Federal Court  Cour fédérale

**Date: 20141121**

**Docket: T-1548-13**

**Citation: 2014 FC 1113**

**Ottawa, Ontario, November 21, 2014**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**STAFF SERGEANT WALTER BOOGAARD**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a staff sergeant of the Royal Canadian Mounted Police (RCMP or the Force). After a few attempts to advance his career, he received a letter from the RCMP Commissioner saying that he would not be appointed to any commissioned rank and that he should consider leaving the Force. The staff sergeant now applies for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[2] Originally, the applicant asked the Court to set aside the Commissioner's letter and direct the Commissioner to promote the applicant to the rank of inspector retroactive to 2005. In his memorandum, he does not expressly request the promotion, but simply asks that the Commissioner be directed to reconsider the matter in accordance with the reasons of the Court. He also wants an opportunity to make additional submissions to the Commissioner if a retroactive promotion is unavailable.

## I. Background

[3] The applicant is a staff sergeant of the RCMP who wants to be an inspector. He has successfully completed the officer candidate program twice and the record includes many positive reviews of his performance on the job.

[4] However, his ambitions have been stymied by circumstances surrounding an incident that happened in 2000. His gun was stolen by two women. He said that they stole it from his vehicle while he was in a restaurant. The women said that the applicant had picked them up and was unsuccessfully negotiating a price for sex with one of them when the other stole the gun.

[5] The applicant was thereafter charged with conducting himself in a disgraceful manner that brings discredit on the Force contrary to subsection 39(1) of the *Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361 [RCMP Regulations]. The appropriate officer representative prosecuting the offence considered and discounted the women's version of the event and so the matter proceeded to the adjudication board upon an agreed statement of facts corresponding to the applicant's story. The applicant admitted that it was disgraceful for him to

leave his firearm unattended and unsecured in his vehicle and the adjudication board agreed. Consequently, it reprimanded him and ordered that he forfeit five days' pay.

[6] At first, this event did not negatively affect his career prospects. He was since promoted twice more through the non-commissioned ranks.

[7] However, the process for becoming an officer described in subsection 6(1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act], is different. Pursuant to subsection 6(3) of the RCMP Act, only the Governor in Council may appoint someone to the rank of officer and the first appointment must be a commission under the Great Seal.

[8] To be considered, interested persons must complete the officer candidate program. If the candidate does so successfully, then he or she will be placed on a national eligibility list for appointments for several years. Once an inspector position becomes vacant, Executive/Officer Development and Resourcing would try to fill the position. Once a candidate is selected by the senior manager and other appropriate officials have approved or are aware of it, they forward the candidate's file to the Commissioner. Upon the recommendations of the Commissioner and the Minister of Public Safety, the Governor in Council may then commission the member.

[9] The applicant successfully completed the officer candidate program in 2004. Although his career development and resourcing advisor was initially quite positive about the applicant's prospects for advancement, his attitude inexplicably changed in 2005. The applicant ultimately was not promoted that time around, though almost everyone else in his cohort was.

[10] He again completed the officer candidate program in 2009. Curious about why he failed the last time, he made an access to information request. It revealed that the chair of the adjudication board that had disciplined the applicant told the applicant's adviser at the time that "there may have been more to the disciplinary matter". The applicant's adviser then called the person who prosecuted the case, who told him that a principled approach had been followed and that she was not comfortable disclosing information that was not before the board.

[11] Upon learning this, the applicant filed a harassment complaint against the chair for his remarks. That complaint was dismissed nearly nineteen months later, but the applicant grieved it on November 18, 2011. On December 15, 2011, the applicant also sought judicial review of the same decision.

[12] Meanwhile, the applicant had been restored to the list of candidates eligible for commission following his second successful completion of the officer candidate program. He was selected for a post in Saskatchewan and most relevant approvals and acknowledgements had been secured. His file was forwarded to the RCMP Commissioner for his approval.

[13] During his review, the Commissioner secured a copy of the investigation report underlying the applicant's earlier disciplinary offence. The women's version of the event caused him concerns that he shared with the applicant's commanding officer, Deputy Commissioner Mike Cabana.

[14] Deputy Commissioner Cabana subsequently met with the applicant on January 10, 2013. He gave to the applicant a copy of the investigation report and inquired about the inconsistencies between the applicant's story and that of the women who stole his firearm. Ultimately, the Deputy Commissioner was not satisfied with the applicant's answers and stopped supporting the applicant's bid for a promotion.

[15] This effectively blocked the applicant from the appointment in Saskatchewan for which he had been selected. Indeed, he was later removed from the list of candidates eligible for commission altogether for the same reason. On January 11, 2013, the applicant filed two related grievances against the Deputy Commissioner for his actions.

[16] On March 13, 2013, this Court rendered its decision on the applicant's judicial review of the earlier harassment investigation. Mr. Justice Donald Rennie agreed with the applicant that it was unreasonable (see *Boogaard v Attorney General of Canada*, 2013 FC 267 at paragraphs 44 to 49, [2013] FCJ No 302). However, the respondent's counsel had told Justice Rennie that the grievance could result in a promotion, while a judicial review could not. Although Justice Rennie was concerned about how long the grievance process had taken (*Boogaard* at paragraphs 28 to 35), the respondent's concession convinced him that the grievance procedure was an adequate alternative process (*Boogaard* at paragraph 27). He therefore denied the applicant any relief.

[17] The grievance related to that same complaint resolved on June 19, 2013. The adjudicator agreed with Justice Rennie; he found that the harassment investigation was inconsistent with policy and that the chair's gossip about the applicant prejudiced his chances for advancement. I

would note that there was misinformation about the availability of a promotion. As such, the adjudicator only ordered the respondent to the grievance to ensure that the Director General of the Executive/Officer Development and Resourcing immediately reinstate the applicant to the list of candidates eligible for commission.

[18] On July 8, 2013, the applicant's counsel wrote directly to the RCMP Commissioner asking him to grant the promotion that he said both the Court and the adjudicator felt was warranted but neither could give.

[19] He initially received no response, so the applicant's counsel sent another letter to the Commissioner on September 9, 2013. This time, counsel invoked the fact that the Commissioner was the final level in the grievance process under subsection 32(1) of the RCMP Act and he requested a response by October 31, 2013.

[20] On September 10, 2013, the Director General of Executive/Officer Development and Resourcing sent a letter to the applicant refusing to respect the adjudicator's decision. Since Deputy Commissioner Cabana had confirmed that he still could not support the applicant's candidacy, she said she had no authority to restore him to the list of eligible candidates. The applicant's counsel brought this to the Commissioner's attention by letter dated September 11, 2013.

II. The Commissioner's Letter

[21] The Commissioner responded in a letter marked "WITHOUT PREJUDICE" and dated September 13, 2013. Though the applicant was seeking a promotion through a number of processes, the Commissioner said he wanted to write "in an effort to arrive at the heart of the matter."

[22] This, he explained, was the incident in 2000. Although the matter was dealt with through formal discipline, the Commissioner said that, "[f]or reasons that are not at all clear to me, the agreed statement of facts was silent on the full nature of the events that gave rise to the disciplinary proceedings." Based on his understanding of those events, the Commissioner stated that the applicant's character did not reflect the core values of the RCMP. He said that he would never commission the applicant as an officer so long as he continued to deny the allegations and that "he should therefore consider whether he can continue to contribute to the mission of the Force at his current rank."

[23] He concluded by inviting the applicant's counsel to meet with him and discuss the matter further if he had any alternative course to propose.

III. Other Information

[24] Superintendent Steven Dunn is the RCMP Commissioner's chief of staff. He swears that the letters from the applicant dated September 9, 2013 and September 11, 2013, did not come to his or the Commissioner's attention until after the Commissioner sent the letter described above.

