Federal Court  Cour fédérale

Date: 20140205

Docket: T-317-13

Citation: 2014 FC 131

Ottawa, Ontario, February 5, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BOBBIE GARNET BEES

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Bees, filed a complaint with the Military Police Complaints Commission ("MPCC" or "Commission") alleging that certain military police ("MP") members from the Canadian Forces National Investigation Service ("CFNIS") failed to conduct a complete investigation, and/or had conducted a "soft" investigation into his allegations of historical sexual abuse which occurred on a Canadian Forces military base. The Applicant filed a subsequent complaint with the MPCC about the failure of MP members to refer "civilian on civilian" sexual assault cases to local civilian law enforcement authorities.

[2] Both complaints were referred to the Canadian Forces Provost Marshal's delegate to deal with MP complaints in the first instance, the Deputy Commander CF MP Group ("Deputy Commander"). The Deputy Commander reviewed the Applicant's complaints, as well as the relevant MP investigation file, following which the Deputy Commander issued his response. The Applicant then requested a further review of his complaint by the MPCC.

[3] The MPCC investigated the complaint throughout 2012. During the course of the investigation, the MPCC reviewed the CFNIS investigative steps and conducted witness interviews with relevant witnesses, including the Applicant. The MPCC completed the investigation and concluded that both complaints were not substantiated.

[4] The Applicant has sought judicial review of these findings on various grounds. Having carefully reviewed the record and the submissions by both parties, I have come to the conclusion that this application must be dismissed.

Facts

[5] The Applicant was a military dependent who lived at the Canadian Forces Base ("CFB") Namao (now part of CFB Edmonton) from 1978 to 1980 with his family. On March 5, 2011, he reported to the Edmonton Police Services that while residing at CFB Namao, he had been sexually assaulted on a number of occasions by another military dependent (Mr. S) who was also residing there. These historical sexual assaults were alleged to have occurred in the private married quarters at Namao. The Applicant, who was approximately 8 years old at the time, describes one notable

episode where Mr. S's sister walked in on Mr. S trying to assault the Applicant. The Applicant says she ran outside and alerted many other kids, who then taunted him.

[6] The Edmonton Police Services contacted the CFNIS, the Canadian Armed Forces' independent investigative agency with the mandate of investigating serious or sensitive service and criminal offences. It was determined that CFNIS had jurisdiction to investigate, given that the alleged offence occurred on military property. CFNIS Western Region assumed responsibility for the investigation into the Applicant's allegations of sexual abuse by a military dependent. The MP members who conducted the investigation during the critical phases were Master Corporal Robert Hancock, Sergeant Christian Cyr and Petty Officer 1st Class Steven Morris (the "Investigators").

[7] The investigation took place from March to October 2011. On March 31, 2011, the Applicant was interviewed. The Investigators also interviewed the Applicant's father and brother (who the Applicant alleges was also a victim of abuse by Mr. S), and Mr. S's sister. Additionally, they located and contacted Mr. S, as well as Mr. S's father, but they both refused to be interviewed.

[8] On May 3, 2011, the Applicant alleges Sgt Cyr asked him questions about a priest being charged with molesting kids on the base. Following this conversation, the Applicant claimed to have found information regarding Captain Father Angus McRae, who would have been charged with sexual assault against boys while working on the military base of Namao. One of the victims is referred to as "P.S.", whom the Applicant believes is Mr. S. The Applicant submits that he remembers Mr. S taking him to Captain Father McRae's quarters, but does not remember what happened there (the Applicant alleges it is because he was given wine). The Applicant further

alleges that the Investigators were made aware of these interactions between the Applicant, Mr. S and Captain Father McRae.

[9] On October 18, 2011, PO1 Morris forwarded a copy of the CFNIS Western Region Detachment Regional Military Prosecution Brief to the Regional Crown Prosecutor in Morinville, Alberta. The Brief included a case summary, an investigative summary, and a recommendation for a possible charge under section 156 of the *Criminal Code*, RSC 1985, c C-46.

[10] MCpl Hancock received a response from the Crown Prosecutor's office by email dated November 1, 2011. MCpl Hancock was advised that the prosecutor had finished his review of the materials forwarded to his office and concluded that there was insufficient evidence to support a criminal conviction in this case.

[11] By letter dated November 7, 2011, Major J.D. Gilchrist, Officer Commanding the CFNIS, informed the Applicant that the CFNIS had completed their investigation into the Applicant's allegation of sexual assault, but did not have enough evidence to support criminal prosecution against the accused and the investigation was concluded.

[12] On November 9, 2011, the Applicant completed a Military Police Complaint Form alleging a failure to completely investigate the allegation of historical child sexual abuse suffered by a former military dependent, and asserting that the case was given a "soft investigation" in order to ensure that the Minister of National Defence was not subjected to a lawsuit (the "First Complaint"). The First Complaint identified the Investigators as the subject of his complaint.

[13] On December 15, 2011 the Applicant completed a second Military Police Complaint Form where he complained that the "military police, as required under the defence act, neglected to involve or notify outside civilian police agencies of 'civilian on civilian' sexual assaults" (the "Second Complaint"). The Second Complaint pertained to the conduct of the MP members at the time of the offences in question. The Applicant was advised that it would be merged with the First Complaint.

[14] On January 18, 2012, the Applicant was advised that his complaints had been reviewed by the Canadian Forces Provost Marshal, who is responsible for initially dealing with conduct complaints pursuant to subsection 250.26(1) of the *National Defence Act*, RSC 1985, c N-5 (the "*Act*"). It was determined, in response to the First Complaint, that every known person had been interviewed by CFNIS Investigators, but that there was insufficient evidence to lay a charge in this matter. Further, it was found that the CFNIS and Investigators acted within the scope of their policing duties and functions, pursuant to the Military Police Policies and Technical Procedures ("MPPTP") and that no breach of the Military Police Professional Code of Conduct ("MPPCC") occurred.

[15] By letter dated March 5, 2012 the Applicant further complained to the MPCC about the legality of the CFNIS investigation. In particular, he questioned whether the CFNIS had jurisdiction over his historical sexual assault complaint, given that the CFNIS was established only after the dates of the alleged offences. As this allegation related to the same CFNIS investigation and subject matter as the First Complaint, the MPCC treated this as a third allegation to the First Complaint.

[16] In response to the Second Complaint, the Applicant was notified that the MPPCC came into force in 1999, and that the MP members in the 1980s were not subject to the MPPCC review as it was not in force at the time. Furthermore, there was no evidence to suggest that MP members during that period were aware of any incidents involving the Applicant. The Applicant was also told that he could request a review of the results of the professional standards review regarding the 2011 CFNIS investigation by contacting the Chair of the MPCC. It was indicated, however, that the MPCC did not have the mandate to review incidents occurring prior to its creation in 1999.

[17] The Applicant requested a review of his complaints by the MPCC on January 27, 2012. He conveyed his concerns by letter to Glen Stannard, Chair of the MPCC, about the investigation and the conduct of the MP members at the time of the alleged original offence. His request for a review was acknowledged by letter dated February 9, 2012 from counsel, Ms Dunbar, on behalf of the MPCC. Ms Dunbar reiterated prior advice that the MPCC did not have the mandate to review cases of incidents prior to the creation of the MPCC in 1999. As such, the MPCC review would be solely focused on his First Complaint. In accordance with the requirements of paragraph 250.31(2)(*b*) of the *Act*, the MPCC sought disclosure from the Provost Marshal of all relevant information and materials in the possession of the MP members.

[18] On March 30, 2012 the MPCC Chair delegated the conduct of the complaint review to Commission member Mr. Hugh Muir. Mr. Muir assigned legal counsel and a lead investigator reviewed the material provided by the Office of the Provost Marshal and the Applicant. Based on the material, the lead investigator prepared an investigation plan. This plan was reviewed by legal counsel and Mr. Muir. It was approved by the MPCC on June 7, 2012. Following approval of the

investigation plan, a second investigator was assigned and the MPCC investigators proceeded to arrange and conduct witness interviews. They conducted interviews with the Applicant, PO1 Morris, Sgt Cyr and MCpl Hancock between July 19 and July 31, 2012.

[19] An investigation report was submitted for review by MPCC legal counsel and Mr. Muir on October 17, 2012 immediately following receipt of the final disclosure item from the Provost Marshal on October 16, 2012. The investigation report was approved by Mr. Muir on October 23, 2012.

[20] The Provost Marshal wrote to the MPCC by letter dated January 21, 2013 advising that the interim report had been reviewed pursuant to sections 250.49 and 250.51 of the *Act* and that no Notice of Action would be submitted as he agreed with the Commissioner's findings. In conformity with subsection 250.53(1) of the *Act*, the MPCC prepared a final report after having considered the Provost Marshal's response letter.

The impugned decision

[21] The MPCC issued its final report on January 24, 2013. In addressing the First Complaint, the MPCC first summarized the investigative steps that were taken by the CFNIS and the Investigators with respect to the allegations of sexual abuse made by the Applicant. The MPCC noted the following concerns with the witness evidence:

- While the Applicant's brother recalled a single incident of a sexual nature involving himself and Mr. S, he did not recall the Applicant being present, and he denied ever

discussing the incident with him. The Applicant's father denied that he was aware of any such incidents involving his son;

- Mr. S's sister, who according to the Applicant witnessed part of the final incident of sexual assault on him by Mr. S, denied any recollection of such an incident and was certain that she would recall such an event; and
- The Commission noted that the Applicant felt that more could have been done to locate and contact the children who gathered outside Mr. S's residence, taunting him, while he was inside with Mr. S. However, the Commission stated that the Applicant was unable to name any of the children.

[22] The MPCC concluded that, in light of the investigative steps being taken and considering all of the relevant evidence, the subject MP members took all reasonable investigative steps in respect of the Applicant's criminal allegations. Accordingly, it found the Applicant's allegation that the Investigators conducted an incomplete investigation was not substantiated.

[23] The MPCC then reviewed the allegation that the investigation was done in such a way as to shield the Department of National Defence ("DND") from liability. The MPCC found that many factors militated against the notion that the Investigators sought to shield DND from liability:

- Since Mr. S was at all material times a civilian, the path to establishing liability would not be clear cut; (para 41)
- To the MPCC's knowledge no lawsuit had been commenced against DND with respect to the allegations; (para 42)

- The Investigators deny the suggestion, and there is no evidence of such thinking or communications recorded in the file; (para 43)
- The extent of the investigation efforts undertaken in this case; (para 43)
- The recommendation by the Investigators to the Crown Prosecutor to proceed with a criminal charge against Mr. S. (para 43)

[24] The MPCC also reviewed the third allegation regarding the lack of CFNIS jurisdiction and the failure to refer the case to civilian police and found that it was also unsubstantiated, for the following reasons:

- The crimes alleged by the Applicant against Mr. S occurred on DND property and the CF military police were, and remain, the law enforcement agency of jurisdiction; (para 46)
- The CFNIS did not exist in 1978-1980 and the CF did not have jurisdiction to prosecute the offence of sexual assault at that time, but those facts are not pertinent to the propriety of the CFNIS's jurisdiction in this case; (para 45)
- Because MPs are, at times, "peace officers" under the *Criminal Code*, they routinely investigate and lay charges in cases that go before local provincial prosecution authorities and the provincial courts; (para 48)
- The jurisdiction was discussed at the outset with the local civilian police and it was agreed that CFNIS would assume responsibility. (para 49)

[25] Finally, the MPCC briefly addressed the Applicant's Second Complaint regarding the alleged conduct of the MP at the base of Namao in 1980 and confirmed that the MPCC is unable to address this complaint since it does not have jurisdiction over police conduct that happened prior to December 1999, pursuant to section 104 of Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 36th Parl, 1998, (assented to 10 December 1998) ("*An Act to amend the National Defence Act and other Acts*").

Issues

[26] In his Notice of Application, the Applicant raised three grounds for relief:

> 1. The Commission erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> 2. The Commission based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; and
>
> 3. The Commission acted, or failed to act, by reason of fraud or perjured evidence.

[27] In his Memorandum of Fact and Law, however, the first point in issue is that the MPCC "failed to observe the principals of natural justice, procedural fairness or other procedure by failing to comply with the procedural framework that it was required by law to observe" (Applicant's Memorandum at page 2).

[28] I agree with the Respondent that the Applicant should not be allowed to raise this procedural fairness argument. Rule 301(e) of the *Federal Courts Rules*, SOR/98-106 provides that a notice of application shall set out a "complete and concise statement of the grounds intended to be argued". The purpose of the Rule is to ensure that a respondent has the opportunity to address the grounds for

review in its affidavit and to ensure that no party is taken by surprise. Where an applicant has contravened Rule 301(e), the Court may refuse to allow the advancement of an argument not provided in the notice of application: see *Arora v Canada (MCI)*, [2001] FCJ No 24 at paras 8-9; *AstraZeneca AB v Apotex Inc*, 2006 FC 7 at paras 17-18, aff'd on other grounds, 2007 FCA 327; *Williamson v Canada (Attorney General)*, 2005 FC 945 at paras 6, 7 and 9.

[29] This is precisely what must be done in the case at bar. Allowing the Applicant to advance the breach of procedural fairness argument at this late stage would prejudice the Respondent. Not only was there no prior warning of this argument given to the Respondent, but it is not even substantiated in the Memorandum. Moreover, the Applicant, who represents himself, has made no submissions in that respect at the hearing of his application. In those circumstances, the most appropriate course of action is to simply disregard this argument.

[30] As a result, it appears from the Applicant's written and oral submissions that his primary concern is with the manner in which the MPCC weighed the evidence in determining that CFNIS acted properly in dealing with his complaint. The Applicant also addresses the jurisdiction of the MPCC to deal with his Second Complaint. The issues to be decided on this application may therefore be stated as follows:

a) Were the MPCC's factual findings regarding whether or not there was an incomplete or "soft" investigation reasonable?

b) Was the MPCC's finding that the CFNIS had jurisdiction over the Applicant's historical sexual assault investigation reasonable?

c) Was the MPCC's finding that it did not have jurisdiction to investigate the conduct of MP members in 1980 reasonable?

Analysis

[31] Before dealing with the issues raised in this application, I will first set out the legislative framework pertaining to the Commission. I will then look into a preliminary evidentiary issue. Finally, I will determine the appropriate standard of review.

The legislative framework

[32] Part IV of the *Act* creates a review mechanism for the conduct of members of the MP in the performance of any of the policing duties or functions that are prescribed for the purposes of this section in regulations made by the Governor in Council (*Act*, subsection 250.18(1)). The regulation adopted by the Governor in Council, *The Complaints About the Conduct of Members of the Military Police Regulations* (Queen's Regulations and Orders for the Canadian Forces ("QR&O"), Vol IV, Appendix 7.2) clarifies that the conduct of an investigation, the handling of evidence, the laying of a charge, the enforcement of laws, and responding to a complaint, among other things, are policing duties or functions for the purposes of subsection 250.18(1) if performed by a member of the MP.

[33] Part IV is comprised of four divisions. The first establishes the MPCC, the second deals with complaints, the third with investigations and hearings by the Commission, and the fourth with the findings, report, and recommendation process.

[34] To carry out this mandate, the Chair of the Commission has the power to investigate complaints, convene public hearings, render findings and make recommendations based on those

findings. The MPCC reports to Parliament through the Minister of National Defence, but the discharge of its functions is independent from both DND and the Canadian Forces.

[35] A person may make a complaint about the conduct of a member of the MP in the performance of police duties. In the normal course, conduct complaints are dealt with by the Provost Marshal (*Act*, subsection 250.26(1)). A dissatisfied claimant may then refer the matter to the MPCC for review (*Act*, subsection 250.31(1)). At any time, however, the Chairperson may conduct an investigation and hold a hearing (*Act*, subsection 250.38(1)).

[36] Once a complaint is received, notice of the complaint is sent as soon as practicable to the Chairperson and the Provost Marshal (*Act*, subparagraph 250.21(2)(c)(i)). The Provost Marshal is responsible for dealing with conduct complaints (*Act*, subsection 250.26(1)) and shall investigate a conduct complaint as soon as possible, subject to any attempts at informal resolution (*Act*, subsection 250.28(1)).

[37] Upon the completion of an investigation into a conduct complaint, the Provost Marshal shall send to the complainant a copy of the report setting out the findings and the right of the complainant to refer the complaint to the MPCC for review, if the complainant is not satisfied with the disposition of the complaint (*Act*, section 250.29).

[38] A complainant who is dissatisfied with the report can refer the complaint in writing to the MPCC for review (*Act*, section 250.31).

[39] In conducting a review of a complaint, the MPCC may investigate any matter relating to the complaint and, upon the completion of the review, the MPCC shall send a report to the Minister, the Chief of Defence staff and the Provost Marshal, setting out the MPCC's findings and recommendations with respect to the complaint (*Act*, subsections 250.32(2), (3)).

Evidence not properly before the Court

[40] The Applicant has provided a significant amount of additional information in his affidavit, which is not included in the Certified Tribunal Record. In particular, the Applicant has issued written examination questions to both his father and brother, and improperly included their responses in affidavits, and relied on this evidence in his submissions.

[41] I agree with the Respondent that this evidence must be struck and cannot be considered by the Court. When adjudicating a judicial review application, the only material that can be considered by a court is the material that was before the decision-maker whose decision has been impugned. The only generally recognized exception to this rule are instances where procedural fairness or jurisdiction are at issue: see *McConnell v Canada Human Rights Commission*, 2004 FC 817 at para 68, aff'd on other grounds: 2005 FCA 389; *Canadian Broadcasting Corporation v Paul*, 2001 FCA 93 at para 77. Since the issue of procedural fairness itself is not properly before this Court, as discussed above, the additional information provided by the Applicant is not relevant to any issue that is before the Court.

[42] As a result, Exhibits "A" to "C", "F", "O", "P", "T", and "U" of the Applicant's affidavit are struck from the Applicant's Record, as well at Tab 8 to 18 of the Applicant's Supplementary Record.

Standard of review

[43] In *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada made it clear that deference will apply where the question is one of fact or where the legal and factual issues are intertwined and cannot easily be separated. Moreover, the Court also stated that an exhaustive review of the standard to be applied need not be conducted in every case, and that existing jurisprudence may provide guidance.

[44] This Court and the Federal Court of Appeal have affirmed that a reasonableness standard of review applies where a decision by a police commission considers officers' conduct of an investigation. In *L'Écuyer v Canada*, 2009 FC 541, this Court considered whether the Royal Canadian Mounted Police Public Complaint Commission ("RCMPPCC") erred in determining an applicant's complaint of inadequate investigation was not founded. The Court of Appeal upheld the application judge's decision, who had considered the decision on a reasonableness standard of review (2010 FCA 117). As the RCMPPCC works similarly to the MPCC and has similar objectives, this is binding authority for the application of the reasonableness standard to the review of the findings of fact and of mixed fact and law in the case at bar. Such a finding is indeed consistent with many cases confirming that deference is to be owed to provincial police complaint commissions' assessment of evidence: see, *inter alia*, *Andrews v Alberta (Law Enforcement Review Board)*, 2010 ABCA 361 at para 26; *Canadian Civil Liberties Assn v Ontario (Civilian Commission*

on Police Services) (2002), 61 OR(3d) 649 at paras 25-29 (Ont CA); *MacNeil v Edmonton (City)*, 2009 ABQB 628 at paras 29-32.

[45] To the extent that the Applicant is asking the Court to review the findings and inferences of fact made by the Commission and to substitute its assessment of the facts for that of the Commission, the standard of reasonableness must therefore govern. When applying that standard, the role of this Court is not to come to its own conclusion, but to determine whether the decision-making process is justified, transparent and intelligible and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, at para 47.

[46] Regarding the jurisdictional issues raised by the Applicant (the MPCC's determination that the CFNIS was correct to investigate the Applicant's complaint and that it did not have jurisdiction over the Applicant's Second Complaint), I agree with the Respondent that the MPCC is interpreting its home statute and related authorities. The MPCC's findings in this case concerned the scope of the CFNIS' investigatory powers, and the scope of its own powers respectively. These are not constitutional questions or questions of law which are of importance to the legal system as a whole. As such, a reasonableness standard applies to these questions as well.

a) Were the MPCC's factual findings regarding whether or not there was an incomplete or "soft" investigation reasonable?

[47] The Applicant alleges the MPCC omitted various factual information. First, he mentions that no reference is made to the Alberta Social Services paperwork and Child Intervention file

("Child and Family reports"), as well as to the examinations of the Applicant's father and brother, which would provide context about his family situation at the time of the alleged events.

[48] Second, he argues that no reference is made to Captain Father McRae. While the Applicant alleges to having told Sgt Cyr about Mr. S taking him to Captain Father McRae on some occasions, this information does not appear in the Commission's report, nor was his complaint amended to include it. The Applicant submits the MPCC should have requested more information from Sgt Cyr about these communications, and should have looked into the connection between Captain Father McRae, Mr. S and the Applicant.

[49] Third, he claims that no reference is made to the communications with Mr. S and with his father. According to MCp1 Hancock's investigation notes, Mr. S would have mentioned that "everything he was involved in with father McRae when he was a youth had 'already been handled by the military'", (Applicant's Memorandum of Fact and Law at para 65) leading the Applicant to believe it referred to the lawsuit he read about in the papers.

[50] Finally, the Applicant is of the view that too much emphasis was put on Mr. S's sister not recalling the incident between Mr. S and the Applicant. The Applicant questions her credibility, based on the fact that she does not recall a serious fire that occurred at her residence on the base of Namao in 1980 while she was living there. The Applicant alleges he submitted evidence about this fire, but nothing is mentioned in the report.

[51] Having carefully reviewed the record and considered the written and oral submissions of the parties, I have come to the conclusion that the MPCC's findings of fact in the final report are within a range of reasonable possible outcomes which are defensible in fact and law. I agree with the Respondent that the Investigators acted within the scope of their duties and conducted as thorough an investigation as was possible in the circumstances, given the historic nature of the complaints. Investigators went to considerable lengths, given the circumstances of a then 30 year old case, to pursue the criminal allegations.

[52] Despite the challenges with the investigation, the Investigators produced a Crown Brief which they referred to the local prosecutor's office, for review. In the Brief, they expressed the opinion that charges could have been supported on the evidence. The prosecutor disagreed.

[53] The main area where the Applicant felt that more could have been done by the Investigators, was in trying to identify and obtain statements from the individuals who he alleges were gathered outside Mr. S's residence shouting taunts to the Applicant while he was in Mr. S's bedroom. The challenge for the Investigators was that the Applicant was unable to provide the MP members with any names other than the sister of Mr. S. She was interviewed but stated that she had no recollection of the events.

[54] Regarding Mr. S and his father, the final report clearly states that they were located and contacted, but that they refused to be interviewed. This is obviously unfortunate, but I do not see how the Investigators could have compelled them to testify. There is no legal basis providing CFNIS with the power to compel someone to testify or to submit to an interview during an

investigation. The Supreme Court has made it clear that peace officers cannot compel an individual to answer questions unless they proceed to arrest that individual: see *R v Grant*, 2009 SCC 32 at para 21; *Dedman v The Queen*, [1985] 2 SCR 2 at 11.

[55] I also find of no consequence the fact that the MPCC did not mention the Child and Family reports and related documents regarding the Applicant's conduct as a child in its final report. It is clear that they were taken into consideration by the MPCC as they are referred to in the investigation report dated October 17, 2012. There was no need for the decision-maker to refer to every piece of evidence in the final report, given that the Child and Family reports are not material in substantiating the alleged aggression on the Applicant by Mr. S.

[56] Finally, I fail to understand how the alleged missing information on Captain Father McRae could have impacted the Applicant. Captain Father McRae was convicted by military courts for having molested boys while working on Namao base, and Mr. S was one of his victims. Even if the Applicant was brought by Mr. S to Captain Father McRae's quarters, it could only support the fact that the Applicant was also Captain Father McRae's victim, not that he was abused by Mr. S.

[57] Regarding the Applicant's complaint about a "soft" investigation, there is no evidence whatsoever that the CFNIS was instructed to undertake a "soft" investigation in the Applicant's case, or generally in cases where, as the Applicant alleges, there may be a risk of liability. In answer to the Applicant's allegation of "soft investigation", the final report underlines that there could have been a conflict of interest if Mr. S had not been a civilian, if a lawsuit had been launched against

DND regarding the Applicant's abuse, or if the evidence led to the conclusion that the 2011 Investigators were asked to do a "soft investigation".

[58] The Applicant responded that, while Mr. S was a civilian, Captain Father McRae was not, and that there was a lawsuit against DND launched by Mr. S for the abuse he had suffered because of Captain Father McRae. I have two problems with these allegations. First, the Applicant's complaint does not involve Captain Father McRae but Mr. S; therefore, the fact that Captain Father McRae was not a civilian is in my view irrelevant. Second, I fail to see how DND could be held liable for the molestation that Mr. S may have inflicted on the children he was babysitting because Mr. S himself was suffering the effects of child sexual abuse inflicted upon him by Captain Father McRae, as suggested by the Applicant in his letter to Chairman Stannard of January 27th, 2011. Moreover, the only evidence presented by the Applicant for that lawsuit is a newspaper article from the early 2000s stating that an individual referred to as "P.S.", has filed a statement of claim in the Alberta Court of Queen's Bench against Captain Father McRae and DND. We have no evidence that the "P.S." suing Captain Father McRae and DND was indeed Mr. S, nor do we know what happened to that lawsuit.

[59] In light of the above, I fail to see how the information regarding Captain Father McRae could support the Applicant's claim that a "soft" investigation was conducted regarding the alleged abuse by Mr. S. The MPCC considered the Applicant's arguments on the issue and reasonably concluded, in my view, in light of its factual findings, that there was nothing improper in the way the CFNIS had conducted its investigation.

b) Was the MPCC's finding that the CFNIS had jurisdiction over the Applicant's historical sexual assault investigation reasonable?

[60] The Applicant questions the legality of the CFNIS Western Region's assumption of jurisdiction to investigate his criminal complaint against Mr. S in respect of his historical sexual abuse allegations against Mr. S. The Applicant notes that the CFNIS was only created in 1996, and that there were no specific regulations, at the time of the alleged crime, which stipulated that the MP had jurisdiction over matters of sexual assault committed by military dependents against fellow military dependents. As a result, the CFNIS did not have jurisdiction in the matter and should have referred the case to a civilian police service, such as the Edmonton Police or the RCMP.

[61] I cannot agree with that argument. The powers of the MP as peace officers are provided by and defined in a number of statutes and regulations. It seems to me that the starting point is the definition of "peace officer" found in paragraph 2(g) of the *Criminal Code*, read in conjunction with section 156 of the *Act* and sections 22.01 and 22.02 of the QR&O. Paragraph 2(g) of the *Criminal Code* reads as follows:

(g) officers and non-commissioned members of the Canadian Forces who are	g) les officiers et militaires du rang des Forces canadiennes qui sont :
(i) appointed for the purposes of section 156 of the *National Defence Act*, or	(i) soit nommés pour l'application de l'article 156 de la *Loi sur la défense nationale*,
(ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned	(ii) soit employés à des fonctions que le gouverneur en conseil, dans des règlements pris en vertu de la *Loi sur la défense nationale* pour l'application du présent alinéa, a prescrites comme étant d'une telle sorte que les officiers et les

members performing them have the powers of peace officers;	militaires du rang qui les exercent doivent nécessairement avoir les pouvoirs des agents de la paix.

[62] Pursuant to section 156 of the *Act*, officers and non-commissioned members who are appointed as MP may only exercise their powers in relation to a person who is subject to the Code of Service Discipline. This Code, which consists of Part III of the *Act*, is designed primarily to regulate the conduct of members of the Canadian Armed Forces. The persons subject to the Code are set out in section 60 of the *Act*. Accordingly, MP members are not "peace officers" with respect to Mr. S, a civilian, pursuant to subparagraph 2(g)(i) of the *Criminal Code*.

[63] More relevant for our purposes is subsection 22.01(2) of the QR&O, which states:

(2) For the purposes of subparagraph (*g*)(ii) of the definition of "peace officer" in section 2 of the *Criminal Code*, it is hereby prescribed that any lawful duties performed as a result of a specific order or established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers:	(2) Aux fins du sous-alinéa *g*)(ii) de la définition d' «agent de la paix» à l'article 2 du *Code criminel*, il est établi par les présentes que toutes les tâches légitimes accomplies en vertu d'un ordre précis ou d'une coutume ou pratique militaire établie qui sont reliées à l'un ou l'autre des domaines énumérés ci-après sont d'une nature telle qu'il est nécessaire que les militaires qui en sont chargés soient investis des pouvoirs d'un agent de la paix :
a. the maintenance or restoration of law and order;	a. le maintien et le rétablissement de l'ordre public;
b. the protection of property;	b. la protection des biens;
c. the protection of persons;	c. la protection des personnes;
d. the arrest or custody of	d. l'arrestation ou la détention

persons; or	des personnes;
e. the apprehension of persons who have escaped from lawful custody or confinement.	e. l'arrestation de personnes qui se sont évadées de la garde ou de l'incarcération légitime.

[64] There is no doubt that the investigation of a sexual assault falls within the "matters" enumerated in subsection 22.01(2) of the QR&O. It could be said to relate to "the maintenance or restoration of law and order" or to "the protection of persons". This is not sufficient, however, for the MP to act as a police officer. It is only when those lawful duties enumerated at subsection 22.01(2) are performed "as a result of a specific order or established military custom or practice" that MP falls under the definition of "peace officer" found in the *Criminal Code*.

[65] The decision of the Supreme Court of Canada in *R v Nolan*, [1987] 1 SCR 1212 [*R v Nolan*], speaks to that very issue. In that case, the accused was observed driving a motor vehicle on the grounds of a Canadian Forces base. The vehicle was seen by the MP officer who was on patrol in the base. At the time the vehicle was seen to be travelling well in excess of the speed limit. The MP officer pursued the vehicle through the main gates of the base and stopped the van on the public highway. As a result of his appearance, the accused was taken back to the Canadian Forces base where the MP officer demanded a breathalyser. The accused was then taken to a civilian police station where a technician was available to administer the test but the accused refused to comply with the demand. Since Mr. Nolan was a civilian and was not subject to the Code of Service Discipline, the charge of having unlawfully refused to comply with a breathalyser demand could only be supported if the Crown could show that the MP officer was a "peace officer" when he made that demand. After concluding that the arresting MP officer could not derive authority from

subparagraph 2(f)(i) of the *Criminal Code* in those circumstances, the Court went on to analyze subparagraph 2(f)(ii) and clarified the requirements under that provision:

> There can be no doubt that the detection and arrest of inebriated drivers falls within the "matters" enumerated in s. 22.01(2). It could be said to relate to the maintenance or restoration of law and order, to the protection of property, or to the protection of persons. It certainly relates to the arrest or custody of persons. That is not the final hurdle, however, for the regulation imposes further conditions upon military personnel claiming to act as peace officers under s. 2(f)(ii) of the *Code*. A member of the armed forces is not given leave by s. 22.01(2) of the *Queen's Regulations* to act as a peace officer in all circumstances. Military personnel only fall within the definition when they are performing "lawful duties" that are the "result of a specific order or established military custom or practice".
>
> (*R v Nolan* at para 26)

[66] In the case at bar, I have no doubt that this final condition is met. Pursuant to section 15 of the *Security and Military Police Services* (Canadian Forces Administrative Order ("CFAO") 22-4), the MP is the law enforcement agency on DND property. That provision reads as follows:

> 15. Military police investigate and report on all criminal and service offenses committed by persons subject to the Code of Service Discipline and on all other criminal and security violations or offenses that occur on or in respect of Defence establishments, works, materiel, CF operation or any other lawful undertakings.

[67] Section 25 of that same administrative order further states:

> 25. Military police may exercise jurisdiction with respect to:
>
> a. (…)
> b. all other persons in regard to an incident or offence, real or alleged, on or in respect of a Defence establishment, Defence works, Defence materiel, CF operations or other lawful undertaking.

[68] Accordingly, the MPCC could reasonably conclude that the Investigators were "peace officers" under the *Criminal Code* and could investigate the offence allegedly committed by Mr. S.

The MP was clearly performing "a lawful duty" resulting from a "specific order or established military custom or practice" when investigating the sexual assault of which the Applicant complained. The CFAOs are issued by the Chief of Defence staff to supplement and amplify the QR&O, and the CFAO 22-4 prescribes the policies and procedures for the provision of security and MP services to the Canadian Forces and DND, its establishments and works. As such, it clearly sets out that the MP has authority to investigate offences that occur on military property. The MP officers are bound to obey such an order, and therefore, it would qualify at least as a custom or a practice.

[69] It appears, moreover, that the Edmonton Police Services, to whom the complaint was first made by the Applicant, referred the matter to the CFNIS Western Region under the assumption that it did not have jurisdiction to investigate an alleged offence that occurred on military property. Whether the RCMP could also have assumed jurisdiction is an open question that was not debated before me, and that I need not decide. Even if the RCMP could have investigated the matter, it would not displace the jurisdiction of the MP to act as "peace officer".

c) Was the MPCC's finding that it did not have jurisdiction to investigate the conduct of MP members in 1980 reasonable?

[70] In his Second Complaint, the Applicant raises concerns with respect to the conduct of the MP members at CFB Namao in 1980. More specifically, he alleges the local MP detachment, which he believes must have been aware of his victimization by Mr. S, wrongly neglected to involve or notify civilian police agencies of incidents of sexual assault committed on the base by Mr. S.

[71] I agree with the Respondent that section 104 of *An Act to amend the National Defence Act and other Acts* clearly bars the MPPC from looking into that complaint. Section 104 reads as follows:

Part IV of the Act does not apply in respect of events that took place before that Part or any of its provisions came into force.	La partie IV de la même loi ne s'applique pas aux faits survenus avant la date d'entrée en vigueur de cette partie ou de telle de ses dispositions.

[72] The complaint made by the Applicant is a conduct complaint, as defined in section 250 of the *Act*, and thus falls under Part IV of that *Act*. Since section 104 explicitly precludes the application of the Part IV MP complaints process, including the jurisdiction of the MPCC, to any complaints regarding MP conduct which would have occurred prior to the coming into force of these legislative provisions, to wit, December 1, 1999, the Commission was not only reasonable but also correct in finding that it was without jurisdiction to address this complaint.

Conclusion

[73] For all of the above reasons, this application for judicial review is dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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