the opinion that they were lying under oath, is relevant information that the Appellant was not permitted to bring before the Board. The fact that Cst. X and her fiancé met before or after the separation is irrelevant to the allegations that were before

> the Board. However, it is relevant to the key issue of credibility, which was the foundation of the Board's decision in relation to the car wash, gun, mitten, and vacation incidents.

[35] The Commissioner also found the evidence to be credible:

> I also find that this information is credible - a police investigator in another disciplinary hearing testified under oath that he had found evidence that supported the Appellant's assertion that, contrary to their testimony under oath in this disciplinary hearing, Cst. X and her fiancé had met prior to the date of the separation.

[36] In consequence, the Commissioner concluded:

> I therefore agree with the ERC, as noted at paragraph 73 of its Report, that the Appellant's new information and supporting documentation concerning an independent investigator's finding that the allegation of perjury against Cst. X's fiancé had been substantiated, and that there was just cause to initiate an investigation into Cst. X's conduct, is information that meets the criteria of fresh evidence on appeal. This information was not available at the time of the hearing and it could have affected the Board's decision since credibility was a key issue.
>
> I also agree with the ERC that it is reasonable to expect that if the Board had found that Cst. X had lied under oath when she first met her fiancé, this could have changed the Board's finding that Cst, X had been forthright in her testimony. For these reasons, I will consider this additional information in reaching my decision.

[37] The Board, the ERC and the Commissioner understood the credibility of Cst. Elhatton to be central to the case. The Commissioner, for his part, adopted the Board's decision with respect to Allegation 4 (Car Wash Incident), and also saw her credibility as the lynch-pin on which the case turned:

> The Board accepted Cst. X's version of this incident. It found her evidence to be clear and reasonable and although her "*memory has faded on some details ... she withstood the scrutiny of cross examination and did not falter on crucial points*."

[38] Cst. Elhatton's testimony was also central to the disposition of the Allegation 5 (Gun Incident). The Commissioner, in his decision, noted:

> **Adjudication Board Decision on the Merits of Allegation #5**
>
> The Board accepted Cst. X's version of this incident. More specifically, the Board stated the following:
>
> > […] Considering the Board has found Constable [X] credible on all other issues there is no reason to disbelieve her now and we find her evidence on these allegations remains credible.

[39] And, to the same effect, in respect of Allegation 6 (Vacation Incident):

> The Board accepted Cst. X's version of the incident and concluded that the allegation was established.

Role of the Commissioner

[40] As noted, the Commissioner is sitting on appeal from a decision of the Board under section 45.12 of the *Act*. Prior to deciding the appeal, the Commissioner must refer the case to the ERC. The Commissioner is not bound by the ERC recommendation, but where he disagrees, he must give reasons: subsection 45.16(6) of the *Act*. This then, raises the question as to the Commissioner's role in relation to findings of fact and evidence considered in the first instance.

[41] The Commissioner indicated that he intended to pay deference to the Board for its findings of fact. Sitting in appeal, it was his role to determine whether there were reviewable errors. In respect of the evidence, he noted at paragraph 174:

> I am mindful of the fact that the Board heard the evidence (except for the additional information submitted by the parties on appeal) and saw the witnesses, and therefore was in a better position to assess the

> credibility of the witnesses. In determining this appeal, it is not my function to perform a re-weighing of the evidence, but to review the matter to determine whether the evidence reasonably supports the Board's conclusion. [Emphasis added]

[42] See also, to the same effect, paragraph 177:

> Consequently, as the ERC also indicated in its Report, I agree that considerable deference should be given to the Board when reviewing findings on credibility.

[43] To conclude on this point, it is clear that the Commissioner, by adopting *Dunsmuir* as the controlling standard of review, characterized his role in relation to the evidence as similar to that of an appellate court.

[44] The Commissioner, like any court of appeal, can receive fresh evidence. That power, however broad, cannot extend so far as to allow the Commissioner to make findings which he was not situated to make.

[45] The Commissioner, sitting as a third level of review, was not in a position to make a decision as to the credibility of Cst. Elhatton. Admittedly relevant evidence as to her credibility had not been put to her. It should be noted that this issue is not simply about the evidence of Cst. Elhatton. Positive findings about Cst. Elhatton equated into adverse conclusions about the credibility of the applicant. The two are inter-related.

