Federal Court Cour fédérale

Date: 20160719

Docket: T-1712-15

Citation: 2016 FC 829

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CONSTABLE ROBERT MCBAIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Commissioner of the Royal Canadian Mounted Police [the RCMP], determining that the Applicant had brought discredit on the RCMP by conducting himself in a disgraceful manner, and directing the Applicant to resign from the RCMP within 14 days or be dismissed.

II. Background

[2] The Applicant, Robert McBain, held the rank of Constable at the High Level RCMP Detachment in Alberta at all material times.

[3] On March 25, 2008, the Appropriate Officer Representative of "K" Division [AOR] initiated a formal disciplinary hearing against the Applicant alleging he had contravened Part III of the *Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361 [the Code of Conduct], since repealed.

[4] The Notice of Disciplinary Hearing set out two allegations against the Applicant. Allegation 1 alleges that on January 27, 2007, the Applicant conducted himself in a disgraceful manner by having consensual sexual intercourse during a contemporaneous professional interaction with a citizen [the Complainant] while on duty, and in uniform, contrary to subsection 39(1) of the Code of Conduct.

[5] The particulars describe that the Applicant had been patrolling the Meander River First Nation community and agreed to help the Complainant, who was intoxicated, find her lost keys. Upon forcing open the door to her locked residence, the Applicant and the Complainant had sexual intercourse, after which the Applicant left.

[6] Paragraph 5 of Allegation 1 describes that on March 23, 2007, another officer, Constable Watts, attended a complaint of an intoxicated female – the Complainant – who disclosed she had

been sexually assaulted by a member of the RCMP. An investigation ensued and upon questioning, the Applicant denied having any sexual relationship with the Complainant to a superior ranked officer.

[7] Paragraph 6 of Allegation 1 describes that on January 28, 2008, the Applicant completed a voluntary statement admitting he had consensual sexual intercourse with the Complainant in her residence.

[8] Allegation 2 alleges that the Applicant knowingly and willfully made a false and misleading statement to a member superior in rank, and contains the identical particulars set out in paragraphs 5 and 6 of Allegation 1.

A. *The Disciplinary Hearing*

[9] The Allegations were put before an RCMP Adjudication Board [the Board] appointed pursuant to Part IV of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, as amended [the Act], and a disciplinary hearing was held on December 14, 16, and 18, 2009.

[10] At the hearing, the Applicant, through his Member Representative [MR], entered a qualified admission "that he engaged in disgraceful conduct by having consensual sexual relations with [the Complainant] on January 27, 2007" while on duty and in uniform.

[11] Following this admission, the AOR withdrew Allegation 2, but informed it would be calling witnesses on the issue of consent. Neither representative advised the Board whether the withdrawal of Allegation 2 affected the identical paragraphs (5 and 6) of Allegation 1.

[12] The MR did not object to the admission of evidence on the issue of consent, but indicated that the wording of Allegation 1 may not support its examination. He directed the Board to the decision in *Gill v Canada (Attorney General)*, 2007 FCA 305 [*Gill*], a case which found that as a matter of procedural fairness, findings of misconduct must be restricted to matters raised in the allegations and particulars.

[13] The Board heard evidence on the issue of consent that included testimony by two witnesses called by the AOR, the Complainant, Constable Watts, a friend of the Complainant, and the Applicant.

[14] The Board rendered an oral decision at the conclusion of the hearing, and provided written reasons dated January 12, 2010, finding that while in uniform and on duty, the Applicant engaged in sexual relations with a citizen. The Board dismissed the joint submission the parties had submitted on sanction that agreed to a reprimand, professional counselling, and the forfeiture of 10 days' pay, and instead directed that the Applicant resign from the RCMP within 14 days or be dismissed (*The Appropriate Officer of "K" Division and Constable McBain* (2009), 5 AO (4th) 136).

B. *The Appeal*

[15] The Applicant appealed the Board's decision on the merits, alleging the hearing was procedurally unfair, and also on the sanction imposed, claiming that the Board erred in rejecting the parties' joint submission on sanction and in its assessment of the aggravating factors.

