Date: 20100614

Docket: T-2231-05

Citation: 2010 FC 586

Ottawa, Ontario, June 14, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MANFRED SCHAMBORZKI

Applicant

and

ATTORNEY GENERAL OF CANADA
AS REPRESENTED BY THE
ROYAL CANADIAN MOUNTED POLICE

Respondent

AMENDED REASONS FOR JUDGMENT
AND JUDGMENT PURSUANT TO RULE 397(2)
OF THE *FEDERAL COURTS RULES*

O'KEEFE J.

[1] The applicant seeks judicial review of a decision of an adjudicator designated as such by the Commissioner of the Royal Canadian Mounted Police (RCMP), pursuant to and acting under the authority of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, as amended, (the

RCMP Act) and related *Dispute Resolution Process for Promotions and Job Requirements*, SOR/2000-141 (Promotions CSO).

[2] The decision by Adjudicator Guertin was the result of an initial request for intervention (an RFI) brought under the Promotions CSO by the applicant. This initial RFI, dated June 18, 2003, alleged there was an error in the hiring process for a promotional opportunity and that the selection committee struck for considering candidates for the opportunity did not choose the applicant as a result. The applicant received a favourable determination for this initial RFI, but was not satisfied with the implementation of the decision and brought a second RFI. In his decision dated November 24, 2005, Adjudicator Guertin determined that he lacked jurisdiction to deal with the RFI.

[3] The applicant initiated this judicial review application in 2005, but the matter was stayed until the applicant had exhausted any remedies available to him under the RCMP Act. The applicant grieved and in February 2006, an adjudicator denied the applicant's grievance. His subsequent appeal to a level II adjudicator was also denied.

[4] The applicant requests an order setting aside the decision of Adjudicator Guertin and referring the matter back with a direction that the RFI submitted by the applicant on August 3, 2004 and all matters relating to that RFI, including any preliminary or collateral matters, be heard and determined. The applicant also seeks his costs in this matter.

Background

[5] The applicant is a long serving member of the RCMP, having joined its ranks in 1977. In that time period, the applicant has been stationed at various locations in Saskatchewan, including seven years in the Regina commercial crime section (CCS).

[6] In February 2003, the applicant applied to be promoted to one of two positions with the Regina CCS. As a result of procedures followed, a qualifying list of candidates was created and subsequently, six individuals were short-listed. Then on May 22, 2003, two candidates were chosen. The applicant had not been short-listed.

[7] The applicant filed an RFI (RFI No. 1) alleging an error in the process in that the experience requirements for the positions outlined in CCS duty code 612 were incorrectly interpreted and misapplied. The position of the respondent was provided by Sergeant Whattam who, by way of a memorandum, provided rationale supporting the selection of the two successful candidates.

[8] On March 29, 2004, Adjudicator McCloskey rendered his decision in favour of the applicant on the ground that the respondent had incorrectly applied the job requirement of experience investigating major criminal offences. He did not offer a better determination for the term major, but stated:

> In a follow-up request to the Respondent by myself, I specifically asked if he had requested any supporting documentation by the [job] applicants to describe what major investigations they had lead and the Respondent advised me that he had not done this.

> Although I strongly believe that the term *Major* needs to be properly defined once and for all, had the Respondent obtained supporting information to assist him in making his final selections, I would have had a more difficult time ruling in favour of the Complainant.

[9] Under the heading Recommendations, Adjudicator McCloskey recommended that a new selection committee compare the performance report for promotion (PRP) of the applicant against the PRPs of the two successful candidates and that if the applicant's PRP was found to exceed either of the two successful candidates' PRPs, the applicant was entitled to redress.

[10] On July 29, 2004, a new selection committee convened and compared the PRPs and determined that the applicant's PRP was not as strong as those of the two successful candidates. In response, the applicant submitted another RFI (RFI No. 2) on August 3, 2004, alleging that one of the successful candidates did not have a sufficient combination of education and experience to be considered in light of Adjudicator McCloskey's decision. It was the applicant's contention that the candidate was not qualified for the position and should not have been in the running.

[11] Sergeant Whattam, for the respondent, submitted that Adjudicator McCloskey's recommendations had been followed diligently. He submitted further that RFI No. 2 flowed directly from RFI No. 1 for which an adjudicator had already ruled in the applicant's favour. Since the decision of an adjudicator that disposes of an RFI is not subject to further review, it was Sergeant Whattam's position that the applicant lacked standing.

[12] On January 4, 2005, Adjudicator Guertin requested further information from the applicant, specifically that the applicant provide clarification regarding the date that he became aware of the decision that was the subject of RFI No. 2. The applicant responded that the relevant date was July 30, 2004, the day he was informed that he was not ranked higher than the two successful candidates by the newly convened selection committee.

[13] In his decision dated November 11, 2005, Adjudicator Guertin dismissed RFI No. 2 and reasoned as follows:

> The original RFI presented to Supt. McCloskey dealt with the same promotion in which this further request for intervention is being presented. The decision of Supt. McCloskey was in favour of the complainant. I do not have authority to review this matter further. In that respect, AM II.30.25 states "the decision of the Adjudicator that disposes of a request for intervention is not subject to appeal or further review".
>
> A number of recommendations not orders were provided by Supt. McCloskey to attempt to redress this situation. These standing orders were never intended to provide a process for members of the Force to further grieve, redress or recommendation [sic] which have been acted upon. Therefore, AM II.30.9 was never met in this request for intervention.

[14] Adjudicator Guertin also determined that RFI No. 2 ought to be dismissed because it was not filed on time.

[15] On December 19, 2005, less than 30 days after the above decision had been received, the applicant commenced this application for judicial review. Then, upon receiving advice from a grievance analyst, the applicant proceeded with a grievance under Part III of the RCMP Act and

obtained an order from this Court staying these proceedings until he had exhausted any remedies available to him under the RCMP Act.

[16] On February 17, 2006, Adjudicator Scott dismissed the applicant's grievance because it had not been filed in a timely fashion. He also concluded that the respondent had implemented the recommendation of Adjudicator McCloskey. Regarding the issue of timeliness, it appeared to be important for Adjudicator Scott that the applicant had been informed on June 1, 2004 that his PRP would be compared to that of the two successful candidates by the new selection committee and although the applicant did not agree with the format, he chose to take his chances with the new selection committee.

[17] The applicant appealed to level II adjudication. The matter was determined by Adjudicator Tranquilla who defined the issue as a grievance of Sergeant Whattam's failure to implement redress directed by RFI No. 1. Adjudicator Tranquilla overturned the decision of Adjudicator Scott on the issue of timeliness and instead held that the grievance failed on the issue of standing. Adjudicator Tranquilla concluded that the applicant was attempting to challenge the decision already rendered by RFI Nos. 1 & 2 and that the RFIs can only be challenged in Federal Court.

Issues

[18] The issues are as follows:

1. Is this application for judicial review moot?

2. If the application for judicial review is not moot, is this application nonetheless barred by the doctrine of issue estoppel?

3. What is the standard of review?

4. Was Adjudicator Guertin's decision unlawful?

Applicant's Written Submissions

[19] The applicant says the appropriate standard of review is correctness since the matter related directly to the adjudicator's jurisdiction over the dispute. RFI No. 2 required Adjudicator Guertin to consider whether the successful candidate was qualified for the selection process, yet he did not address the merits of the dispute, citing his lack of jurisdiction. He was apparently moved by a desire to avoid conflict with the decision of Adjudicator McCloskey.

[20] Pursuant to section 8 of the Promotions CSO, a member is entitled to submit an RFI in relation to any decision, act or omission made in the course of a selection process. RFI No. 2 alleged that one of the candidates should not have been able to stand in competition, thus the subject of RFI No. 2 was a selection process. Adjudicator Guertin's decision to decline jurisdiction was incorrect.

[21] Adjudicator McCloskey was required by paragraph 22(1)(b) of the Promotions CSO to order the corrective action he did. Therefore, Adjudicator Guertin misconstrued Adjudicator McCloskey's decision when he held that these were recommendations not orders. Since Adjudicator McCloskey was prevented from ordering substantive relief by section 23, he ordered a special

process. If Adjudicator Guertin's decision with respect to RFI No. 2 is correct, it would mean that any remedial action ordered was not part of a selection process. This would run counter to the purpose of the limiting provision in section 23, which is to reserve to the selection committee the ultimate authority to award promotions. In addition, says the applicant, it would leave aggrieved members without a remedy any time management misapplied the corrective action ordered by an adjudicator.

[22] The applicant also says that in order for Adjudicator Guertin to consider RFI No. 2 on the merits, he would have to inquire into whether both successful candidates met the requirements.

[23] Finally, the applicant says that Adjudicator Guertin misconstrued the privative clause in section 25 to insulate Adjudicator McCloskey's decision from further review.

[24] On the timeliness issue, the applicant submits that the basis on which Adjudicator Guertin found that the applicant was out of time is unclear. There are two possible bases. One is that he viewed RFI No. 2 as an attempt by the applicant to request further intervention in relation to RFI No. 1 and was therefore out of time. This does not work. For the reasons stated above, it is clear that RFI No. 2 was a new RFI. The other possible explanation is that Adjudicator Guertin deemed the applicant to have known of the decision, act or omission prior to the July 30th decision of the selection committee. This reasoning fails as well. While the applicant was informed of the process that would be employed by the new selection committee, he did not know with certainty whether Sergeant Whattam had failed to implement the recommendation of Adjudicator McCloskey with

respect to the criterion of major. Further, it was yet to be determined whether an ultimate error would occur.

Respondent's Written Submissions

[25] The respondent submits that the appropriate standard of review is reasonableness. The question here is not, in the parlance of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL), "a true jurisdictional question". Adjudicator Guertin was not declining to exercise the authority conferred upon him by the RCMP Act and Promotions CSO, but was in fact exercising the authority conveyed upon him by his legislation not to hear a matter in appropriate circumstances. Interpretation and application of the privative clause in section 21 or the limitation period in section 8 is not a jurisdictional issue but a discretionary decision by an adjudicator. Interpretations of enabling legislation and questions of discretion are to be reviewed on the reasonableness standard. Further, jurisprudence of this Court suggests that decisions by an adjudicator under the Promotions CSO are to be afforded a great deal of deference.

[26] Fifteen days prior to bringing this application for judicial review, the applicant brought a grievance under the RCMP Act grieving essentially the same issue that is before this Court, namely, Sergeant Whattam's failure to implement redress directed by Adjudicator McCloskey. The relief requested by the applicant is to quash the decision of Adjudicator Guertin and have the issue decided anew in a further adjudication but this has, in effect, already occurred through the level I and level II adjudication decisions. Accordingly, a decision by this Court will not have the effect of

resolving a controversy affecting the rights of parties. The matter is thus moot and should not be considered says the respondent. Furthermore, a decision by this Court would have no practical effect on the rights of the parties.

[27] The respondent says that because of the level I and level II adjudication decisions, the applicant is estopped from proceeding. All the elements of issue estoppel are present: the same question is being decided both here and at the level I and II adjudications. Those decisions were final and binding and those proceedings and this proceeding are between the same parties.

[28] The respondent's primary submission on the merits of the application is that Adjudicator Guertin was correct to determine that the issue before him had already been determined by Adjudicator McCloskey. Therefore, Adjudicator Guertin was correct to apply section 25 of the Promotions CSO and refuse to hear the RFI. RFI No. 1 sought to challenge a promotional process and alleged that the selection committee misunderstood or misapplied the selection criteria.The decision of Adjudicator McCloskey found in favour of the applicant and ordered corrective action. In particular, Adjudicator McCloskey ordered the new selection committee to compare the applicant's PRP against the PRPs of the two successful candidates. This was done. Adjudicator Guertin realized that RFI No. 2 was again in essence alleging that the selection committee misunderstood or misapplied the selection criteria and in reality was not challenging the manner in which the corrective action from RFI No. 1 had been implemented. RFI No. 2 asked Adjudicator Guertin to inquire into whether the corrective action ordered by Adjudicator McCloskey had been implemented. Such an inquiry would not require Adjudicator Guertin to inquire whether the

applicants qualified in the first place. Had Adjudicator McCloskey intended the new selection committee to determine if the applicant were qualified, he would have recommended such action.

[29] Finally, the basis on which Adjudicator Guertin determined that RFI No. 2 had been filed late was clear. He asked the applicant to clarify the date on which he first became aware of the decision, act or omission giving rise to the request. He also asked for the RFI No. 1 materials. It is therefore clear that Adjudicator Guertin considered FRI No. 2 to have been filed late because it was the applicant's attempt to have the original promotion process reviewed again and was therefore well outside the 30 day cut off. This conclusion went hand in hand with his conclusion that he should decline to hear the matter under section 25.

Analysis and Decision

[30] Due to the complexity of the events, the long history of the dispute and the multiple lower level decisions on this matter (four in all), the Court is confronted with a difficult task when determining how to approach this case. The respondent raises several procedural issues, namely, that the application for judicial review is now moot and that the applicant is estopped from proceeding with this application by operation of the doctrine of issue estoppel. The respondent suggests that either issue, if found valid, would operate to dismiss the application and prevent this Court from undertaking a substantive review of Adjudicator Guertin's decision. In my view, that would be a denial of justice.

[31] The respondent's arguments are also broadly based on the implicit assertion that the applicant has sought to abuse the processes, first, by seeking to have two separate reviews of the original selection process and second, by initiating this application while simultaneously grieving to a higher level within the RCMP process. I will deal with this first.

[32] It is regrettable that several years have passed since the decision of Adjudicator Guertin. However, after examining the evidence, it seems that the applicant's actions, both before and after his decision are quite explainable and defendable. First, I believe that despite what Adjudicator McCloskey expressed, his decision was not really in the applicant's favour. At least the recommendations were not in the applicant's favour. Perhaps the applicant should have sought judicial review of Adjudicator McCloskey's decision. However, it is understandable that the applicant did not take this step. After all, the decision claimed to be in his favour. Second, the applicant was justified in initiating this application while simultaneously grieving. He was getting mixed messages about whether he could grieve or not and was prudent to try both options. In any event, the level II adjudication said that this Court was the proper place to review Adjudicator Guertin's decision.

[33] **Issue 1**

Is this application for judicial review moot?

Even if a proceeding has been rendered moot, a court may nonetheless exercise its jurisdiction to decide on the merits of the case despite the absence of a live controversy (see *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14). Because in my

view, the application is not moot, I need not determine whether or not to exercise the discretion to hear the application.

[34] In *Borowski* above, the Supreme Court of Canada described mootness in the following terms:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. . . .

[35] The live controversy test will be met if the decision of the Court will have some practical effect on the rights of the parties. I believe the test is met here because this Court's judgment would have a significant practical effect on the rights of the parties.

[36] Courts have declined to hear appeals where an enactment or by-law being challenged has been struck down or repealed before the hearing (see *Borowski* above, *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.)). That is not the case here.

[37] The respondent asserts that the application is purely academic because the remedy requested by the applicant, that the decision be quashed and the matter be referred back for further adjudication, has already been obtained by the applicant in the form of the level I and level II adjudications. I disagree.

[38] Here, the applicant requests *inter alia*:

> An Order referring the matter back to Adjudicator Guertin, or to another Adjudicator designated by the Commissioner, with a direction that the request for intervention submitted by the Applicant on August 3, 2004 and all matters relating to the request for intervention including any preliminary or collateral matters, be heard and determined; . . .

[39] It would also be well within the powers of this Court to send the matter back for determination in accordance with any such directions this court considers appropriate (see *Federal Courts Act*, R.S.C. 1985, c. F-7, s 18.1(3)(b)). Such a remedy would clearly give the applicant something more than he had when he took his dispute to the level I grievance process.

[40] In addition, it is not clear whether the level I Adjudicator Scott had proper jurisdiction. In the determination of level II Adjudicator Tranquilla, the matter was not properly before Adjudicator Scott due to its origins as a promotions dispute and should have been directed to this Court instead. He stated:

> The Level I Adjudicator found that he had jurisdiction to review this submission in that it had been properly submitted under Part III of the RCMP Act. With respect, I do not agree with this finding. In my view, the matter under review clearly concerns a promotional process issue. The Grievor is attempting to challenge, using Part III of the

> RCMP Act, the decision already rendered by the Level I Adjudicator under the DRPP process. The DRPP Level I decision can only be challenged in Federal Court.

[41] Thus, the respondent cannot claim that the level I grievance heard by Adjudicator Scott was equivalent to the remedy now sought by the applicant, because it was not a level I decision under the DRPP process.

[42] In *Borowski* above, it was important for Mr. Justice Sopinka, in determining that the issue was moot that, "None of the relief claimed in the statement of claim is relevant" (at paragraph 26). Here, it is clear that the relief which the applicant could obtain if successful, is relevant, is significantly different from what the applicant has already obtained and would significantly affect the rights of the parties.

[43] **Issue 2**

If the application for judicial review is not moot, is this application nonetheless barred by the doctrine of issue estoppel?

I would also dismiss the respondent's suggestion that the applicant is estopped from bringing this application.

[44] First, I note that it is odd that a subsequent administrative decision is being used to estop judicial review of the underlying decision. The very nature of judicial review contemplates the same parties to a final and binding administrative decision, bringing the same question that was before the

administrative decision maker to the Court for review and scrutiny. Yet, the judicial review of a decision is fundamentally different from the process in most administrative appeals because the focus of judicial review is the decision itself, not the underlying merits. The concepts of standard of review and deference, as well as scrutiny of the decision making process significantly skew the degree to which one can say whether the same question is being decided for the purposes of an issue estoppel analysis.

[45] The differences in the approach reviewing courts take to the matters that were before the administrative decision maker only serve to highlight the difficulty inherent in the respondent's attempt to frame the two types of decisions as fitting the profile of issue estoppel.

[46] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, 201 D.L.R. (4th) 193, the Supreme Court affirmed the three preconditions to the operation of issue estoppel, as set out by Mr. Justice Dickson in *Angle v. Canada (Minister of National Revenue – M.N.R.)*, [1975] 2 S.C.R. 248, as follows:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. . . .
>
> (*Danyluk* above, at paragraph 25)

[47] Typically, a judicial review application will only be allowed to proceed after the final or highest level administrative decision on the matter. To that extent, this case presents an anomaly, though the parties did agree to a stay of the judicial review proceedings until the applicant had exhausted any remedies available to him under the RCMP Act. Nevertheless, the respondent submits that when the level I and II grievance decisions and the current application for judicial review are compared, all three of the *Danyluk* conditions are met.

[48] I cannot accept the respondent's proposal because the first *Danyluk* condition is not met. Due to the fundamental differences between judicial review and further administrative appeals noted above, it is doubtful that such processes will look at the same question. More importantly, the level I and level II decisions do not bar this judicial review because they did not make any final and binding decision on the subject matter that was before Adjudicator Guertin and further, because the final level II decision held that the applicant lacked standing to bring his dispute before that process.

[49] It bears noting that the applicant was justified in commencing the judicial review when he did because as it turned out, the level I and level II grievance processes should not have been available to him. The decision of Adjudicator Guertin indicated that either avenue was open, but the final determination of level II adjudicator Tranquilla was that the only appropriate avenue for recourse after the decision of Adjudicator Guertin was this Court. To the extent that that opinion overturned the level I decision has not been challenged by either party, Adjudicator Tranquilla's determination that the applicant lacked standing, in effect renders both the level I and II decisions as nullities. Thus, the result of the level I and II decisions was simply that the applicant was put back in

the same position he was in after the decision of Adjudicator Guertin. Though both Adjudicators Scott and Tranquilla commented on the merits of the applicant's claim, neither gave a final answer on it because they based their decisions on primary matters; timeliness and standing respectively.

[50] **Issue 3**

What is the standard of review?

In *Dunsmuir* above, the Supreme Court directed that a complete standard of review analysis will not be required where existing jurisprudence has already determined the appropriate standard of review. To that end, the existing jurisprudence would suggest that decisions by an arbitrator under the Promotions CSO are to be shown deference under the standard of reasonableness (see *Sansfaçon v. Canada (Attorney General)*, 2008 FC 110, [2008] F.C.J. No. 124 at paragraphs 14 and 15 and *Smith v. Canada (Attorney General)*, 2009 FC 162, [2009] F.C.J. No. 205 at paragraphs 13 and 14).

[51] The only question left to determine is whether the decision of Adjudicator Guertin in the present case was a determination of a true question of jurisdiction or *vires* and therefore must have been answered correctly (see *Dunsmuir* above, at paragraph 59).

[52] Adjudicator Guertin declined to consider RFI No. 2 on it merits. In this regard, his reasons for his decision read:

> The original RFI presented to Supt. McCloskey dealt with the same promotion in which this further request for intervention is being presented. The decision of Supt. McCloskey was in favour of the complainant. I do not have authority to review this matter further.

[53] The relevant provision in the Promotions CSO relied on by Adjudicator Guertin reads as follows:

> AM II.30.25. The decision of the Adjudicator that disposes of a request for intervention is not subject to appeal or further review.

[54] The mere fact that jurisdiction is declined does not render the question a true question of jurisdiction or *vires*. Though it is true that Adjudicator Guertin declined to hear the matter citing section 25 which limited his jurisdiction, I cannot agree that the question for judicial review was the question of his jurisdiction. In my opinion, the true question before Adjudicator Guertin was not the outer limits of his jurisdiction under section 25, but whether that section had been triggered at all. This was a determination by Adjudicator Guertin that, "The original RFI presented to Supt. McCloskey dealt with the same promotion . . .". Yet, the proper interpretation of section 25 does not appear to be at issue. That leaves me to surmise that it is only his determination of mixed fact and law that lies in dispute and not a jurisdictional matter at all.

[55] Since I have determined that it is not a question of pure jurisdiction, the reasonableness standard shall apply.

[56] **Issue 4**

Was Adjudicator Guertin's decision reasonable?

After reviewing the matter and hearing the arguments made before me, I have come to the conclusion that Adjudicator Guertin's disposition of RFI No. 2 was unreasonable.

[57] Adjudicator Guertin's determination that RFI No. 2 was not filed on time was tied to his determination that he did not have authority to review the matter pursuant to section 25. Both of these determinations were based on his determination that RFI No. 2 was an attempt by the applicant to have the original promotion process that was the subject of RFI No. 1 reviewed again. This allowed Adjudicator Guertin to avoid dealing with the substance of the applicant's complaint: that one of the two successful candidates should not have qualified and that Adjudicator McCloskey's decision was not followed.

[58] According to section 25, the decision of the adjudicator that disposes of an RFI is not to be subject to appeal or further review. In other words, if a member disputes a promotional process and is unhappy with the resulting adjudicator's decision, he cannot take his dispute to another adjudicator for a second opinion.

[59] That is clearly not what happened in the present case. The original selection committee determined which applicants were qualified and created a short list. The applicant brought RFI No. 1 seeking to challenge the promotional process alleging that the selection committee improperly applied the selection criteria for determining who would qualify for the position. The decision of Adjudicator McCloskey focused on the improper understanding of the term major in regards to the selection criteria. He then recommended the following corrective action:

> An adjudicator does not have the authority to order any outcome other than direct that the process in question be returned to the point where an error, act or omission occurred and for the process to proceed once again from that point onward.

> For this reason, I cannot support the Complainant's request as found in Part "D" of his form 3772 dated 2003-06-16, specifically, that he is promoted. What I can recommend is that a Selection Committee be struck […] and that the Committee compare the PRP of the Complaint [*sic*] against the PRP's of the two successful candidates in this case. If the Complainant's PRP is found to exceed that of either successful candidate, then I suggest that the Complainant would be entitled to redress.
>
> Additionally, I strongly urge the appropriate policy reviewers to visit this matter immediately and take steps to define what is truly meant by the word *Major* as found in the CMM. It is not fair to the Staffing & Personnel employees to be left with the job of defining these matters on their own. Even if you do not agree with the position I have taken on this matter, the fact that Sec. 462.3 CC no longer provides any offence examples is in itself reason enough to revisit this issue. Once the matter of describing what is meant by the term *Major* has been dealt with, I am confident that the issue relating to giving appropriate credit for previous experience in CCS for the subordinate/supervisor and investigator levels will also be addressed.

[60] The respondent asserts that it followed the recommendations. It convened a new selection committee. In RFI No. 2, the applicant argued before Adjudicator Guertin that that new selection committee failed to implement the decision and recommendations of Adjudicator McCloskey properly. Clearly, the applicant was not seeking to appeal or overrule Adjudicator McCloskey's decision, yet Adjudicator Guertin's decision implies that he is doing just that. This determination is unintelligible.

[61] The crux of the matter is that unfortunately, Adjudicator McCloskey's recommendation to compare PRPs gave no effect to and did not flow logically from his decision. Simply comparing PRPs would not resolve the issue of whether any of the two successful candidates had been wrongfully qualified, due to a misapplication of the word major. It appears that the applicant held

out hope that a new qualification process would occur in accordance with Adjudicator McCloskey's decision, but that did not happen. The respondent followed a very narrow reading of the recommendation and gave no effect to the decision. In my view, it is clear that Adjudicator McCloskey's decision was not followed.

[62] Importantly however, the recommended course of action did precipitate a new selection process, for which an affected employee could request an RFI. The applicant initiated such an RFI and since the RFI was not in violation of section 25, Adjudicator Guertin was required to make a determination on its merits.

[63] As a result of my conclusions, the application for judicial review must be allowed with costs to the applicant and the matter is referred to another adjudicator for determination. This amendment with respect to costs is made due to the fact that I omitted my finding on costs in the original reasons for judgment and judgment.

JUDGMENT

[64] **IT IS ORDERED that** the application for judicial review is allowed with costs to the applicant and the matter is referred to another adjudicator for determination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10

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 (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).	(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 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).

Dispute Resolution Process for Promotions and Job Requirements, SOR/2000-141

8.(1) A member who is aggrieved by any decision, act or omission made in the course of a selection process for the member's promotion may submit a request for the intervention of an adjudicator, to the office for the coordination of grievances in the region where the member is posted, within 30 days after the day on which the member knew or ought to have known of the decision, act or omission.	8.(1) Le membre à qui une décision, un acte ou une omission lié au processus de sélection en vue de sa promotion cause un préjudice peut présenter une demande d'intervention d'un arbitre au bureau de coordination des griefs dans sa région d'affectation, dans les trente jours suivant celui où le membre a connu ou aurait dû connaître la décision, l'acte ou l'omission.
. . .	. . .
21.(1) The adjudicator shall decide all matters relating to a request for intervention, including any preliminary or collateral matters.	21.(1) L'arbitre tranche toutes les questions relatives à la demande d'intervention, y compris toute question préliminaire ou incidente.
(2) The adjudicator shall reject any request for intervention that does not conform with the requirements of section 9.	(2) L'arbitre rejette toute demande qui n'est pas conforme à l'article 9.
22.(1) If a request for intervention is not rejected under subsection 21(2), the adjudicator	22.(1) Si la demande d'intervention n'est pas rejetée aux termes du paragraphe 21(2), l'arbitre :
(a) shall dismiss the request for intervention; or	a) soit, rejette la demande;
(b) shall, if the adjudicator determines that a decision, act or omission is erroneous and has prejudiced the complainant, order appropriate corrective	b) soit, s'il conclut que la décision, l'acte ou l'omission donnant lieu au différend est erroné et que le demandeur en a subi un préjudice, ordonne la

action.

prise des mesures correctives indiquées.

(2) In the case of a request for intervention under subsection 8(1), the only corrective action that may be awarded by the adjudicator is an order that the erroneous decision, act or omission be corrected.

(2) Dans le cas d'une demande présentée aux termes du paragraphe 8(1), la seule mesure corrective que l'arbitre peut ordonner est la correction de la décision, de l'acte ou de l'omission erroné.

(3) In the case of a request for intervention under subsection 8(2), the only corrective action that may be awarded by the adjudicator is an order requiring the addition or deletion of one or more job requirements for the position and requiring publication of the revised job requirements.

(3) Dans le cas de la demande présentée aux termes du paragraphe 8(2), les seules mesures correctives que l'arbitre peut ordonner sont l'ajout ou le retrait d'une ou de plusieurs exigences de poste, et la publication des exigences modifiées.

23. The decision of the adjudicator to grant a request for intervention shall not extend to a determination of whether or not the complainant is entitled to be promoted.

23. Dans sa décision, l'arbitre ne peut se prononcer sur le droit du demandeur à la promotion.

FEDERAL COURT

SOLICITORS OF RECORD

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