[46] There is a paucity of jurisprudence addressing the question when, if ever, credibility decisions can be made on the basis of new evidence on appeal. Counsel advised that none could be found. This is not surprising given the role of appellate courts and tribunals, which, as a matter of

long-standing jurisprudence, defer to the tribunals of first instance who are better situated to make findings of fact.

[47] It is, in this regard, axiomatic that an appellate court, and similarly, the Commissioner, should not intervene in credibility findings unless the trier of fact made a palpable and overriding error or made findings of fact that were clearly wrong or unsupported by the evidence: *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at para 73. *McDougall* is instructive. Rothstein J. wrote at paragraph 72:

> With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in R. v. Gagnon, 2006 SCC 17 (CanLII), [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:
>
> > Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in H.L., that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

Treatment of Evidence

[48] I should add that the outcome would be entirely different were the issue, in respect of which the new evidence was admitted, immaterial or peripheral to the key issues for determination; here, however, the Commissioner found the new evidence both relevant and determined that it could have

affected the outcome of the proceedings as it could have changed the Board's perception of the witness' credibility: see para 125 of the Commissioner's decision.

[49] It is also within the scope of appellate review to sustain the lower court finding where the new evidence is outweighed when situated in the context of otherwise uncontested evidence. An appellate court is not required to remit a matter for a new hearing simply upon the receipt of new evidence. Appeal courts consider, for example, the impact of evidence improperly excluded, and conversely, the impact of evidence improperly admitted on the ultimate disposition. Even if the new evidence contradicts the facts as found, the decision maker sitting in appeal is still free to sustain the original decision. The new evidence may be only of tangential relevance, or the new evidence may be outweighed by other evidence. This function is reinforced by the power granted to the Commissioner under paragraph 45.16(2)(c) of the *Act*:

45.16	45.16
[…]	[…]
(2) The Commissioner may dispose of an appeal in respect of a finding referred to in paragraph 45.14(1)(*a*) by	(2) Le commissaire, lorsqu'il est saisi d'un appel interjeté contre la conclusion visée à l'alinéa 45.14 (1)*a*), peut :
[…]	[…]
(*c*) where the appeal is taken by the member who was found to have contravened the Code of Conduct, allowing the appeal and making the finding that, in the Commissioner's opinion, the adjudication board should have made.	*c*) soit accueillir l'appel, s'il est interjeté par le membre reconnu coupable d'une contravention au code de déontologie, et rendre la conclusion que, selon lui, le comité d'arbitrage aurait dû rendre.

[50] There is, however, an inherent limitation on the scope of this power where credibility is in issue. It is not surprising therefore that neither counsel could identify any case where an appellate tribunal, having received new evidence that went to the credibility of the principle witness, made its own determination as to credibility. This is in fact what transpired here, as the Commissioner concluded that his assessment of the credibility of the witness did not change. This was, in my view, an error. The Commissioner was in no position to make a finding of credibility. Indeed, he expressly defined his role as that not being his function.

[51] The second difficulty with the decision is that it fails to meet the *Dunsmuir* criteria. There is no cogent line of reasoning between the conclusion that "… it [the evidence as to perjury on cross-examination] could have affected the Board's decision since credibility was a key issue" and the conclusion that the fresh evidence "… did not cause [him] to reach a different finding than the Board on the issue of credibility." The Commissioner continued:

> My review of this fresh evidence did not cause me to reach a different finding than the Board on the issue of credibility. Based on the results of the investigation conducted following the Appellant's perjury complaint against Cst. X, I am not satisfied that this would have changed the Board's conclusions respecting Cst. X's credibility as it does not change mine. Consequently, I do not agree with the recommendation of the ERC, and will not order a new hearing in respect of the three allegations contained in the second Notice of Hearing (i.e. car wash, gun, and vacation incidents).

[52] Fresh evidence was received as it was relevant to the credibility of the principle witness and could have affected the disposition of the case.

[53] This places an onus on the decision maker to establish that the Board's assessment of the facts and, in particular, the credibility of Cst. Elhatton would have been the same had it heard the

evidence and had the witness been cross-examined. This would require, in respect of each of the allegations, that the events occurred, and in the manner found, objective evidence, independent from Cst. Elhatton's testimony that sustained the allegation on a balance of probabilities. The Commissioner did not, however, reach his decision on this basis.

Application to Particular Allegations

[54] Allegation 1 (Mitten Incident) and Allegation 2 (Office Incident) were not appealed. With respect to Allegation 3 (Disobeying a Lawful Order), the Commissioner did not sustain this allegation and allowed the appeal. In consequence, this judicial review concerns only three of the six allegations.