He also says that neither he nor the Commissioner considered the letter dated July 8, 2013 to be a level II grievance request.

[25] Superintendent Dunn also observes that the grievances against Deputy Commissioner Cabana were still unresolved as of November 29, 2013. The respondent says in submissions that they were resolved in January 2014 and one has been grieved to level II.

## IV. Issues

[26] The applicant submits four issues for consideration:

1. What is the nature of the decision being challenged?
2. What is the appropriate standard of review?
3. Is the RCMP Commissioner's decision unreasonable?
4. What is the appropriate remedy?

[27] The respondent proposes that there are essentially six issues, which I rephrase as follows:

A. Is the Commissioner's letter subject to judicial review?

B. Could the grievance process supply an adequate alternative remedy?

C. What is the standard of review?

D. Was the process unfair?

E. Was the decision unreasonable?

F. What remedies are available?

[28] I prefer the respondent's division of the issues and will address them in the same order.

V. Applicant's Written Submissions

[29] Despite the fact that the Governor in Council formally decides who is appointed to be an officer, the applicant submits that the Commissioner's recommendation is so crucial to this process that it is an exercise of statutory power. As such, he asserts that denying him the opportunity in Saskatchewan is reviewable pursuant to subsection 18.1(1) of the *Federal Courts Act*.

[30] Further, he submits that the Court should not decline to exercise the power to decide the case. He has been languishing in the RCMP dispute resolution process for four years and even when it had only been three years, Justice Rennie found that the delays "stretch the boundaries of tolerance" (*Boogaard* at paragraph 35). Further, it would be futile since the Commissioner ultimately has overall control of the Force and he has already unequivocally expressed his views.

[31] As for the standard of review, the applicant submits that it is correctness for the questions of procedural fairness and reasonableness otherwise. Still, the applicant submits that even highly discretionary decisions can be set aside when they rely on irrelevant considerations or violate the principles of natural justice.

[32] In this regard, he notes that disciplinary proceedings under the RCMP Act are serious and typically attract a high degree of deference. In his case, it was followed appropriately and the evidence of the women who stole his firearm was discounted. In his view, the Commissioner acted unreasonably by going behind that and disregarding the opinion of the appropriate officer

without any inquiry at all. He says it is entirely contrary to the statutory scheme to elect not to proceed with an allegation against a member but then secretly store the information to be used against him years later.

[33] Moreover, he says the process was unfair since the applicant was not even told that this information was being used against him for more than a decade and only then because he made an access to information request. Indeed, no one even formally made the case against him until 2013. Then, the Commissioner essentially said that his only choice was to come clean. He never had a hearing before the adjudication board and it is basically impossible for him to contest the allegations so long after the fact. In his view, it is entirely unfair to hold such serious allegations against him for so long without any recourse to adjudication.

[34] Finally, given the long history of this dispute, he says the Court should give very specific directions. He says there is little doubt that he would have been promoted in 2005 had it not been for the RCMP's unreasonable actions. He says the Commissioner should be directed to reconsider promoting the applicant to inspector and, if possible, to do so retroactively to 2005. If that is not possible, the applicant says that some other remedy like waiving pay increments should be considered and he should be permitted to make submissions to the Commissioner about that.

[35] Further, the applicant asks for an enhanced costs award because he has been disputing this for so long and the Force completely ignored the findings of this Court and the adjudicator.

Further, the outcome of the last proceeding could have been different had it not been for the respondent's misrepresentation to Justice Rennie about the availability of a promotion.

## VI. Respondent's Written Submissions

[36] The respondent argues that the Commissioner's letter is not subject to judicial review because it was drafted "without prejudice". It should not have been disclosed to the Court and the respondent says that the Court should dismiss the case to protect the public interest in encouraging settlement.

[37] The applicant is seeking identical relief in a related grievance and should have done the same for this letter. Just like last time, the respondent submits that the grievance process is an adequate alternative and the Court should not interfere. The respondent recognizes that the Commissioner is himself the final level, but says there would be no bias because he would often delegate the task in circumstances like this. The respondent points out that very few circumstances are exceptional enough to justify interference with an ongoing administrative process (see *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 [*CB Powell*]). Further, the available remedies do not have to be perfect or even the ones that the applicant wants, so long as they are adequate.

[38] In the alternative, the respondent says the decision was lawful. Though the respondent agrees with the applicant about the standard of review, it says that the process was fair and the decision was reasonable.

[39] Specifically, the process was fair because the applicant was given a copy of the report and an opportunity to meet with both his commanding officer and the Commissioner. He chose not to meet with the Commissioner, but it was still offered.

[40] Further, the respondent says that the decision was reasonable. Nobody has a right to a commissioned appointment. It is a discretionary decision based on the RCMP's core values, which is something the Commissioner has special expertise to assess. In doing that, the respondent says the Commissioner was entitled to consider any information available to him, including the investigation report that was never considered by the board adjudicating the applicant's disciplinary offence. The inconsistencies disclosed therein cast doubt on the applicant's honesty, integrity, and accountability and time has not erased those character flaws.

[41] As such, the respondent submits that the application should be dismissed with costs against the applicant.

[42] Alternatively, the respondent also criticizes the relief requested by the applicant. First, it says the Court has no ability to order the Commissioner to exercise his discretion in any specific way since the applicant has no right to a promotion. Second, only the Governor in Council can appoint someone to a commissioned rank; the Commissioner has no such power, nor could he even recommend him for this promotion since the applicant's commanding officer also withdrew his support. Third, even if he could, an appointment retroactive to 2005 is statute-barred by subsection 23(2) of the *Interpretation Act*, RSC 1985, c I-21.

[43] Finally, the respondent says that any costs award should not be influenced by the respondent's misrepresentation in the earlier proceeding. It was likely an honest mistake and the respondent was not seeking a promotion from the Court at the time anyway.

## VII. Analysis and Decision

### A. *Issue 1 - Is the Commissioner's letter subject to judicial review?*

[44] Under subsection 18.1(3), the Federal Court only has jurisdiction to review decisions made by a "federal board, commission or other tribunal". With a few exceptions irrelevant to this case, subsection 2(1) defines this to mean "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown".

[45] As Mr. Justice David Stratas observed in *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paragraphs 52 to 56, [2013] 3 FCR 605 [*Air Canada*], this depends not just on whether the body itself is created by statute but whether the specific power being exercised is public in nature.

[46] Curiously, *Air Canada* might not bind this Court. Though Justice Stratas gave the only set of reasons, the other two members of the panel said only that they "concur with his proposed disposition" (*Air Canada* at paragraph 87, emphasis added). Still, having reviewed the jurisprudence recited by Justice Stratas, I find his summary of the law on this area at paragraph 60 helpful and this Court has followed it before (see *Maloney v Council of the Shubenacadie*

*Indian Band*, 2014 FC 129 at paragraph 26, 237 ACWS (3d) 829 [*Maloney*]; *Hengerer v Blood Indians First Nation*, 2014 FC 222 at paragraph 42, [2014] FCJ No 259).

[47] The respondent does not dispute that a decision to commission an officer is public, nor even that the Commissioner's recommendation is too. However, it is worth noting that the RCMP Act itself does not actually assign to the Commissioner any role at all. Instead, subsection 6(3) exclusively gives that power to the Governor in Council. Although pending amendments will change that (*Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18, section 5), they are not yet in force.

[48] Still, the recommendation power can currently be justified by subsection 5(1) of the RCMP Act, which gives to the Commissioner the "control and management of the Force and all matters connected therewith," subject to the Minister's direction. Moreover, section 98 of the RCMP Regulations expressly refers to "a recommendation by the Commissioner to the Governor in Council for the appointment or promotion of an officer," which suggests some power in that regard.

[49] Indeed, Ms. Dansereau swears in her affidavit that no appointment is ever made without the Commissioner's recommendation. Further, there is no evidence that either the Minister of Public Safety or the Governor in Council has ever refused a recommendation from the Commissioner. Indeed, the Commissioner even says in his letter that "I will not be commissioning S/Sgt. Boogaard" (emphasis added), thus acknowledging that the decision is

effectively his to make. The Commissioner's power to recommend candidates for appointment is therefore public in nature.

[50] It is with that in mind that the respondent's assertion of settlement privilege should be considered. By 2012, the applicant had secured all relevant approvals and the Commissioner's recommendation was the only remaining hurdle. Once the file reached his desk, the Commissioner had a duty to decide whether to recommend the applicant for commission. Although Deputy Commissioner Cabana subsequently withdrew his support for the applicant, that was only after the Commissioner had reviewed the file and shared with him his concerns. In my view, the Commissioner was exercising a public power and doing it for the reasons he set out in his letter and the Commissioner should not be able to shield it from review merely by writing "without prejudice" on it.

[51] Despite the general value of settlement privilege (see *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paragraphs 2, 11 to 13, [2013] SCJ No 37), this letter does not fit very well within its scope. In *Bellatrix Exploration Ltd v Penn West Petroleum Ltd*, 2013 ABCA 10 at paragraph 25, 358 DLR (4th) 628, the Alberta Court of Appeal observed that "[a] communication that is not in substance privileged does not become so just because one party places "without prejudice" on it." It also said at paragraph 24 that "the types of communications covered by the settlement privilege require at least a hint of potential compromise or negotiation."

[52] There is no such hint in the Commissioner's letter. He said this:

> Now, were S/Sgt. Boogaard to elect to change his ways, come clean as it were and explain his behaviour we might, after a suitable period of time, find that his actions were sufficiently repaired so as to warrant consideration for advancement. In the meantime, I will not be commissioning S/Sgt. Boogaard and he should therefore consider whether he can continue to contribute to the mission of the Force at his current rank.
>
> Should you have any alternative course you might want me to consider I would be pleased to meet with you and discuss this matter further.
>
> [Emphasis added]

[53] That is tantamount to an outright refusal. The offer, if it can be called that, was that the applicant must recant and admit to something he may not have done in exchange for which the Commissioner might reconsider commissioning him at some vague future time. In contrast, the Commissioner is quite definite when he says that he will not commission the applicant otherwise. The only thing that could possibly suggest settlement is the invitation to propose an "alternative course". However, the preceding paragraph makes it quite clear that there is no room for any real compromise on the issues that matter.

[54] As such, this Court has jurisdiction to review the decision and should not decline it out of a desire to promote settlements.

B. *Issue 2 - Could the grievance process supply an adequate alternative remedy?*

[55] The respondent is right that parties can normally come to the courts only after exhausting adequate administrative processes (see *Halifax (Regional Municipality) v Nova Scotia (Human*

*Rights Commission)*, 2012 SCC 10 at paragraph 36, [2012] 1 SCR 364). Justice Stratas expressed the rule this way in *CB Powell* at paragraph 31:

> [A]bsent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court.
>
> [Emphasis added]

[56] Further, there is no dispute that the Commissioner's letter could have been grieved under subsection 31(1) of the RCMP Act. As such, the question is whether that process is an adequate one and can afford an effective remedy.

[57] In other cases, including the applicant's earlier judicial review, courts have found that it is adequate (see *Boogaard* at paragraphs 23 to 35; *Bruno v Canada (Attorney General)*, 2006 FC 462 at paragraph 21, 268 DLR (4th) 98; *Lebrasseur v Canada*, 2011 FC 1075 at paragraph 51, 418 FTR 49). In the present circumstances, however, I am convinced that it is not.

[58] Justice Rennie's earlier decision to the contrary in this case was largely premised on the respondent's concession that a promotion was available through the grievance process. That was false and the process's adequacy needs to be re-evaluated.

[59] In that regard, subsection 17(2) of the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181, requires the level hearing a grievance to "determine what corrective action is

appropriate in the circumstances" if the grievance is well-founded. However, the legislation leaves the scope of its remedial authority unclear.

[60] Fortunately, the respondent filed with its record an affidavit from Superintendent O'Rielly that explains it further. He says at paragraph 16 that an adjudicator will try to place "the member in the position he or she would have been in but for that error, subject to any limitations imposed on the adjudicator." That sounds expansive, but it turns out that the limitations are many. Superintendent O'Rielly says the following:

> There are limits on a level's authority to order certain remedies. In general terms, an adjudicator will not award general damages or interest on monies owed; will not validate a candidate in a promotion process nor award a promotion; and will not determine a Grievor's fitness for duty by re-examining a medical or dental diagnosis or reassessing a medical profile. The adjudicator has no power to overturn a Treasury Board decision or direct changes to a policy or directive which is not under the control of the RCMP, such as a Treasury Board policy. An adjudicator is not authorized to exercise the powers provided to other persons or bodies under the Act, for example an adjudicator may not appoint a person to the rank of an officer, an authority that rests solely with the Governor in Council.
>
> [Emphasis added]

[61] Admittedly, the respondent is right that a remedy need only be adequate, not perfect (see *Froom v Canada (Minister of Justice)*, 2004 FCA 352 at paragraph 12, [2005] 2 FCR 195). Tellingly, however, the respondent does not even propose what available remedy could possibly compensate the applicant.

[62] After all, the harm alleged by the applicant is that he was denied a promotion for which he had already been selected. Ordinarily one would think either a promotion to that rank would

be an effective remedy, or else some kind of compensation for the lost salary. Evidently, however, neither is available.

[63] Indeed, even the very modest remedy awarded by the adjudicator – that of being restored to the list of candidates eligible for promotion – is apparently out of bounds. So out of bounds, in fact, that Deputy Commissioner Cabana considered himself entitled to thwart it entirely. It seems perverse to me that the respondent to a grievance cannot appeal an adjudicator's decision (see Affidavit of Superintendent O'Rielly at paragraph 13), but the RCMP can simply decline to obey the remedy ordered. Yet, the respondent seems to suggest that the applicant's only recourse should be another grievance, this time of the decision to ignore the adjudicator's order. Assumedly, this recursive process could continue forever.

[64] Moreover, I share Justice Rennie's concerns about the delays in this case. The original harassment investigation took nineteen months. The grievance took nineteen months more. It then took nearly three more months for the Director General of Executive/Officer Development and Resourcing to tell the applicant that she could not respect the adjudicator's decision. The reason for that, Deputy Commissioner Cabana's decision to withdraw his support, was grieved immediately in January 2013, but it took twelve months to resolve. At least on these facts, Justice Rennie spoke truly when he said that "[t]he RCMP and its members have the worst of both worlds: a procedure that truncates procedural fairness in the name of efficiency and workplace harmony, but provides neither" (*Boogaard* at paragraph 37). The delays were barely tolerable fourteen months ago when Justice Rennie still believed the grievance process could yield a promotion (*Boogaard* at paragraph 35); they are intolerable now.

[65] Consequently, I have no confidence that the grievance procedure could be adequate in this case and I will decide this matter on its merits.

C. *Issue 3 - What is the standard of review?*

[66] I agree with the parties about the standard of review. For questions of procedural fairness, the standard of review is nominally correctness (see *Canada (Attorney General) v Clegg*, 2008 FCA 189 at paragraph 19, 380 NR 275; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] SCJ No 24). The Commissioner must have afforded to the applicant all procedural rights to which he was entitled, though relief may be denied if any error is "purely technical and occasions no substantial wrong or miscarriage of justice" (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43, [2009] 1 SCR 339).

[67] As for the substance of the decision, it is discretionary and thus presumptively reviewable on the reasonableness standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190). I share Justice Rennie's view that the "Commissioner has specialized expertise on the realities of policing and what is required to maintain the integrity and professionalism of the RCMP" (see *Elhatton v Canada (Attorney General)*, 2013 FC 71 at paragraph 29, 425 FTR 281).

[68] That said, the applicant points out that even discretionary decisions must be made in good faith and without relying on considerations irrelevant to the statutory purpose (see *Maple Lodge Farms Limited v Government of Canada*, [1982] 2 SCR 2 at 7 and 8, 137 DLR (3d) 558 [*Maple Lodge*]). Though *Maple Lodge* was decided before *Dunsmuir*, this Court has confirmed its

continuing guidance by observing that breaching any of the *Maple Lodge* criteria will almost always be unreasonable (see *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2013 FC 363 at paragraph 56, 430 FTR 238).

D. *Issue 4 - Was the process unfair?*

[69] Though the Commissioner must decide fairly, the content of that duty varies (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 21, 174 DLR (4th) 193). In *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paragraph 42, [2011] 2 SCR 504 [*Mavi*], the Supreme Court of Canada said this:

> The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in *Baker* to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "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, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27). Other cases helpfully provide additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but *not* exhaustive.
>
> [Emphasis added]

[70] Still, the factors are helpful and most point to a low level of procedural fairness. The decision to recommend someone for a commission is nothing like a judicial decision. Moreover,

the statute itself does not even contemplate this decision and the appointment power is formally exercised by the Governor in Council. As well, the procedures chosen by the RCMP Commissioner for making his recommendation generally do not indicate a very high level of procedural fairness and the applicant raises no argument about legitimate expectations.

[71] Indeed, the only thing in favour of a higher degree of procedural fairness is how important it is to the applicant; the Commissioner's decision denies him any prospect for advancement in his chosen career. Even then, most members of the RCMP would not become officers at an inspector rank or higher regardless.

[72] Altogether, I consider this decision to attract a minimal degree of procedural fairness. Still, even a fairly minimal duty typically requires some form of notice and an opportunity to respond (see *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311 at 328, 88 DLR (3d) 671; *Baker* at paragraph 22; *Mavi* at paragraph 5; *Maloney* at paragraph 52).

[73] In this regard, nothing in the record suggests that the applicant could have known that the Commissioner personally had concerns about his candidacy until his counsel received the letter.

[74] Still, the respondent argues that the decision can inherit its fairness from the process Deputy Commissioner Cabana used when withdrawing his support. Though that seems strange, I think it is acceptable in the circumstances. The evidence shows that the Commissioner was, in fact, the first person to have access to the investigation report and that it was he who raised his

concerns with Deputy Commissioner Cabana. They also met and discussed how Deputy Commissioner Cabana would tell the applicant about their concerns. In my view, this shows an ongoing decision-making process in which the Commissioner was always engaged.

[75] Indeed, the concerns the Commissioner expressed in his letter were the same that Deputy Commissioner Cabana discussed with the applicant at the meeting in January. The Deputy Commissioner also gave to the applicant a copy of the investigation report and an opportunity to persuade him that his concerns were ill-founded. That was fair enough.

[76] The applicant's other arguments about the fairness of using the investigation report against him goes more to the substance of the decision, not the procedure used in making this decision. As such, I will assess them there.

E. *Issue 5 - Was the decision unreasonable?*

[77] The respondent is right that the investigation report reveals inconsistencies between the applicant's version of the circumstances surrounding his stolen firearm and that of the women who stole it. Equally, I am satisfied that if the women's description of the incident was true, the applicant's behaviour and his lies to cover it up would reflect poorly enough on his character to justify denying him a commission. I am also satisfied that the Commissioner could reasonably consider someone's disciplinary record regardless of when the offence occurred.

[78] Nevertheless, the applicant has convinced me that the decision was unreasonable. The appropriate officer and the adjudication board already decided what happened on that day in

2000 and it was they to whom Parliament assigned that task (see RCMP Act, subsections 43(1), 45.12(1)). It is not open to the Commissioner to revisit it now and substitute his own judgment for that of the entities actually charged with that responsibility.

[79] In my view, the RCMP Act makes Parliament's intention in that regard abundantly clear. The RCMP Act and its associated Regulations supply a complete code regarding disciplinary offences and it gives an accused member substantial procedural rights. These include rights to notice and a full oral hearing subject to many of the laws of evidence (RCMP Act, subsections 45.1(2), 45.1(7), 45.1(8) and 45.1(10)). Indeed, the adjudication board is even required to keep a record so that the member can appeal (RCMP Act, subsections 45.13(1), 45.14(1)). These procedural rights correspond to the very serious consequences a decision against a member could entail (RCMP Act, subsection 45.12(3)), including the loss of promotional opportunities.

[80] By his actions, however, the RCMP Commissioner circumvented the entire procedure chosen by Parliament and has held the allegations against the applicant as if they had actually been proven. That is unacceptable. Had the appropriate officer brought these charges against the applicant he could have challenged the women's testimony and potentially cleared his name on a balance of probabilities, which is the opportunity Parliament intended to give him. It is impossible to do so now. Moreover, no new evidence has arisen that could justify reopening the adjudication board's decision. For the purposes of the RCMP Act, the truth was settled thirteen years ago.

[81] Therefore, the Commissioner violated the scheme enacted by Parliament by looking behind the adjudication board's decision and preferring his own intuitions to the judgment of every relevant authority. Consequently, he exceeded his discretion because he relied on considerations prohibited by the statute from which he derives his power. That makes the decision unjustifiable and it must be set aside.

[82] Before leaving this, Superintendent Dunn also said in his affidavit that the decision was justified because the inconsistencies in the report would raise concerns "[r]egardless of their veracity". Whatever that was supposed to mean, it introduces a nuance that is nowhere to be found in the Commissioner's decision. The Commissioner referred repeatedly to the "full nature" of the events and exhorts the applicant to "come clean." Evidently, the Commissioner concluded that the applicant tried to purchase sex from one of the women and then lied to cover it up, all the while casting aspersions on the honesty of the other witnesses. That was because he inappropriately substituted his opinion about the disciplinary case for that of the appropriate officer's and ignored the adjudication board's judgment. Superintendent Dunn's observation was not among the Commissioner's reasons and therefore cannot justify his decision.

F. *Issue 6 - What remedies are available?*

[83] The Court's remedial options on judicial review are set out by subsection 18.1(3) of the *Federal Courts Act*. Paragraph 18.1(3)(a) permits the Court to compel a tribunal to do something that it has unlawfully refused to do and paragraph 18.1(3)(b) allows the Court to set aside a decision and give directions when sending it back for redetermination.

[84] The respondent argues that this means the applicant's requested relief is unavailable. In *Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74 at paragraph 126, [2011] 2 FCR 80, the Federal Court of Appeal observed that "*mandamus* cannot be sought to compel the exercise of discretion in a particular way." As such, it says the Court cannot order the Commissioner to recommend the applicant's promotion, nor can it give directions to the same effect. The respondent submits that the only thing the Court could do is set aside the decision and that directions are uncalled for.

[85] That is often true, but not always. On rare occasions, a mandatory order directing a decision-maker to reach a specific outcome is appropriate (see *LeBon v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 at paragraphs 13 and 14, 444 NR 93 [*LeBon*]; *D'Errico v Canada (Minister of Human Resources and Skills Development)*, 2014 FCA 95 at paragraph 16, [2015] FCJ No 370 [*D'Errico*]). However, this would generally only be appropriate where either "the outcome of the case on the merits is a foregone conclusion" (*D'Errico* at paragraph 16) or else there are other exceptional circumstances warranting relief (*LeBon* at paragraph 14; *D'Errico* at paragraph 16).

[86] This applies even to highly discretionary decisions like the one in this case. For instance, in *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 [*TWU*], the decision being reviewed was about whether to accredit a university program. Though that also is highly discretionary, the Supreme Court refused to send it back to the College of Teachers because the only reason it was ever refused was for irrelevant reasons (*TWU* at paragraphs 41 to 43).

[87] However, having stated the above about *mandamus*, the applicant stated at the hearing he was seeking directions not *mandamus*.

[88] Similarly, the only reason the Commissioner refused his recommendation in this case was because he believed accusations against the applicant that the relevant authorities had dismissed. Apart from that, the applicant had secured all approvals and his professional record was excellent. The Deputy Commissioner, in the notes of his interview with the applicant, even said the following:

> The writer clearly explained to Mr. Boogaard that the issue was not in relation to the fact he lost his firearm, or the quality of his work which is irreproachable, but more a question of integrity.

[89] Indeed, the Commissioner recognized in his letter that, after the theft of his firearm, "S/Sgt. Boogaard went on to positively develop himself in many aspects of his professional life". Indeed, the Commissioner described his concerns about the investigation report as "the heart of the matter" and his offer to potentially reconsider if the applicant confessed suggests that this was the one roadblock preventing his approval. As this was the only reason the Commissioner withheld his recommendation and it was unlawful, a directed outcome is available.

[90] Further, the Federal Court of Appeal has recognized that a directed outcome is also justified "where there has been substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute" (*D'Errico* at paragraph 16). I agree with Justice Rennie's observation that delays are especially serious "where what is in issue is promotion from a pool to a senior position. Officers may have only a limited number of years of eligibility in the pool before they

retire" (*Boogaard* at paragraph 33). The applicant was first eligible to be appointed an officer nearly a decade ago. These allegations were used against him then and the adjudicator decided that they likely hurt his promotional chances. They definitely are the only reason that he was not appointed to the position for which he was selected in 2012. If the RCMP continues to delay the process, it could very well drag it out until the applicant retires.

[91] Further, it would appear that this delay will not be compensable. As the respondent argues, retroactive appointments are unavailable. Paragraph 6(3)(b) of the RCMP Act provides that a first commission is issued under the Great Seal and subsection 23(2) of the *Interpretation Act* says the following:

| | |
|---|---|
| 23. …(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect. | 23. …(2) La date de la prise d'un acte de nomination revêtu du grand sceau peut être considérée comme celle de l'autorisation de la prise de l'acte ou une date ultérieure, la nomination prenant effet à la date ainsi considérée. |

[92] In my view, this means that an instrument could not purport to be issued before the day on which its issue was authorized. Since that would necessarily occur in the future and is within the power of the Governor in Council, a retroactive promotion is unavailable.

[93] As such, given the serious delays and the RCMP's refusal to obey the order of the adjudicator, further delay could bring the administration of justice into disrepute. This makes the giving of a direction justified.

[94] The respondent raises another objection, however. Since Deputy Commissioner Cabana has withdrawn his support, the applicant is off the list of candidates eligible for promotion. The respondent submits that while that is the case, "the Commissioner cannot recommend the Applicant for appointment to a position at the officer level."

[95] Deputy Commissioner Cabana withdrew his support for the very same reason the Commissioner never gave his recommendation. That was unreasonable and Deputy Commissioner Cabana will likely reconsider his position upon reviewing this decision. Should he continue to withhold support, it should be recalled that the officer appointment process is not one created by any legislation. Rather, the policies upon which the respondent relies were created by the Commissioner himself pursuant to the control and management power he derives from subsection 5(1) of the RCMP Act. I am therefore satisfied that the Commissioner can recommend a candidate to the Governor in Council over a commanding officer's unreasonable objections. Similarly, the Commissioner could override any other self-imposed rules that would otherwise prevent the applicant from being restored to the eligibility list.

[96] There is, however, another problem. The applicant cannot simply be promoted to an inspector rank immediately. Rather, the maximum number of officers in each of the commissioned ranks is prescribed by the Treasury Board by subsection 6(2) of the RCMP Act. As such, a position needs to be vacant. These are things over which the Commissioner has little control.

[97] Therefore, I would only order that the Commissioner do as much as he can to enable the applicant's promotion and to not withhold his consent once a position is available. This, of course, is conditional on nothing else coming to light that would reasonably cast a shadow over the applicant's qualifications.

[98] The applicant also wants the Commissioner to consider if he can do anything to compensate the applicant for the lost promotion. Admittedly, further compensation would be necessary to restore the applicant to the position he would have been in if the impugned decision had not been made.

[99] However, that is ultimately not the purpose of judicial review. Judicial review is only intended to ensure that public powers are exercised lawfully and its remedies cannot always repair the harm an unlawful decision does. I have not been directed to anything that would suggest that the Commissioner has any obligation to consider other remedies nor that he has yet ignored it, so it would be premature to order the Commissioner to consider additional remedies.

[100] Finally, the applicant requests substantial indemnity costs for two reasons: (1) the respondent misinformed Justice Rennie about the availability of a promotion, which would have changed the outcome of the application; and (2) the RCMP ignored the adjudicator's decision.

[101] In my view, neither circumstance justifies the level of costs the applicant seeks.

[102] First, the outcome of the earlier application might have been different if Justice Rennie had known about the remedial inadequacy of the grievance process, but it would not have been better. Unlike this case, where the decision was expressly one to recommend the applicant for a promotion or not, the decision in that case was a harassment investigation. Indeed, Justice Rennie implied that the only remedy he would have ordered was to have it set aside (*Boogaard* at paragraph 50). That would have meant that the entire harassment investigation would need to be repeated, which probably would have taken a long time and for which the only remedy requested was an apology. The remedy the adjudicator ordered was, in fact, better. Further, I see no evidence that the respondent intentionally lied to the Court.

[103] Second, although it is true that the RCMP should not have simply disobeyed the adjudicator's order, the adjudicator made his decision based only on the fact that there were rumours of misconduct. At the time, the investigation report had not been disclosed and so there was no foundation to the gossip.

[104] This case was more arguable. Though the Commissioner should not have considered the investigation report, it was not just a rumour. Therefore, the results in the grievance and the earlier judicial review did not dictate the result in this one. I would not order enhanced costs and would instead have them assessed under column III in the table of Tariff B.

[105] I am satisfied that the Commissioner's decision is reviewable and that it was unreasonable and therefore must be set aside. I would direct that the Commissioner must do as much as he can to enable the applicant's promotion and that he not withhold his recommendation

once a position becomes available to the applicant because of the circumstances surrounding the theft of the applicant's firearm.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The Commissioner's decision is set aside.

2. The Commissioner is directed to do as much as he can to enable the applicant's promotion to the rank of inspector and that he not withhold his recommendation once a position becomes available to the applicant because of the circumstances surrounding the theft of the applicant's firearm.

3. The applicant shall have his costs of the application.

"John A. O'Keefe"

Judge

## ANNEX

**Relevant Statutory Provisions**

***Federal Courts Act*, RSC 1985, c F-7**

| | |
|---|---|
| 2. (1) In this Act, | 2. (1) Les définitions qui suivent s'appliquent à la présente loi. |
| … | … |
| "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; | « office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. |
| … | … |
| 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. | 18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. |
| … | … |
| (3) On an application for judicial review, the Federal Court may | (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : |

| | |
|---|---|
| (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or | a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable; |
| (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. | b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral. |

***Interpretation Act*, RSC 1985, c I-21**

| | |
|---|---|
| 23. (2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect. | 23. (2) La date de la prise d'un acte de nomination revêtu du grand sceau peut être considérée comme celle de l'autorisation de la prise de l'acte ou une date ultérieure, la nomination prenant effet à la date ainsi considérée. |

***Royal Canadian Mounted Police Act*, RSC 1985, c R-10**

| | |
|---|---|
| 2. (1) In this Act, | 2. (1) Les définitions qui suivent s'appliquent à la présente loi. |
| … | … |
| "appropriate officer" means, in respect of a member, such officer as is designated pursuant to subsection (3); | « officier compétent » Membre ayant qualité d'officier et désigné conformément au paragraphe (3). |
| … | … |

| | |
|---|---|
| "member" means any person | « membre » |
| (a) who has been appointed as an officer or other member of the Force under section 5 or paragraph 6(3)(a) or 7(1)(a), and | a) Personne nommée en qualité d'officier ou à tout autre titre en vertu de l'article 5 ou des alinéas 6(3)a) ou 7(1)a); |
| (b) who has not been dismissed or discharged from the Force as provided in this Act, the regulations or the Commissioner's standing orders; | b) personne non congédiée ni renvoyée de la Gendarmerie dans les conditions prévues à la présente loi, à ses règlements ou aux consignes du commissaire. |
| … | … |
| (3) The Commissioner may, by rule, designate an officer to be the appropriate officer in respect of a member either for the purposes of this Act generally or for the purposes of any provision thereof in particular. | (3) Le commissaire peut, par règle, désigner un officier compétent à l'égard d'un autre membre pour l'application de la présente loi ou de telle de ses dispositions. |
| … | … |
| 5. (1) The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith. | 5. (1) Le gouverneur en conseil peut nommer un officier, appelé commissaire de la Gendarmerie royale du Canada, qui, sous la direction du ministre, a pleine autorité sur la Gendarmerie et tout ce qui s'y rapporte. |
| (2) The Commissioner may delegate to any member any of the Commissioner's powers, duties or functions under this Act, except the power to delegate under this subsection, the power to make rules under this Act and the powers, duties or functions under section 32 | (2) Le commissaire peut déléguer à tout membre les pouvoirs ou fonctions que lui attribue la présente loi, à l'exception du pouvoir de délégation que lui accorde le présent paragraphe, du pouvoir que lui accorde la présente loi d'établir des règles et des |

(in relation to any type of grievance prescribed pursuant to subsection 33(4)), subsections 42(4) and 43(1), section 45.16, subsection 45.19(5), section 45.26 and subsections 45.46(1) and (2).

pouvoirs et fonctions visés à l'article 32 (relativement à toute catégorie de griefs visée dans un règlement pris en application du paragraphe 33(4)), aux paragraphes 42(4) et 43(1), à l'article 45.16, au paragraphe 45.19(5), à l'article 45.26 et aux paragraphes 45.46(1) et (2).

6. (1) The officers of the Force, in addition to the Commissioner, shall consist of

6. (1) Les officiers comprennent, outre le commissaire et les titulaires des grades désignés par le gouverneur en conseil :

(a) Deputy Commissioners,

a) des sous-commissaires;

(b) Assistant Commissioners,

b) des commissaires adjoints;

(c) Chief Superintendents,

c) des surintendants principaux;

(d) Superintendents,

d) des surintendants;

(e) Inspectors,

e) des inspecteurs.

and such other ranks as are prescribed by the Governor in Council.

(2) The maximum number of officers in each rank shall be as prescribed by the Treasury Board.

(2) Le nombre maximal d'officiers de chaque grade est fixé par le Conseil du Trésor.

(3) The Governor in Council may

(3) Le gouverneur en conseil peut :

(a) appoint any person to the rank of an officer;

a) procéder aux nominations aux grades d'officier;

(b) authorize the issue of a commission under the Great Seal to an officer on the officer's first appointment to

b) autoriser l'émission d'une commission sous le grand sceau à un officier lors de sa première nomination à ce

the rank of an officer;

(c) by way of promotion appoint an officer to a higher rank; and

(d) by way of demotion appoint an officer to a lower rank.

…

12. (1) Officers of the Force hold office during the pleasure of the Governor in Council.

…

31. (1) Subject to subsections (2) and (3), where any member is aggrieved by any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.

(2) A grievance under this Part must be presented

(a) at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance; and

grade;

c) par voie de promotion, nommer un officier à un grade supérieur;

d) par voie de rétrogradation, nommer un officier à un grade inférieur.

…

12. (1) Les officiers de la Gendarmerie sont nommés à titre amovible par le gouverneur en conseil.

…

31. (1) Sous réserve des paragraphes (2) et (3), un membre à qui une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour corriger ce préjudice.

(2) Un grief visé à la présente partie doit être présenté :

a) au premier niveau de la procédure applicable aux griefs, dans les trente jours suivant celui où le membre qui a subi un préjudice a connu ou aurait normalement dû connaître la décision, l'acte ou l'omission donnant lieu au

grief;

(b) at the second and any succeeding level in the grievance process, within fourteen days after the day the aggrieved member is served with the decision of the immediately preceding level in respect of the grievance.

b) à tous les autres niveaux de la procédure applicable aux griefs, dans les quatorze jours suivant la signification au membre de la décision relative au grief rendue par le niveau inférieur immédiat.

(3) No appointment by the Commissioner to a position prescribed pursuant to subsection (7) may be the subject of a grievance under this Part.

(3) Ne peut faire l'objet d'un grief en vertu de la présente partie une nomination faite par le commissaire à un poste visé au paragraphe (7).

(4) Subject to any limitations prescribed pursuant to paragraph 36(b), any member presenting a grievance shall be granted access to such written or documentary information under the control of the Force and relevant to the grievance as the member reasonably requires to properly present it.

(4) Sous réserve des restrictions prescrites conformément à l'alinéa 36b), le membre qui présente un grief peut consulter la documentation pertinente placée sous la responsabilité de la Gendarmerie et dont il a besoin pour bien présenter son grief.

(5) No member shall be disciplined or otherwise penalized in relation to employment or any term of employment in the Force for exercising the right under this Part to present a grievance.

(5) Le fait qu'un membre présente un grief en vertu de la présente partie ne doit entraîner aucune peine disciplinaire ni aucune autre sanction relativement à son emploi ou à la durée de son emploi dans la Gendarmerie.

(6) As soon as possible after the presentation and consideration of a grievance at any level in the grievance process, the member constituting the level shall render a decision in writing as to the disposition of the grievance, including reasons

(6) Le membre qui constitue un niveau de la procédure applicable aux griefs rend une décision écrite et motivée dans les meilleurs délais possible après la présentation et l'étude du grief, et en signifie copie au membre intéressé, ainsi qu'au président du Comité en cas de

for the decision, and serve the member presenting the grievance and, if the grievance has been referred to the Committee pursuant to section 33, the Committee Chairman with a copy of the decision.

renvoi devant le Comité en vertu de l'article 33.

(7) The Governor in Council may make regulations prescribing for the purposes of subsection (3) any position in the Force that reports to the Commissioner either directly or through one other person.

(7) Le gouverneur en conseil peut, par règlement, déterminer, pour l'application du paragraphe (3), les postes dont le titulaire relève du commissaire, directement ou par l'intermédiaire d'une autre personne.

32. (1) The Commissioner constitutes the final level in the grievance process and the Commissioner's decision in respect of any grievance is final and binding and, except for judicial review under the Federal Courts Act, is not subject to appeal to or review by any court.

32. (1) Le commissaire constitue le dernier niveau de la procédure applicable aux griefs; sa décision est définitive et exécutoire et, sous réserve du contrôle judiciaire prévu par la Loi sur les Cours fédérales, n'est pas susceptible d'appel ou de révision en justice.

(2) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a grievance referred to the Committee under section 33, but if the Commissioner does not so act, the Commissioner shall include in the decision on the disposition of the grievance the reasons for not so acting.

(2) Le commissaire n'est pas lié par les conclusions ou les recommandations contenues dans un rapport portant sur un grief renvoyé devant le Comité conformément à l'article 33; s'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.