[16] Pursuant to section 45.15 of the Act, the appeal was referred to the RCMP External Review Committee [the ERC]. The ERC issued a non-binding recommendation report [ERC Report] dated February 26, 2015, finding the Board had erred by:

a. failing to clarify whether particulars 5 and 6 of Allegation l (duplicative of Allegation 2) had been withdrawn;
b. failing to clarify whether sexual assault was alleged and thus whether consent was a relevant issue;
c. admitting irrelevant evidence; and
d. relying extensively on inadmissible evidence to make findings of credibility, to identify mitigating and aggravating factors, and to determine sanction.

[17] The ERC found that the Applicant's right to procedural fairness had been seriously breached, and his right to a fair hearing prejudiced. It also found that the Board's reasons on sanction reflected a lack of consideration of the joint submission, and the circumstances under which the Board was entitled to depart from that submission. The ERC recommended that the Commissioner (i) allow the appeal on the merits and order a new hearing, or alternatively (ii)

allow the appeal on sanction and impose the sanction placed before the Board in the joint submission.

C. *The Commissioner's Decision*

[18] It is the Commissioner's Decision, rendered on September 11, 2015, that is under review [the Decision]. The Decision is lengthy and includes summaries and excerpts of both the Board's findings at the disciplinary hearing, and of the ERC Report.

[19] Though the Commissioner noted he is not bound by the ERC's findings or recommendations (subsection 45.16(6) of the Act), he agreed that the Board had breached the Applicant's right to procedural fairness and to a fair hearing, which rendered the Board's Decision invalid.

[20] The Commissioner found that once the AOR withdrew Allegation 2, any references to misleading a superior in Allegation 1 became irrelevant and should not have been considered. He found that the Board did not compartmentalize the evidence, and erred by referencing the Applicant's misleading of a superior throughout the Decision.

[21] Moreover, the scope of Allegation 1 concerns consensual sexual relations, and does not encompass sexual assault. Though it was not improper for the Board to hear the evidence prior to determining its admissibility, once the evidence was found to be irrelevant and inadmissible, it should have been disregarded.

[22] The Commissioner acknowledged that breaches of procedural fairness usually result in the matter being reheard by the Board. However, on the basis of the limited exception set out by the Supreme Court in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at paragraphs 51-54 [*Mobil Oil*] (more recently applied in *Renaud v Canada (Attorney General)*, 2013 FCA 266 at para 5), he concluded he would not remit the matter, as "the circumstances will inevitably lead to the same result on the merits of Allegation 1". Moreover, subsection 45.16(2)(c) of the Act provides that the Commissioner may dispose of an appeal by "allowing the appeal and making the finding that, in the Commissioner's opinion, the adjudication board should have made".

[23] The Commissioner found that (i) the Applicant's admission to the alleged disgraceful conduct, (ii) the passage of time, and (iii) the preponderance of relevant evidence that would be brought to bear, supported his decision not to return the matter to a different Board.

[24] Applying the test for disgraceful conduct, the Commissioner concluded that a reasonable person with knowledge of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, would be of the opinion that having sexual relations while in uniform and on duty is disgraceful and sufficiently related to the employment situation so as to warrant discipline.

[25] Turning to the issue of the Board's rejection of the joint submission on sanction, the Commissioner acknowledged the ERC's recommendation that the only admissible evidence available for determining sanction was the Applicant's admission, the evidence of the two

character/performance witnesses called by the MR during the sanction hearing, and the documentary evidence filed in support of the Applicant.

[26] However, the Commissioner was not convinced he was required to ignore "even the most relevant portions of the testimony of the Complainant and her friend". He did however disregard the entire testimony of the Applicant and of Constable Watts, and that of the Complainant and her friend, apart from the following evidence:

a. the events took place in the First Nation community of Meander River;
b. the Complainant was not able to locate her house keys, and so she asked the spouse of her friend to open her door but her friend told her to find someone else;
c. the Complainant flagged down the Applicant and asked him to push open her door which he eventually did;
d. the sexual activity occurred in the Complainant's bedroom; and
e. later the same day, the Complainant returned to the house of her friend and told her that "she had sex with a cop".

[27] The Commissioner recognized that sanctions are fact-driven and discretionary determinations (*Gill*, above, at para 14; *Elhatton v Canada (Attorney General)*, 2014 FC 67 at para 72). He then applied the three-part test for determining an appropriate sanction:

a. determine the appropriate range of sanction, given the seriousness of the conduct;
b. determine any mitigating and/or aggravating factors; and,
c. select a penalty that best reflects the severity of the misconduct and the nexus between the misconduct and the requirements of the policing profession.

[28] The range of sanctions related to incidents of a sexual nature while on duty spans from forfeiture of pay to dismissal.

[29] The Commissioner recognized as mitigating factors, the fact that the Applicant had admitted to Allegation 1, offered an apology before the Board, enjoyed the support of other members including the Commanding Officer, received consistently high performance assessments, acted out of character, and had difficulty establishing a social/work balance in part due to the remoteness of his community. In terms of aggravating factors, the Applicant encountered the Complainant in a professional capacity while she was seeking his assistance, and was in an Aboriginal community.

[30] The parties relied on a number of cases to support their joint submission on sanction, which the Commissioner divided into three categories: (1) sexual relations while on duty at a private location in an on-going relationship; (2) sexual relations while on duty in a police vehicle or RCMP facility; and (3) sexual relations while on duty resulting from a contemporaneous professional interaction with a citizen – the situation at hand.

[31] The Commissioner reviewed the facts of these cases and their imposed sanctions. In the cases allotted to the first and second categories, the Board accepted the joint submission, and the sanctions resulted in forfeiture of pay.

[32] For the two cases cited under the third category, the AOR had sought dismissal, and the Board in both cases found the mitigating factors insufficient to alleviate the seriousness of the

conduct, and directed the member to resign or be dismissed (*The Appropriate Officer Division and Constable "A"* (1994), 16 AD (2d) 184; *The Appropriate Officer Division and Constable "A"* (1993), 11 AD (2d) 83).

[33] While each case must be assessed on its facts, the Commissioner noted that circumstances involving sexual relations while on duty resulting from a contemporaneous professional interaction with a citizen have been consistently treated as the most serious, as "there is a steadfast public expectation that whatever the situation […] responding police officers will not abandon their sworn professional duty and responsibilities for impulsive gratification".

[34] The Decision provides that the principles applied by Canadian appellate courts to determine when trial judges may properly reject joint proposals on sentence are readily applicable to joint submissions on sanction in police disciplinary matters. As summarized in the ERC Report, the proper test for justifying a departure from a joint submission on sanction is whether:

a. the proposed sanction brings the administration of justice into disrepute;
b. the proposed sanction is otherwise contrary to the public interest;
c. the proposed sanction is unfit or unreasonable; and
d. there is a good reason for rejecting the joint recommendation; the reason is stated in a clear and cogent manner; the reason is more than an opinion that the proposed sanction is insufficient; and the reason is preceded by a thorough inquiry as to the circumstances underlying the joint submission.

[35] The Commissioner acknowledged this is not a situation where the Applicant agreed to make an admission in exchange for a lenient joint submission. However, the Commissioner's role involves the balancing of the interests of the RCMP member subject to discipline with those of the Force and the Canadian public, by ensuring that those members who have engaged in disgraceful conduct are sanctioned in a manner that maintains public confidence in the RCMP (*Kinsey v Canada (Attorney General)*, 2007 FC 543 at para 44 [*Kinsey*]). Moreover, contributing to safer and healthier Aboriginal communities is a long-standing RCMP strategic priority.

[36] The Commissioner found that the Applicant was expected to perform his duties with the utmost professionalism. The evidence showed the Applicant was regarded as an exceptional performer with great potential, and had the support of the Commanding Officer. Ultimately however, the Commissioner found that's the mitigating factors did not sufficiently alleviate the gravity of the Applicant's admitted actions, which however out of character, displayed extremely poor judgment and completely undermine the values, priorities and mission of the RCMP.

[37] Under the circumstances, and considering the precedents involving sexual relations resulting from contemporaneous professional interactions, the Commissioner found the joint submission on sanction entirely unfit and contrary to the public interest. Accordingly, he ordered the Applicant to resign, and in default of resigning within 14 days of being served a copy of the Decision, to be dismissed.

III. Issues

[38] The issues are:

A. Whether the acknowledged breaches of procedural fairness and right to a fair hearing leading to the Board's initial decision were remedied by the Commissioner's subsequent Decision;

B. Whether the Commissioner's Decision on the merits and on sanction was reasonable.

IV. Standard of Review

[39] The first issue of procedural fairness is to be reviewed on the standard of correctness (*Schmidt v Canada (Attorney General)*, 2011 FC 356 at para 14 [*Schmidt*]).

[40] The Respondent argues that some deference is nevertheless warranted, based on Justice Stratas' statements that the Court is to review procedural fairness issues with a "degree of deference" respectful of the decision-maker's choices (*Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 69, citing *Re Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 42). These cases are however distinguishable, as the issue before the Court presently involves review of a potential breach of procedural fairness and the right to a fair hearing – not an assessment of the procedural choices made by an administrative body. I find that no deference should be afforded on issues involving breaches of procedural fairness that include the right to a fair hearing (*Canadian Tire Corp v Koolatron Corp*, 2016 FCA 2 at para 14).

[41] Considering my finding on the first issue with respect to a breach of procedural fairness, it is unnecessary to consider the standard of review applied to the Commissioner's Decision on the merits and on sanction.

V. Analysis

A. *Whether the acknowledged breaches of procedural fairness and right to a fair hearing leading to the Board's initial decision were remedied by the Commissioner's subsequent Decision*

[42] The Applicant argues that the Commissioner's Decision was procedurally unfair, given his failure to direct a new hearing, notwithstanding his recognition that the Applicant's right to a fair hearing and procedural fairness had been seriously breached.

[43] The Applicant submits that a breach of procedural fairness renders a decision invalid in all but the most exceptional circumstances (*Kinsey*, above; *Cardinal v Kent Institution*, [1985] 2 SCR 643 at para24 [*Cardinal*]). The Supreme Court has recognized a limited exception to the requirement for a new hearing stemming from a breach of procedural fairness – where the result would be legally inevitable (*Mobil Oil*, above, at paras 52-55). The Applicant states that the Commissioner's expectation the outcome would be the same is not sufficient.

[44] The Respondent's position is that it was reasonable for the Commissioner in this case to decide the matter rather than returning it to the Board for a new decision.

[45] The Respondent submits that the Applicant's reliance on *Cardinal*, above, for the proposition that absent exceptional circumstances, the initial decision is void, is incorrect. Appellate tribunals can cure breaches of procedural fairness by an underlying tribunal in the appropriate circumstances (*Taiga Works Wilderness Equipment Ltd, Re*, 2010 BCCA 97 at para 28 [*Taiga Works*]; *Schmidt*, above, at para 16; *McBride v Canada (Minister of National Defence)*, 2012 FCA 181 at para 41 [*McBride*]). The test is whether, given the circumstances as a whole, the proceeding overall – including the initial proceedings and appellate review – was fair.

[46] Upon review of the pertinent case law, I agree with the Respondent that in certain circumstances, administrative appellate tribunals have been found to have the power to cure procedural lapses or unfairness arising in a subordinate adjudication (*Schmidt*, at para 16; *Taiga Works*, above, at para 17). In *Taiga Works*, the British Columbia Court of Appeal thoroughly canvassed the relevant jurisprudence regarding an appellate tribunal's power to cure breaches of procedural fairness. At paragraphs 36 to 38, the Court wrote:

> 36 The fact that the Supreme Court of Canada mentioned both *Harelkin* and *Cardinal* with approval means that *Cardinal* cannot be taken to have overruled the proposition established by *Harelkin* (and *King*) that a breach of the rules of natural justice or procedural fairness can be cured by an appellate tribunal in appropriate circumstances.
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> 37 I think it is fair to say that *Cardinal* stands for the proposition that a breach of the rules of natural justice or procedural fairness cannot be overlooked on the basis that the reviewing court or appellate tribunal is of the view the result would have been the same had no breach occurred. As demonstrated by the post-*Cardinal* authorities to which I have referred, *Harelkin* and *King* continue to stand for the proposition that appellate tribunals can, in appropriate circumstances, cure breaches of natural justice or procedural fairness by an underlying tribunal. The question then becomes how one should determine whether such breaches have been properly cured.

> 38 As did Huddart J.A. in *International Union of Operating Engineers* and Berger J.A. in *Stewart*, I prefer the approach advocated by de Smith, Woolf and Jowell in *Judicial Review of Administrative Action*. One should review the proceedings before the initial tribunal and the appellate tribunal, and determine whether the procedure as a whole satisfies the requirements of fairness. One should consider all of the circumstances, including the factors listed by de Smith, Woolf and Jowell.
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> [Emphasis added]

[47] The factors a court should consider in deciding whether the curative capacity of the appeal has ensured that the proceedings as a whole have reached an acceptable level of fairness are:

a. the gravity of the error committed at first instance;
b. the likelihood that the prejudicial effects of the error may also have permeated the rehearing;
c. the seriousness of the consequences for the individual;
d. the width of the powers of the appellate body; and
e. whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.

Taiga Works, at para 28, citing de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed (London: Sweet & Maxwell, 1995) at 489-90; *Schmidt*, at para 16.

[48] The Respondent argues that an analysis of these factors suggests the overall process was fair. The Commissioner considered whether the hearing before the Board impacted his ability to make a decision, and found it did not. He referred specifically to the errors the Board made, and set clear parameters on the uncontentious facts he took into account, ignoring objectionable evidence.

[49] The Respondent claims the Board did not commit a serious error in initially admitting the evidence related to the issue of consent, as that evidence also provided the context and circumstances of the Code of Conduct violation. Though the Board's consideration of the evidence respecting Allegation 2 was more egregious, the Respondent argues such evidence was disregarded. The Commissioner was careful to limit his consideration to evidence that fell within the scope of Allegation 1, properly defined, and thus the prejudicial effects of the error are unlikely to have permeated the rehearing.

[50] As well, the Respondent emphasizes that the Commissioner carries the responsibility for maintaining the standards of integrity of the RCMP, and has broad statutory power under subsection 45.16(2)(c) of the Act to make the findings the Board should have made and to reject or accept the sanction the Board imposed. Though the Commissioner's Decision is not *de novo*, the Respondent submits the Decision was based on uncontentious evidence before the Board that was contained in the particulars, and the Commissioner gave no weight to the initial decision.

[51] After a consideration of the above enumerated factors, I disagree with the Respondent that the proceedings as a whole have reached an acceptable level of fairness. While the Commissioner was attuned to the procedural breaches, having considered and cited the ERC Report and tailored his decision accordingly, given the nature of the breaches and their permeation through the record upon which the Decision was based, I find that the appeal did not cure the breaches that occurred in the initial decision.

[52] With regards to the first factor, there is no doubt that the Applicant was denied procedural fairness at the Adjudication Hearing. As the ERC noted, and Commissioner agreed, "the [Applicant's] right to procedural fairness has been *seriously breached* and his right to a fair hearing prejudiced" [emphasis added]. There was not only one, but several, procedural errors during the hearing process. These breaches spanned from the improper drafting of the allegations (which delimit the scope of the entire hearing), to the extensive reliance upon immaterial, irrelevant and thus inadmissible evidence that was prejudicial to the Applicant, throughout the Board's Decision. The ERC found following a thorough review, and upon consideration of the applicable legal principles, that the errors were grave.

[53] Regarding the second factor, I find that the nature of the procedural lapses at the adjudication hearing suggests there is a greater likelihood that their prejudicial effect permeated the appeal.

[54] The ERC Report found that "the only evidence available to the Commissioner in determining sanction would be the limited admission of the [Applicant], the evidence of the witnesses called by the MR in the sanction phase of the hearing and the documentary evidence filed in support of the [Applicant] by the MR". Though the Commissioner is not bound by the findings of the ERC, where he departs from them, he is required to give reasons (subsection 45.16(6) of the Act (repealed)).

[55] The Commissioner found it was "abundantly clear" that the Board relied on inadmissible evidence, and did not compartmentalize the evidence presented. Yet, in his decision on sanction,

the Commissioner was "not convinced [he] should ignore even the most relevant portions of the testimony of the Complainant and her friend" – thereby departing from the ERC's findings. Difference of opinion, without more, does not justify the Commissioner's consideration of testimony elicited for the issue of consent, and thus which fell outside the ambit of Allegation 1 and was not properly before the decision-makers. As the Court of Appeal found in *Gill*, above, the ultimate decision in RCMP disciplinary proceedings cannot be based on findings that exceed the boundaries of the allegation.

[56] Though the Respondent submits this evidence was uncontentious and was contained in the particulars, the Commissioner relied on evidence in his decision on sanction that was not relevant to a material issue and thus not properly before him to consider. This constitutes an error of law, and a breach of procedural fairness (Sopinka et al, *The Law of Evidence in Canada*, 4th ed, (Markham: LexisNexis, 2014) at 51). The proceedings before the Board were tainted by a number of procedural failures and the Record contains extensive inadmissible evidence. By picking and choosing which evidence was most relevant, and relying upon that in rendering a decision on sanction, the Commissioner acted in a procedurally unfair manner, which cannot be condoned by this Court.

[57] The very nature of the procedural breaches of the Board, and their apparent pervasiveness throughout the record upon which the Commissioner made his Decision are not easily remedied in the absence of a *de novo* hearing, and suggest the prejudicial effects of the errors below also permeated the appeal.

[58] With regards to the third factor, it is not disputed that the Commissioner's Decision will have serious consequences for the Applicant, both personally and professionally.

[59] With respect to the fourth factor, despite the Commissioner's ability to disregard the Board's determination and substitute his own on appeal, subsection 45.16(2)(c) of the Act cannot be read so as to override the Applicant's basic entitlement to fundamental guarantees of procedural fairness. This is particularly so where the decision is highly adjudicative, and is of great importance to the affected individual (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23 to 27).

[60] The fifth and final factor also suggests that the curative measures taken did not make the proceedings as a whole fair.

[61] A *de novo* appeal is one in which an entirely fresh record is developed and no regard at all is had to a prior decision (*Canada (Minister of Citizenship & Immigration) v Thanabalasingham*, 2004 FCA 4 at para 6).

[62] Notwithstanding the Commissioner's ability to give no deference to the Board's Decision, his Decision was not *de novo*. On appeal, the Commissioner must consider the record of the hearing before the Board, the statement of appeal and any written submissions (subsection 45.16(1)). The Commissioner must also consider the ERC Report, though he is not bound by their findings and recommendations.

[63] The record contained extensive inadmissible evidence, without which there was a limited factual foundation to determine the matter. This is not a situation where the Applicant benefitted from a *de novo* appeal which could have cured the errors below.

[64] I also note that the cases upon which the Respondent relies to argue that the proceedings as a whole were fair, despite procedural defects below, apply in the situation of a *de novo* review (*Alghaithy v University of Ottawa*, 2012 ONSC 142 at paras 38, 40, 44; *McBride*, above, at para 43; *Schmidt*, at paras 19, 20; *Khan v University of Ottawa*, [1997] OJ No 2650 (ONCA) at paras 40-45). Generally, in cases where the appeal was not *de novo*, courts have found the appellate review did not cure procedural unfairness at the initial level (*Taiga Works;* also see *Beauregard v Canada (Attorney General)*, 2015 FC 1383 at para 55).

[65] In the present circumstances, I find that the proceeding overall was procedurally unfair. The breaches of procedural fairness at the initial hearing were not *de minimis* and it cannot be said with certainty that those breaches did not impact the outcome of this case. I do not find the outcome is inevitable and “the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness” (*Mobil Oil*, at para 53).

[66] Accordingly, the Commissioner’s Decision to determine the appeal, despite the breaches of procedural fairness, was in error. Notwithstanding the significant passage of time in this matter, the basic principles of procedural fairness should be adhered to, particularly where the outcome of a decision has such a dramatic impact on the life and career of the Applicant.

[67] A newly constituted Board will have to come to a fresh determination after a fair hearing, and then the issue of sanction can be appropriately determined.

[68] Given my above finding on procedural fairness, there is no need to assess the reasonableness of the Commissioner's Decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;

2. The Decision of the Commissioner is set aside, and the Applicant's disciplinary case will be referred to a differently constituted Adjudication Board.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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