[55] In relation to Allegation 4 (Car Wash Incident): This allegation is based on a single event, on an unspecified date between February 1, 1993 and July 31, 1996, wherein the applicant struck Cst. Elhatton's upper left leg with a clenched fist while they were entering into a car wash. The evidence of the applicant before the Board was:

> Q. Speaking of other issues with your wife, you did receive a second notice of discipline in regard of issues that occurred in Saskatchewan. The first allegation is that on the occasion between February 1 1993 and July 31 1996 at or near Saskatoon you struck your wife, Constable [X], on the leg with a closed fist. What can you tell the Board about that particular incident?
>
> A. There was something about a carwash. We have gone through car washes before together in that Buick LeSabre and I've never struck [Cat. X]. I don't strike [Cst, X], have not, will not, and never will.
>
> Q. So you have no recollection of any Incident that - -
>
> A. I did not strike [Cst. X] in any way, shape or form. There's no way she can misconstrue it as me punching her because I didn't. The way the Buick is anyway, she's not even close to me. She's in the

> front passenger seat and there's a divider that goes up and down and I always have my right hand on it, but I don't strike her.
>
> Q. You don't recollect an incident like what was testified on Monday where you went through the car wash and you almost hit the post or something - -
>
> A. No.

[56] The conclusion of the Commissioner in respect of this allegation was:

> The Board accepted Cst. X's version of this incident. It found her evidence to be clear and reasonable and although her "*memory has faded on some details ... she withstood the scrutiny of cross examination and did not falter on crucial points*."

[57] In relation to Allegation 5 (Gun Incident): The particulars of this allegation are:

> On one occasion between February 1, 1993 and July 31, 1996, at your residence in Milden, in the Province of Saskatchewan, you got into an argument with your wife, Cst. [X]. At the time of the argument, you had just removed your uniform and gun belt. In the course of the argument, you removed your service firearm from the holster and your gun belt, grabbed your wife's hand and placed it around the firearm. You then pointed the gun to your head (with your wife's hand still around the firearm) and said words such as: "If you hate me so much, just shoot me, shoot me now." Your wife told you to stop and put the gun down, which you did.

[58] The Board accepted Cst. Elhatton's version of this incident, stating:

> Considering the Board has found Constable [X] credible on all other issues there is no reason to disbelieve her now and we find her evidence on these allegations remains credible.

[59] In relation to Allegation 6 (Vacation Incident): The particulars of this allegation are:

> On one occasion between May 1, 1998 and September 30, 1998, during a vacation trip to Prince Edward Island with your wife, Cst. [X], and children, you grabbed your wife by the arm and pounded on her forearm approximately 4 or 5 times.

[60] The applicant's mother was a witness to this event. The Board found the applicant's version unreasonable, that he lacked credibility, his explanation self-serving and rejected his mother's evidence as an attempt to protect her son.

[61] The ERC summarized the Board's decision with respect to credibility of the applicant:

> The Board found that all six allegations had been established. It noted that, due to "*conflicting testimony on critical points about the actions of* [the Appellant] *as well as many other related issues*" (Decision, p. 17), credibility was a key issue.
>
> […]
>
> The Board noted two specific concerns with the Appellant's credibility. First, the Board found that the Appellant showed no remorse for his prior misconduct, and significantly minimized the facts of it to the point of being misleading. Second, the Board noted that although the Appellant was convicted of assault for that same prior misconduct, nonetheless he failed to accept that he had a criminal record for it (Decision, p. 21).
>
> The Board also noted that four witnesses (the DC, the potential supervisor, Cst. X and her fiancé) described the Appellant's loss of control or anger or rage, and that even the Appellant's mother testified that she had to admonish the Appellant for raising his voice.

[62] Several observations emerge from this review of the allegations and the evidence on which they were based.

[63] First, Cst. Elhatton was the only witness to the allegations at issue (4, 5 and 6) for this judicial review.

[64] Second, because the evidence of Cst. Elhatton was accepted in respect of Allegation 1 (Mitten Incident), the Board concluded she was probably truthful in respect of the later incidents. There was thus an initial finding on credibility which cascaded through the later allegations. This reasoning is central to the Board's analysis. In *R. v M.G.*, 1994 CanLII 8733, the Ontario Court of Appeal cited with approval the following cautionary words of the British Columbia Court of Appeal in *Faryna v Chorny*, [1952] 2 DLR 354 on the perils inherent in making credibility findings in these circumstances:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. […] Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[65] Third, the evidence was given in the context of what was obviously a deteriorating marriage, which necessitates a certain caution or scepticism in assessing the evidence of each spouse.