(3) Notwithstanding subsection (1), the Commissioner may rescind or amend the Commissioner's decision in respect of a grievance under this Part on the presentation to the Commissioner of new facts

(3) Par dérogation au paragraphe (1), le commissaire peut annuler ou modifier sa décision à l'égard d'un grief visé à la présente partie si de nouveaux faits lui sont soumis ou s'il constate avoir fondé sa

or where, with respect to the finding of any fact or the interpretation of any law, the Commissioner determines that an error was made in reaching the decision.

décision sur une erreur de fait ou de droit.

33. (1) Before the Commissioner considers a grievance of a type prescribed pursuant to subsection (4), the Commissioner shall refer the grievance to the Committee.

33. (1) Avant d'étudier un grief d'une catégorie visée par règlement pris en vertu du paragraphe (4), le commissaire le renvoie devant le Comité.

…

…

(4) The Governor in Council may make regulations prescribing for the purposes of subsection (1) the types of grievances that are to be referred to the Committee.

(4) Le gouverneur en conseil peut, par règlement, prescrire, pour l'application du paragraphe (1), les catégories de griefs qui doivent faire l'objet d'un renvoi devant le Comité.

…

…

40. (1) Where it appears to an officer or to a member in command of a detachment that a member under the command of the officer or member has contravened the Code of Conduct, the officer or member shall make or cause to be made such investigation as the officer or member considers necessary to enable the officer or member to determine whether that member has contravened or is contravening the Code of Conduct.

40. (1) Lorsqu'il apparaît à un officier ou à un membre commandant un détachement qu'un membre sous ses ordres a contrevenu au code de déontologie, il tient ou fait tenir l'enquête qu'il estime nécessaire pour lui permettre d'établir s'il y a réellement contravention.

…

…

43. (1) Subject to subsections (7) and (8), where it appears to

43. (1) Sous réserve des paragraphes (7) et (8), lorsqu'il

an appropriate officer that a member has contravened the Code of Conduct and the appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.

apparaît à un officier compétent qu'un membre a contrevenu au code de déontologie et qu'eu égard à la gravité de la contravention et aux circonstances, les mesures disciplinaires simples visées à l'article 41 ne seraient pas suffisantes si la contravention était établie, il convoque une audience pour enquêter sur la contravention présumée et fait part de sa décision à l'officier désigné par le commissaire pour l'application du présent article.

(2) On being notified pursuant to subsection (1), the designated officer shall appoint three officers as members of an adjudication board to conduct the hearing and shall notify the appropriate officer of the appointments.

(2) Dès qu'il est avisé de cette décision, l'officier désigné nomme trois officiers à titre de membres d'un comité d'arbitrage pour tenir l'audience et en avise l'officier compétent.

…

…

45.1 (2) An adjudication board shall set the place, date and time for a hearing and serve the parties thereto with a notice in writing of that place, date and time.

45.1 (2) Le comité d'arbitrage fixe la date, l'heure et le lieu de l'audience; il en signifie un avis écrit aux parties à l'audience.

…

…

(7) Notwithstanding any other provision of this Part, a member whose conduct is the subject of a hearing is not compelled to testify at the hearing, but the member may give evidence under oath and

(7) Par dérogation à toute autre disposition de la présente partie, le membre dont la conduite fait l'objet de l'audience n'est pas tenu d'y témoigner; il peut, cependant, faire une déposition sous

where the member does so, subsections (11) and (12) apply to the member.

serment, auquel cas les paragraphes (11) et (12) s'appliquent à lui.

(8) The parties to a hearing shall be afforded a full and ample opportunity, in person or by counsel or a representative, to present evidence, to cross-examine witnesses and to make representations at the hearing.

(8) Les parties à une audience doivent avoir toute latitude de présenter des éléments de preuve à l'audience, d'y contre-interroger les témoins et d'y faire des observations, soit personnellement, soit par l'intermédiaire d'un avocat ou autre représentant.

…

…

(10) Notwithstanding section 45 but subject to subsection (11), an adjudication board may not receive or accept any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence.

(10) Par dérogation à l'article 45 mais sous réserve du paragraphe (11), le comité d'arbitrage ne peut recevoir ou accepter des éléments de preuve ou autres renseignements non recevables devant un tribunal du fait qu'ils sont protégés par le droit de la preuve.

…

…

45.12 (1) After considering the evidence submitted at the hearing, the adjudication board shall decide whether or not each allegation of contravention of the Code of Conduct contained in the notice of the hearing is established on a balance of probabilities.

45.12 (1) Le comité d'arbitrage décide si les éléments de preuve produits à l'audience établissent selon la prépondérance des probabilités chacune des contraventions alléguées au code de déontologie énoncées dans l'avis d'audience.

…

…

(3) Where an adjudication board decides that an allegation of contravention of the Code of Conduct by a member is established, the

(3) Si le comité d'arbitrage décide qu'un membre a contrevenu au code de déontologie, il lui impose une ou plusieurs des peines

board shall impose any one or more of the following sanctions on the member, namely,

suivantes :

(a) recommendation for dismissal from the Force, if the member is an officer, or dismissal from the Force, if the member is not an officer;

a) recommander que le membre soit congédié de la Gendarmerie, s'il est officier, ou, s'il ne l'est pas, le congédier de la Gendarmerie;

(b) direction to resign from the Force and, in default of resigning within fourteen days after being directed to do so, recommendation for dismissal from the Force, if the member is an officer, or dismissal from the Force, if the member is not an officer;

b) ordonner au membre de démissionner de la Gendarmerie, et si ce dernier ne s'exécute pas dans les quatorze jours suivants, prendre à son égard la mesure visée à l'alinéa a);

(c) recommendation for demotion, if the member is an officer, or demotion, if the member is not an officer; or

c) recommander la rétrogradation du membre, s'il est officier, ou, s'il ne l'est pas, le rétrograder;

(d) forfeiture of pay for a period not exceeding ten work days.

d) imposer la confiscation de la solde pour une période maximale de dix jours de travail.

….

…

45.13 (1) An adjudication board shall compile a record of the hearing before it, which record shall include

45.13 (1) Le comité d'arbitrage établit le dossier de l'audience tenue devant lui; ce dossier comprend notamment :

(a) the notice of the hearing under subsection 43(4);

a) l'avis d'audience prévu au paragraphe 43(4);

(b) the notice of the place, date and time of the hearing under subsection 45.1(2);

b) l'avis de la date, de l'heure et du lieu de l'audience signifié conformément au paragraphe 45.1(2);

(c) a copy of all written or documentary evidence

c) une copie de la preuve écrite ou documentaire produite à

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| produced at the hearing; | l'audience; |
| (d) a list of any exhibits entered at the hearing; and | d) la liste des pièces produites à l'audience; |
| (e) the recording and the transcript, if any, of the hearing. | e) l'enregistrement et la transcription de l'audience, s'il y a lieu. |
| … | … |
| 45.14 (1) Subject to this section, a party to a hearing before an adjudication board may appeal the decision of the board to the Commissioner in respect of | 45.14 (1) Sous réserve des autres dispositions du présent article, toute partie à une audience tenue devant un comité d'arbitrage peut en appeler de la décision de ce dernier devant le commissaire : |
| (a) any finding by the board that an allegation of contravention of the Code of Conduct by the member is established or not established; or | a) soit en ce qui concerne la conclusion selon laquelle est établie ou non, selon le cas, une contravention alléguée au code de déontologie; |
| (b) any sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (a) is established. | b) soit en ce qui concerne toute peine ou mesure imposée par le comité après avoir conclu que l'allégation visée à l'alinéa a) est établie. |

***Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18**

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| 5. Subsection 6(3) of the Act is replaced by the following: | 5. Le paragraphe 6(3) de la même loi est remplacé par ce qui suit : |
| (3) The Governor in Council may appoint any person to the rank of Deputy Commissioner to hold office during pleasure. | (3) Le gouverneur en conseil peut nommer, à titre amovible, toute personne au grade de sous-commissaire. |
| (4) The Commissioner may appoint any person to any other rank of officer and, by way of promotion, appoint an | (4) Le commissaire peut nommer toute personne aux autres grades d'officier et, par voie de promotion, un officier |

officer to a higher rank, other than to the rank of Deputy Commissioner.

à un grade supérieur autre que le grade de sous-commissaire.

(5) The Governor in Council may authorize the issue of a commission under the Great Seal to an officer on the officer's first appointment to the rank of an officer or on the recommendation of the Commissioner.

(5) Le gouverneur en conseil peut autoriser l'émission d'une commission sous le grand sceau à un officier lors de sa première nomination ou sur recommandation du commissaire.

…

…

87. (3) Subsections 2(1), (4), (5) and (7) and 3(1) and (2), sections 4 to 7, subsections 8(1) and (4), sections 9 to 11, 13 and 14, subsections 15(2) and 16(3), sections 20 to 31, 33, 34 and 37 to 39, subsection 40(2) and sections 46 and 59 to 66 come into force on a day to be fixed by order of the Governor in Council.

87. (3) Les paragraphes 2(1), (4), (5) et (7) et 3(1) et (2), les articles 4 à 7, les paragraphes 8(1) et (4), les articles 9 à 11, 13 et 14, les paragraphes 15(2) et 16(3), les articles 20 à 31, 33, 34 et 37 à 39, le paragraphe 40(2) et les articles 46 et 59 à 66 entrent en vigueur à la date fixée par décret.

***Royal Canadian Mounted Police Regulations*, 1998 SOR/88-361**

36. For the purposes of subsection 33(4) of the Act, the types of grievances that are to be referred to the External Review Committee are grievances relating to

36. Pour l'application du paragraphe 33(4) de la Loi, les catégories de griefs qui doivent faire l'objet d'un renvoi devant le Comité externe d'examen sont les suivants :

(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

a) les griefs relatifs à l'interprétation et à l'application, par la Gendarmerie, des politiques gouvernementales visant les ministères qui ont été étendues aux membres;

(b) the stoppage of the pay and allowances of members made pursuant to subsection 22(3) of

b) les griefs relatifs à la cessation, en application du paragraphe 22(3) de la Loi, de

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| the Act; | la solde et des allocations des membres; |
| (c) the Force's interpretation and application of the Isolated Posts Directive; | c) les griefs relatifs à l'interprétation et à l'application, par la Gendarmerie, de la Directive sur les postes isolés; |
| (d) the Force's interpretation and application of the R.C.M.P. Relocation Directive; and | d) les griefs relatifs à l'interprétation et à l'application, par la Gendarmerie, de la Directive de la Gendarmerie sur la réinstallation; |
| (e) administrative discharge for grounds specified in paragraph 19(a), (f) or (i). | e) les griefs relatifs au renvoi par mesure administrative pour les motifs visés aux alinéas 19a), f) ou i). |
| … | … |
| 39. (1) A member shall not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force. | 39. (1) Le membre ne peut agir ni se comporter d'une façon scandaleuse ou désordonnée qui jetterait le discrédit sur la Gendarmerie. |
| … | … |
| 98. Standards and procedures for a recommendation by the Commissioner to the Governor in Council for the appointment or promotion of an officer shall be approved by the Commissioner. | 98. Le commissaire approuve les normes et les procédures applicables aux recommandations qu'il soumet au gouverneur en conseil en vue de la nomination ou de la promotion d'un officier. |

***Commissioner's Standing Orders (Grievances)*, SOR/;2003-181**

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| 1. The following definitions apply in these Standing Orders. | 1. Les définitions qui suivent s'appliquent aux présentes consignes. |
| … | … |
| "level I" means the initial level | « niveau I » Le premier niveau |

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| in the grievance process for grievances presented under section 31 of the Act. | de la procédure applicable aux griefs présentés en vertu de l'article 31 de la Loi. |
| "level II" means the final level in the grievance process referred to in subsection 32(1) of the Act. | « niveau II » Le dernier niveau de la procédure applicable aux griefs visé au paragraphe 32(1) de la Loi. |
| … | … |
| 2. (1) The member who constitutes level I is | 2. (1) Le membre qui constitue le niveau I est : |
| (a) in the case of a grievance in respect of a stoppage of pay and allowances under section 2 of the R.C.M.P. Stoppage of Pay and Allowances Regulations, a Deputy Commissioner; | a) dans le cas d'un grief portant sur la cessation de la solde et des indemnités en application de l'article 2 du Règlement sur la cessation de la solde et des allocations des membres de la Gendarmerie royale du Canada, un sous-commissaire; |
| (b) in the case of a grievance in respect of a decision, act or omission made by a Deputy Commissioner, another Deputy Commissioner designated by the Commissioner; | b) dans le cas d'un grief portant sur une décision, un acte ou une omission d'un répondant qui est un sous-commissaire, un autre sous-commissaire désigné par le commissaire; |
| (c) in the case of a grievance in respect of a decision, act or omission made in a region, other than a grievance referred to in paragraphs (a) or (b), an officer or a senior manager for that region designated by the Commissioner; | c) dans le cas d'un grief, autre que celui visé aux alinéas a) ou b), portant sur une décision, un acte ou une omission survenu dans une région, un officier ou cadre supérieur désigné par le commissaire pour la région; |
| (d) in the case of a grievance in respect of a decision, act or omission made in headquarters, other than a grievance referred to in paragraphs (a) or (b), an officer | d) dans le cas d'un grief, autre que celui visé aux alinéas a) ou b), portant sur une décision, un acte ou une omission survenu au quartier général, un officier ou cadre supérieur désigné par |

or a senior manager designated by the Commissioner for headquarters; and

le commissaire pour le quartier général;

(e) in any other case, an officer or a senior manager designated by the Commissioner.

e) dans tout autre cas, un officier ou cadre supérieur désigné par le commissaire.

(2) If the member who constitutes level I under subsection (1) is unable to act, the member who constitutes level I is the officer or senior manager designated by the Commissioner to act in the place of that member.

(2) En cas d'empêchement du membre constituant le niveau I, son remplaçant est l'officier ou le cadre supérieur désigné par le commissaire.

…

…

17. (1) If the level considering the grievance determines that they have jurisdiction over the grievance under subsections 31(1) and (2) of the Act, the level shall determine if the decision, act or omission that is the subject of the grievance is consistent with applicable legislation and Royal Canadian Mounted Police and Treasury Board policies.

17. (1) Si le niveau saisi du grief juge qu'il a compétence à l'égard du grief au titre des paragraphes 31(1) et (2) de la Loi, il décide si la décision, l'acte ou l'omission qui fait l'objet du grief est compatible avec la législation applicable et les politiques applicables du Conseil du Trésor et de la Gendarmerie royale du Canada.

(2) If the level considering the grievance determines that the decision, act or omission is not consistent with applicable legislation or Royal Canadian Mounted Police or Treasury Board policies, and that it has caused a prejudice to the grievor, the level shall determine what corrective action is appropriate in the circumstances.

(2) Si le niveau saisi du grief décide que la décision, l'acte ou l'omission est incompatible avec la législation applicable ou les politiques applicables du Conseil du Trésor ou de la Gendarmerie royale du Canada et a causé un préjudice au requérant, il détermine quelles sont les mesures correctives indiquées dans les circonstances.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1548-13 |
| **STYLE OF CAUSE:** | STAFF SERGEANT WALTER BOOGAARD v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MAY 22, 2014 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | O'KEEFE J. |
| **DATED:** | NOVEMBER 21, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Paul Champ<br>Bijon Roy | FOR THE APPLICANT |
| Gregory S. Tzemenakis<br>Adrian Bieniasiewicz | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| William F. Pentney<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |