Federal Court Cour fédérale

Date: 20250210

Docket: T-662-24

Citation: 2025 FC 257

Ottawa, Ontario, February 10, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

EVAN WIOME

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Captain Evan Wiome has served as a member of the Canadian Armed Forces [CAF] for more than 18 years. Until November 29, 2023, he held the rank of Major and was the Officer Commanding A Squadron of the Royal Canadian Armoured Corps School.

[2] On June 8, 2023, Captain Wiome attended a mess dinner. Also present were candidates in a training course. Captain Wiome became voluntarily and severely intoxicated.

[3] After dinner Captain Wiome met with four subordinates, three of whom were in his direct chain of command. He proceeded to make comments of a sexualized and homophobic nature. When the wife of a subordinate arrived to drive the course candidates downtown, Captain Wiome entered the vehicle and made racist and sexualized comments about the wife, alluded to sex tourism in a foreign country, and recounted stories of a sexualized nature. He also suggested that he would withhold course reports, depending on the candidates' responses to his behaviour.

[4] On November 10, 2023, four charges were laid against Captain Wiome under the *Queen's Regulations and Orders* [QR&O]:

> Charge 1–QR&O 120.03 (i): Undermining Discipline, Efficiency, or Morale in that on or about 8 Jun 2023, at or about Oromocto, in the Province of New Brunswick made comments of a sexual nature;
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> Charge 2 -QR&O 120.03 (i): Undermining Discipline, Efficiency, or Morale in that on or about 8 Jun 2023, at or about Oromocto, in the Province of New Brunswick made racist comments directed towards foreigners;
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> Charge 3 - QR&O 120.03 (i): Undermining Discipline, Efficiency, or Morale in that on or about 8 Jun 2023, at or about Oromocto, in the Province of New Brunswick threatened to withhold course reports for an improper purpose; and
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> Charge 4 - QR&O 120.03 (i): Undermining Discipline, Efficiency, or Morale in that on or about 8 Jun 2023, at or about Oromocto, in the Province of New Brunswick urinated in public while in uniform.

[5] On November 29, 2023, a summary disciplinary hearing was conducted by Colonel M.J. Reekie, the "Officer Conducting the Summary Hearing" [OCSH]. After considering the testimony of eight witnesses, including Captain Wiome, the OCSH found that Charges 1 and 2 had been established on a balance of probabilities.

[6] With respect to Charge 3, the OCSH determined that Captain Wiome had made an honest and reasonable mistake of fact and found him not responsible. The OCSH decided not to proceed with Charge 4, because the witness statements contained insufficient detail.

[7] The OCSH concluded that Captain Wiome's conduct was inconsistent with that of a senior officer and contravened both the QR&O and the *Canadian Armed Forces Ethos: Trusted to Serve*. The OCSH imposed a reduction in rank, the most severe sanction available following a summary hearing.

[8] On January 16, 2024, Captain Wiome requested a review of the OCSH's decision on the ground that insufficient written reasons had been provided to justify the sanction. Captain Wiome also asserted that the reduction in his rank adversely affected his mental health, and infringed his right to security of the person guaranteed by s 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

[9] Captain Wiome did not contest the findings that Charges 1 and 2 had been established, but argued that the reduction of rank was excessive. He said that an appropriate and reasonable sanction should be limited to a reprimand, with or without a deprivation of pay for up to 14 days.

[10] On March 4, 2024, Brigadier General S.G. Graham, as the "Review Authority" [RA], concluded that the sanction imposed by the OCSH was reasonable. Captain Wiome seeks judicial review of the RA's decision.

[11] The RA did not comply with the legislative and policy framework that prescribed the nature of the review he was required to undertake. His decision was internally inconsistent, and lacked the requisite degree of justification, intelligibility and transparency. It was therefore unreasonable.

[12] The application for judicial review is allowed.

II. Legislative and Policy Framework

[13] The RA's decision was made within the framework prescribed by the *National Defence Act*, RSC, 1985, c N-5 [NDA], the QR&O, and the Military Justice at the Unit Level [MJUL] Policy.

A. *Service Infractions and Summary Hearings*

[14] The summary hearing is a new kind of administrative proceeding introduced by *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 [Bill C-77]. It is intended to address less serious breaches of military discipline (QR&O, Ch 120). There are three categories of service infractions: infractions in relation to property and information, infractions in relation to military service, and infractions in relation to drugs and alcohol.

[15] Captain Wiome was charged with infractions in relation to military service, which may be tried only by summary hearing (NDA, s 162.4).

[16] Summary hearings are conducted by the OCSH, who must be an officer at least one rank above the CAF member charged with the infraction. The standard of proof is the balance of probabilities. Hearings are conducted in accordance with the principles of procedural fairness under Canadian administrative law.

B. *Sanctions*

[17] The NDA prescribes the sanctions, from most to least severe, that may be imposed after a member of the CAF is found to have committed a service infraction:

Scale of sanctions	**Échelle des sanctions**
162.7 The following sanctions may be imposed in respect of a service infraction, and each is a sanction less than every sanction preceding it:	162.7 Les manquements d'ordre militaire sont passibles des sanctions ci-après, énumérées dans l'ordre décroissant de gravité :
(a) reduction in rank;	a) rétrogradation;
(b) severe reprimand;	b) blâme;
(c) reprimand;	c) réprimande;
(d) deprivation of pay, and of any allowance prescribed in regulations made by the Governor in Council, for not more than 18 days; and	d) privation des indemnités prévues par règlement du gouverneur en conseil et de la solde pendant au plus dix-huit jours;
(e) minor sanctions prescribed in regulations made by the Governor in Council.	e) sanctions mineures prévues par règlement du gouverneur en conseil.

[18] The imposition of sanctions is intended to achieve one or more of the objectives enumerated in s 162.9 of the NDA:

Objectives of sanctions	**Objectif**
162.9 The imposition of sanctions is intended to achieve one or more of the following objectives:	162.9 L'infliction de sanctions vise un ou plusieurs des objectifs suivants :
(a) to promote a habit of obedience to lawful commands and orders;	a) renforcer le devoir d'obéissance aux ordres légitimes;
(b) to maintain public trust in the Canadian Forces as a disciplined armed force;	b) maintenir la confiance du public dans les Forces canadiennes en tant que force armée disciplinée;
(c) to denounce indisciplined conduct;	

(d) to deter persons from committing service infractions;	c) dénoncer les comportements qui constituent de l'indiscipline;
(e) to assist in rehabilitating persons who have committed service infractions;	d) dissuader la commission de manquements d'ordre militaire;
(f) to promote a sense of responsibility in persons who have committed service infractions.	e) favoriser la réadaptation des personnes ayant commis des manquements d'ordre militaire;
	f) susciter le sens des responsabilités chez ces personnes.

[19] Sanctions must be proportionate to the gravity of the infraction and the degree of responsibility of the person who committed it (NDA, s 162.91). Sanctions must also conform to the following additional principles (NDA, s 162.92):

> (a) a sanction should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the commission of the service infraction or the person who committed it, and aggravating circumstances include evidence establishing that
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> > i. the person, in committing the service infraction, abused their rank or other position of trust or authority,
> >
> > ii. the service infraction was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor, or

iii. the commission of the service infraction resulted in harm to the conduct of a military operation or any military training;

(b) a sanction should be similar to sanctions imposed on persons for similar service infractions committed in similar circumstances; and

(c) a sanction should be the least severe sanction required to maintain the discipline, efficiency and morale of the Canadian Forces.

[20] A superior commander may impose any sanction, while a commanding offer may not impose a sanction more severe than a reprimand (NDA, ss 163.1(1) & (2)).

C. *Review*

[21] A person who has committed a service infraction may request a review by an RA, who is the next superior officer to the OCSH in matters of discipline. A review may also be undertaken by the RA upon his or her own initiative. In either case, the OCSH must be given the reasons underlying the review or review request, and may provide a response. The person found to have committed the infraction may then respond to the OSCH's submissions, and/or provide representations.

[22] The RA may review a finding of infraction or a sanction. A sanction may be reviewed on the ground that it is of much greater severity than the range of sanctions that would normally or

reasonably be imposed for the same infraction in similar circumstances. As a general rule, the RA should avoid disturbing a sanction unless it is clearly unreasonable.

[23] The RA must obtain legal advice prior to conducting the review (QR&O, Art 124.02(2)). In conducting the review, the RA must consider only:

(a) the reasons for initiating the review;

(b) the charge report and anything appended to the charge report in accordance with the MJUL Policy;

(c) the OCSH's decision and sanction; and

(d) any responses provided by the OCSH and the person found to have committed the service infraction.

III. Decision under Review

[24] On January 26, 2024, the OCSH provided submissions in response to Captain Wiome's stated reasons for requesting a review of the sanction. The OCSH emphasized that three of Captain Wiome's direct subordinates had expressed a loss of confidence in his ability to lead, and the only acceptable minimum sanction was therefore a reduction of rank. The OCSH also provided a copy of the handwritten notes he took during the summary hearing.

[25] Captain Wiome responded to the OCSH's submissions on February 2, 2024. He continued to maintain that the OCSH's written reasons were insufficient, and the response did not remedy the shortcomings in the initial decision. He asserted that there was no reasonable justification for the OCSH's imposition of the most severe sanction available.

[26] The RA held that the sanction imposed upon Captain Wiome should remain unchanged. The RA acknowledged that the OCSH's reasons lacked detail and were brief, but found they were nevertheless reasonable. The RA also conducted an independent assessment of the sanction imposed.

[27] The RA was not persuaded that Captain Wiome's security of the person was breached by the imposition of the reduction in rank. While expressing sympathy for Captain Wiome's mental health challenges, the RA found there is no constitutionally guaranteed right to a military rank, and its loss could not give rise to a breach of s 7 of the Charter.

[28] The RA therefore upheld the reduction in Captain Wiome's rank.

IV. Issue

[29] The sole issue raised by this application for judicial review is whether the RA's decision was reasonable.

V. New Evidence

[30] The Attorney General of Canada [AGC] has submitted an affidavit appending nine exhibits. Captain Wiome notes that none of the exhibits were before the RA when he made the decision under review. He takes particular exception to Exhibit I, the job description of Captain Wiome's previous position generated by Captain Daniel Jongsma-Burke on May 21, 2024.

[31] The AGC says that Exhibits H and I comprise background information that may assist the Court in understanding the issues raised in this proceeding. Exhibit H is an email message from Captain Jongsma-Burke dated February 23, 2024 informing Captain Wiome that a further extension of time was required for the RA to render his decision.

[32] The record before a court on judicial review is usually restricted to the evidentiary record that was before the administrative decision maker. However, there are exceptions, for example, evidence that provides general background; addresses issues of procedural fairness; or highlights the complete absence of evidence before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras 19–20; *Shhadi v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 1580, at para 43; *Bolduc v Canada (Attorney General)*, 2023 FC 1497, at para 48. This list of exceptions is not exhaustive.

[33] Exhibits A and B, which contain a legislative summary of Bill C-77 and a publication presenting an overview of Bill C-77, fall within the first exception. These documents are

intended to clarify the legislative background of these proceedings, including recent changes to the military justice system.

[34] Exhibits C to G consist of Canadian Forces General Messages regarding changes to the military justice system, guidance on professional conduct, and the CAF's response to sexual misconduct. This information may be accepted as general background information, although it is of tenuous relevance to the issues raised in this proceeding.

[35] Exhibit H provides background information regarding the procedure leading up to the RA's decision, and potentially falls within the recognized exception of information that pertains to procedural fairness. The document is admissible, but again is of tenuous relevance to the issues raised in this proceeding.

[36] Exhibit I, the job description of Captain Wiome's previous position, is not admissible. Its provenance is unclear, and it appears to be offered by the AGC only to buttress the decision of the RA.

VI. Analysis

[37] The RA's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[38] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[39] In order to assess the reasonableness of the RA's decision, it is first necessary to determine the nature of the review undertaken by the RA.

[40] Paragraph 17 of the RA's decision reads as follows:

> The Supreme Court case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, clarifies that reasonableness is the applicable standard of review of administrative decisions. Based on this case, I find the OCSH's decision to be reasonable despite the brevity of his reasons provided to you.

[41] Notwithstanding the RA's reference to *Vavilov*, it is readily apparent that he did not engage in reasonableness review of the OCSH's decision. In addition to noting the brevity of the reasons provided by the OCSH, the RA observed at paragraph 14 of his decision: "While the OCSH did not provide details for his chain of reasoning, it nevertheless indicates that he had turned his mind to a detailed analysis" of Captain Wiome's behaviour. A decision maker's failure to articulate a coherent chain of reasoning is ordinarily fatal to an administrative decision that is subject to review against the standard of reasonableness (*Vavilov* at para 103).

[42] In paragraph 18 of his decision, the RA wrote: "the record as a whole, including but not limited to the evidence before the OCSH […] and other applicable orders and policy are relevant

in the review of severity of sanctions". As discussed above, evidence that was not before the decision maker, and that is directed towards the merits of the decision, is generally inadmissible when conducting reasonableness review (*Access Copyright* at para 19).

[43] The OCSH identified three mitigating factors that affected his choice of sanction. The RA confirmed these mitigating factors, but then identified aggravating factors that were never mentioned by the OCSH, specifically Captain Wiome's position as a senior officer, the nature of the impugned conduct, and his excessive consumption of alcohol.

[44] The AGC says that the RA mistakenly characterized his review as constrained by *Vavilov*. Instead, the AGC argues that it was open to the RA to conduct an independent analysis and uphold the OCSH's decision for reasons that differed from those provided previously.

[45] The AGC relies on the following provisions of the NDA, all of which suggest that the RA does not engage in reasonableness review as contemplated by *Vavilov*:

(a) the RA may act on its own initiative or on application of the person found to have committed the service infraction (NDA, s 163.6(2));

(b) the RA may substitute a new finding for any finding invalidly made by the OCSH if it appears to the RA that the OCSH was satisfied of the facts that establish the service infraction specified or involved in the new finding (NDA, s 163.8(1));

(c) if a new finding is substituted, and the sanction previously imposed is excessive or unduly severe, the RA may substitute a new sanction that it considers appropriate (NDA, s 163.8(2));

(d) the RA may substitute for any invalid sanction imposed by the OCSH any new sanction or sanctions that it considers appropriate (NDA, s 163.9(1)); and

(e) the RA may commute, mitigate or remit any or all of the sanctions imposed by the OCSH (NDA, s 163.91(1)).

[46] Chapter 4 of the MJUL Policy states that the function of the RA is to "review the results" of the summary hearing when the person charged has been found to have committed a service infraction. Consistent with the NDA, the MJUL Policy confirms in s 4.3.2 that the RA is empowered to (a) leave a finding of the OCSH as it is and make no change; (b) quash the finding; or (c) quash the finding and substitute a new finding.

[47] The MJUL Policy states in ss 4.4.7 and 4.4.8:

> **Responses and representations**
>
> 4.4.7 The officer who conducted the SH may provide any response they may have concerning the reasons for initiating the review. Any response must be provided to both the RA and to the person found to have committed a service infraction within 7 days of receiving the reasons for initiating the review.
>
> 4.4.8 The person found to have committed a service infraction may respond to the response of the officer who conducted the SH, as described at para 4.3.11, and/or provide representations. Any response and/or representations must be provided to the RA within

> 7 days of receiving the response of the officer who conducted the SH, or within 14 days of receiving the reasons for initiating the review should no response be provided.

[48] The MJUL Policy also permits the RA to consider new information, but only if it is relevant and was unknown at the time of the summary hearing (ss 4.5.1 & 4.5.2):

> **New information**
>
> 4.5.1 When an application for review contains information that was unknown at the time of the SH, the RA must determine whether the information is relevant. If the information is relevant, the RA must assess its impact upon the finding(s) in order to determine whether one or more findings must be quashed as a result. Once the review has been completed, the RA must explain in their decision any impact the new information has had on their decision, including any conclusion that the new information was not relevant and therefore had no impact.
>
> 4.5.2 When the RA determines that new information is relevant, the RA must then determine whether that information is relevant to the interests of any person in relation to whom a service infraction is found to have been committed or who has suffered physical or emotional harm, property damage or economic loss as a result of a service infraction. If the information is deemed relevant to them, the RA must give them a reasonable opportunity to provide representations, and in accordance with the principles of procedural fairness, the RA must also give the person found to have committed a service infraction a reasonable opportunity to provide further representations in response. If the new information is not relevant to the interests of any such person, the RA must follow the process for a review requested by the person found to have committed a service infraction as set out at paras 4.3.2 - 4.3.8 and 4.5.1.

[49] Considering the legislative and policy framework as a whole, the review undertaken by the RA is not the deferential standard of reasonableness review described in *Vavilov*. Instead, it is a hybrid proceeding that combines elements of an appeal of the OCSH's decision and a

hearing *de novo*. The RA is largely constrained by the factual record before the OCSH, but has a limited discretion to accept new evidence, and may receive submissions and representations from the OCSH and the person found to have committed the service infraction. The RA is empowered to make new findings of fact, provided they are supported by the evidence before the OCSH or by new and relevant information that was unknown at the time of the summary hearing, and may quash or vary any sanction imposed by the OCSH.

[50] In this case, the RA stated that he was applying *Vavilov* (at para 17), but then augmented the OCSH's reasons with a different analysis. The RA observed (at para 18) that the record as a whole, "including but not limited to the evidence before the OCSH", was relevant to his review of the severity of the sanction, but it is unclear what new evidence he considered or why he considered this to be admissible.

[51] The RA's analysis departed significantly from the OCSH's written reasons and supplemental submissions. While the OCSH found that Captain Wiome had not demonstrated remorse and maturity, the RA accepted that Captain Wiome had repeatedly acknowledged his wrongdoing. Confusingly, the RA considered this to be an aggravating factor (at para 18(c)).

[52] The RA's decision did not comply with the legislative and policy framework that prescribed the nature of the review he was required to undertake. The decision was internally inconsistent, and lacked the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100). It was therefore unreasonable.

VII. Conclusion

[53] The application for judicial review is allowed, and the matter is remitted to a different RA for redetermination.

[54] By agreement of the parties, costs are awarded to Captain Wiome in the all-inclusive amount of $4,500.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to a different RA for redetermination.

2. Costs are awarded to Captain Wiome in the all-inclusive amount of $4,500.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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