[66] In sum, Allegations 1 (Mitten Incident) and 2 (Office Incident) were not appealed. The Commissioner allowed the appeal on Allegation 3 (Disobeying a Lawful Order). Allegation 4 (Car Wash Incident) and Allegation 5 (Gun Incident) and Allegation 6 (Vacation Incident) were sustained, but only on the sole evidence of Cst. Elhatton.

[67] The net effect of this is that Allegations 4, 5 and 6 were sustained on the testimony of a single witness; the applicant's ex-spouse. Her testimony was essential to the findings. In the circumstances of conflicting testimony between estranged spouses, in the absence of independent corroborative evidence, it was unreasonable to conclude that Cst. Elhatton's credibility would be unaffected by the new evidence. Cst. Elhatton was not cross-examined on the alleged perjury. There is no basis upon which the conclusion that her credibility would be unaffected could be reasonably predicated, and to do so amounted to unsubstantiated speculation.

[68] This rendered the decision unreasonable according to the standard of *Dunsmuir*. There is no clear, intelligible line of reasoning which supports the conclusion that Cst. Elhatton's credibility would not be affected by cross-examination and that this would not have a material impact on the assessment of the merits of Allegations 4, 5 and 6.

[69] The decision cannot be deemed reasonable by reference to the credibility findings in respect of Allegation 1 (Mitten Incident). The ERC summarized the evidence in respect this allegation:

> The Board found the testimony of Cst. X and her fiancé to be credible because they confirmed each other's testimony harmoniously and without hesitation, and because Cst. P. corroborated their evidence by testifying that they had related the incident to others shortly after it happened. In addition, the Board found that the fiancé's credibility was enhanced because he had apologized immediately when he previously played a prank on Cst. P's husband.

[70] This is, in my view, a precarious foundation from which it can be extrapolated that Cst. Elhatton's credibility would have been unaffected. Given the shaky platform on which the

determination of credibility rests, the decision of the Commissioner that the critical witness' credibility would be unaffected is, all the more, unsustainable.

[71] Before concluding, it should be noted that the question whether Cst. Elhatton in fact gave perjured testimony remains unproven. The applicant was denied a chance to establish that point. The fact that no criminal charges were laid is not determinative. The dual prosecutorial test of a reasonable prospect of conviction and it being in the public interest to prosecute have no bearing on whether the credibility of Cst. Elhatton, when confronted with the contradictory evidence, remained intact.

[72] Secondly, the Commissioner received as fresh evidence a "joint affidavit", signed by Cst. Elhatton and her fiancé. Joint affidavits are unknown to our legal system. There are many good reasons for this; they inherently reflect a collusion between two separate and distinct witnesses and interfere with the truth-seeking function of cross-examination. In respect of this particular affidavit, the affiant deposes that it was based on personal knowledge when it is manifestly not; rather it is replete with egregious hearsay.

[73] The evidence in the joint affidavit was relied on to explain the outcome of the perjury investigation, and to support the conclusion that the credibility of Cst. Elhatton would be unaffected. While the Commissioner is not bound by strict rules of evidence, reliance on the joint affidavit to conclude that her credibility would be unaffected falls short of the *Dunsmuir* standard of cogency. It does not follow that because no charges were laid her credibility in respect of her testimony before the Board would be unaffected.

[74] The Commissioner, may, in the exercise of the powers available to him under subsection 45.16(2) and paragraph 45.16(3)(b) of the *Act*, remit Allegations 4, 5 and 6 to a newly constituted Board. The Commissioner may also reconsider and vary his decision in respect of sanctions on the basis that Allegations 3, 4, 5 and 6 have not been established.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The Commissioner's decision is set aside and the matter remitted to him for reconsideration in accordance with these reasons.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-889-11
STYLE OF CAUSE:	**SHAWN P. ELHATTON v ATTORNEY GENERAL OF CANADA and APPROPRIATE OFFICER "J" DIVISION OF THE ROYAL CANADIAN MOUNTED POLICE**
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	November 20, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	January 25, 2013

APPEARANCES:

Mr. William R. Gilmour	FOR THE APPLICANT
Ms. Shelley C. Quinn	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Gilmour Barristers Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS