Federal Court of Appeal | Cour d'appel fédérale

Date: 20150622

Docket: A-556-14

Citation: 2015 FCA 150

CORAM: **STRATAS J.A.**
SCOTT J.A.
BOIVIN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

STAFF SERGEANT WALTER BOOGAARD

Respondent

Heard at Ottawa, Ontario, on June 3, 2015.

Judgment delivered at Ottawa, Ontario, on June 22, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Attorney General asks us to set aside the judgment of the Federal Court (*per* Justice O'Keefe) dated November 21, 2014: 2014 FC 1113.

[2] For some time, the respondent, a staff sergeant in the Royal Canadian Mounted Police, has been seeking promotion. He sent letters to the Commissioner of the RCMP requesting

promotion. The Commissioner replied by way of a letter marked "without prejudice." The respondent considered the letter to be a decision rejecting his requests. He sought judicial review in the Federal Court.

[3] The Federal Court found that the letter was not protected by the privilege over negotiation/settlement communications even though it was marked "without prejudice." It was a reviewable decision under the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[4] The Federal Court concluded that the Commissioner's decision was unreasonable. The Court directed the Commissioner to do as much as he could to promote the appellant to the rank of inspector.

[5] The Attorney General appeals the Federal Court's decision to this Court. He submits that the "without prejudice" letter is not a reviewable decision. In the alternative, this Court should uphold it as a reasonable decision. Finally, in the further alternative, the Attorney General contests the remedy the Federal Court granted.

[6] In my view, the Federal Court's finding that the letter was not privileged and was a reviewable decision is unassailable. The Federal Court also properly selected reasonableness as the standard of review of the decision. However, contrary to the Federal Court, I conclude that the Commissioner's decision was reasonable. Therefore, I would allow the appeal with costs, set aside the judgment of the Federal Court and dismiss the application for judicial review.

A. Background facts

[7] The Federal Court has set out the history and facts giving rise to this matter with admirable clarity and detail. For the purposes of this appeal, I need only highlight a few things.

[8] The main ground for the Commissioner's refusal of the respondent's request to be promoted is an incident fifteen years ago. While the respondent was on duty, his gun was stolen by two women, workers in the sex trade.

[9] Investigators looked thoroughly into the incident. In the end, an investigation report was prepared. It describes uncertainty surrounding the circumstances of the theft of the gun, uncertainty that could not be resolved.

[10] The uncertainty arises from the differing accounts of the incident by the respondent and the women:

- The respondent said the women stole the gun from his vehicle while he was in a restaurant.

- The women said they stole the gun from the respondent's vehicle while the respondent was in it. One of them was negotiating a price for sex with the respondent while the other stole the gun.

[11] The women were interviewed separately and their accounts of the incident were substantially similar. Further, the criminal history of the woman who stole the gun suggests that she did not steal from unoccupied cars but rather from "johns" when inside their cars. The women's account of the incident could not be dismissed.

[12] The respondent was charged with conducting himself in a disgraceful manner that brings discredit on the RCMP contrary to subsection 39(1) of the *Royal Canadian Mounted Police Regulations*, S.O.R./88-361. Ultimately, this disciplinary offence proceeded on an agreed statement of facts that left out any reference to the incident with the women. The respondent admitted that it was disgraceful for him to leave his firearm unattended in his car. The adjudication board reprimanded him and ordered him to forfeit five days' pay.

[13] The adjudication board did not decide whether the respondent, while on duty, was negotiating with the women for sex. It never had that issue before it. The agreed statement said nothing about it. The investigation report was never placed before the board.

[14] All we know is that before the hearing the prosecutor considered the "matter concerning the prostitutes" and "discounted" it: Appeal Book, page 113. It is unclear why. The investigation report refers to "[the women's] availability as witnesses" as being "less than certain" but there is nothing in the record that confirms this to be the reason: Appeal Book, page 216. The investigation report remained in the files, its uncertainty unresolved.

[15] From the time of the incident to today, some fifteen years, the respondent has been promoted within the non-commissioned ranks. His record has been excellent and beyond reproach.

[16] However, the respondent has never been promoted out of the non-commissioned ranks. In 2005 and again in 2009, the respondent participated in and passed the officer Candidate Program. He then placed on the list of those eligible for promotion. Both times, his eligibility expired without him receiving a commission as an officer: Reasons of the Federal Court, paragraphs 8-9. It turns out that a Superintendent told the Director administering promotions that "there may have been more to the disciplinary matter" than that disclosed by the decision and record: Reasons of the Federal Court, paragraph 10. The respondent discovered this from an access to information request.

[17] Proceedings concerning this have ensued and have given rise to grievances brought by the respondent. The respondent contends that he has been the victim of workplace harassment by the spreading of gossip about the incident. The grievance process is ongoing.

B. The specific facts triggering this matter

[18] By 2011, the respondent had successfully completed the officer candidate program for a second time. He was restored to the list of candidates eligible for promotion. Most approvals for the promotion had been secured.

[19] In the end, the file was sent to the Commissioner. He was to consider whether to recommend to the Governor in Council that the respondent should be promoted to the position of inspector in Saskatchewan.

[20] During his consideration of the file, the Commissioner viewed a copy of the investigation report. He was concerned and discussed it with the Deputy Commissioner. The Deputy Commissioner met with the respondent and discussed it with him. He gave a copy of the investigation report to the respondent and asked questions about it, noting the inconsistencies in the accounts of the respondent and the women. The respondent answered the questions without objection.

[21] The Deputy Commissioner was not satisfied by the respondent's answers and so he withdrew his support for the respondent's promotion. As the Deputy Commissioner's support is required for promotion, the respondent was no longer eligible for the Saskatchewan position. Later, the respondent was removed from a list of candidates generally eligible for promotion. The respondent has filed two grievances against the Deputy Commissioner for his actions.

[22] Following success on one grievance and favourable comments received in a judicial review of another grievance decision (see *Boogaard v. Canada (Attorney General)*, 2013 FC 267), counsel for the respondent wrote the Commissioner, asking his client to be promoted. A couple of months later, in September 2013, the respondent sent further letters asking for promotion.

[23] On September 13, 2013, the Commissioner sent the "without prejudice" letter to counsel for the respondent rejecting his request for promotion. The respondent considered this to be a reviewable decision. So he applied to the Federal Court for an order quashing the Commissioner's decision and directing the Commissioner to promote him to the rank of inspector, retroactive to 2005.

C. A preliminary objection: was the Commissioner's "without prejudice" letter covered by negotiation/settlement privilege and, thus, not a reviewable decision?

[24] Both in the Federal Court and in this Court, the Attorney General submits that the Commissioner's letter was covered by negotiation/settlement privilege and was not a "decision" that could be reviewed under the *Federal Courts Act*, above.

[25] Appropriately, the Federal Court dealt with this preliminary objection to judicial review first: see generally *Budlakoti v. Canada (Citizenship and Immigration*), 2015 FCA 139 at paragraphs 27-30. If upheld, the preliminary objection would bring the judicial review to an early end.

[26] But the Federal Court did not uphold the objection. It ruled that the Commissioner's letter was a decision that rejected the respondent's request for promotion. In the course of its ruling, the Federal Court found that the letter was not covered by negotiation/settlement privilege. True, it bore the words "without prejudice," but in the circumstances that was of no consequence. In reaching these conclusions, the Federal Court identified the relevant legal principles and closely examined the letter in light of those principles.

[27] In this Court, the Attorney General suggests that the Federal Court misapprehended the relevant legal principles and mischaracterized the letter. He submits that the letter should have been kept confidential as a communication sent as part of an attempt to settle matters. In his view, it cannot qualify as a reviewable decision.

[28] What is the standard of review of a decision of the Federal Court on a preliminary objection to judicial review? It is the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The administrative law standard of review—that set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190—does not apply. In this case, we are reviewing a decision of the Federal Court about its own ability to proceed with the application, not a decision of the Federal Court about the acceptability of a decision of an administrative decision-maker: *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 25-26; *Budlakoti*, above at paragraphs 37-38. The administrative law standard of review applies to the former, not the latter.

[29] Thus, in order for this Court to set aside the Federal Court's finding that the letter was not privileged and was a decision letter, the Attorney General must persuade us that the Federal Court either erred on an extricable legal issue or committed palpable and overriding error.

[30] The Attorney General has failed to establish either of these things. The Federal Court identified the relevant legal principles properly and did not commit palpable and overriding error when it applied them to the letter.

[31] Having dismissed the preliminary objection, the Federal Court could proceed with the judicial review. It did so. It quashed the Commissioner's decision and directed the Commissioner do as much as he can to promote the respondent to the rank of inspector.

D. Reviewing the Commissioner's decision

(1) The standard of review: reasonableness

[32] The Federal Court held that it should review the Commissioner's decision using the standard of reasonableness. In this Court, everyone agrees with that.

[33] I agree that reasonableness is the standard. The Commissioner's decision involves fact-based discretion, with elements of expertise, policy and specialization. More will be said about this below when discussing the margin of appreciation to which the Commissioner is entitled. For present purposes, decisions of that sort are presumed to be subject to reasonableness review: *Dunsmuir*, above at paragraphs 51 and 53.

[34] Having found that the Federal Court selected the appropriate standard of review—here, reasonableness—the job of this Court on appeal is to determine whether the Federal Court properly concluded that the Commissioner's decision was unreasonable. In other words, we are to step into the shoes of the Federal Court and conduct reasonableness review ourselves to see if we agree. See generally *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47.

[35] It is instructive to think of reasonableness review as consisting of a number of analytical steps: *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraphs 26-28.

[36] First, we are to identify the precise issue before the administrative decision-maker and the decision-maker's legal power to decide it. Then we must consider the range of acceptability and defensibility or margin of appreciation the decision-maker enjoys. In some cases, the range or margin is broad, in others narrow: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraphs 37-41. Certain concepts and factors can assist on this: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at paragraphs 90-99. Finally, having regard to the evidentiary record that was before the decision-maker and the applicable law, we must decide whether the decision was within that range or margin. See generally *Asad v. Canada (Citizenship and Immigration)*, 2015 FCA 141 at paragraphs 27-28.

[37] This is not a formula that must be followed in all cases. In many cases, the analysis can be conducted in a loose way. But depending on the nature of the case, counsel arguing a judicial review or the reviewing court itself might usefully focus on the particular step or steps in the analysis upon which the case will turn. This is how I shall proceed.

[38] The precise issue before the Commissioner was whether he should recommend the respondent for promotion.

[39] The parties agree that the Commissioner's power to recommend promotions is found in section 5 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10. In particular, they agree that promotions are part of the Commissioner's "control and management of the Force and all matters connected therewith" in subsection 5(1).

[40] Section 5, as it read at the times material to this matter, provides as follows:

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).

[41] In my view, the Commissioner is entitled to a very broad margin of appreciation over his promotion decisions under subsection 5(1). In this case, there is nothing that would narrow that margin.

[42] The statutory words—"control and management of the Force and all matters connected therewith"—are very broad indeed. They are unqualified and not made subject to any other sections in the Act. The power and the responsibility is bestowed upon the Commissioner personally, and no one else.

[43] Sometimes statutory words direct an administrative decision-maker to follow a particular recipe or restrict the scope of discretion: see, *e.g.*, *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C. 203 at paragraph 53. Here there are none.

[44] Sometimes cases interpreting statutory words can constrain the decisions an administrative decision-maker can reasonably reach: *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 N.R. 120. Here there are none.

[45] It may be that rulings on issues by administrative decision-makers under the Act, such as discipline and grievance bodies, can constrain the Commissioner's power to "control and [manage] the Force and all matters connected therewith." Or perhaps not. This likely depends on upon the interpretation of the Act, perhaps against the backdrop of the law of issue estoppel. In this case, though, we need not decide this. As we shall see in paragraphs 66-72 below, the discipline and grievance bodies in this case have not resolved the uncertainty described in the investigation report. Indeed, they have shed no new light on the conflicting accounts of the respondent and the women.

[46] In making promotion decisions under subsection 5(1), the Commissioner must draw upon his knowledge, experience and expertise concerning the needs of the police force, the management of policing, and his appreciation of what sort of individual will best advance the objectives of the police force and fulfil the public interest.

[47] An added dimension is the policing context. Police are part of Canada's governance. To perform effectively, they require the confidence of the public. To maintain that confidence, they must discharge—and must be seen to discharge—their duties in a fair and faultless way. This is all the more so in the case of the RCMP, a police force of special standing and broad mandate:

> The RCMP is a unique Canadian law enforcement organization. Not only is it our national police force, but it also provides provincial and municipal policing services in much of the country, as well as providing police services to international airports and hundreds of Aboriginal communities. The RCMP provides protective services to Canadian and foreign dignitaries, security at significant national and international events in Canada, and border policing. It provides specialized policing services to all police services in Canada, including criminal intelligence, biological evidence recovery, DNA analysis, fingerprint and criminal record information, and ballistics identification. The RCMP also runs the Canadian Firearms Program, the Canadian Police Information Centre, the Canadian Police College, the National Child Exploitation Coordination Centre, the National Sex Offender Registry, and the Technological Crime Program. Across Canada, the RCMP enforces a host of federal laws, including those dealing with commercial crime, counterfeiting, drug trafficking, organized crime, and terrorism.

(*Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, 380 D.L.R. (4th) 1 at paragraph 265 *per* Rothstein J. [dissenting, the majority not disagreeing on this point]; see also Alain-Robert Nadeau, *Federal Police Law, 2010* (Toronto: Thomson Canada, 2009) at page xiv [RCMP "under more scrutiny than ever"].)

[48] Next is the nature of the decision in issue here, promotion. Here, the respondent emphasized the importance of the promotion decision to him. Work is of prime importance to the individual and promotions result in enhanced satisfaction, often more potential for achievement and self-fulfilment, and often more pay. The respondent also noted that many of his former peers and, now, many junior to him have already been promoted.

[49] Without doubt, the respondent has a strong personal interest in promotion. Nothing in these reasons should be taken to minimize that. And in certain circumstances, decisions of strong import to individuals can make the reviewing court more vigilant in its enforcement of rule of law standards and, thus, can narrow the margin of appreciation to be afforded to the decision-maker: *Farwaha*, above at paragraph 92. For example, administrative decisions that affect the liberty interests of individuals call for strict scrutiny: *Walchuk v. Canada (Justice)*, 2015 FCA 85 at paragraphs 33 and 56; *Erasmo v. Canada (Attorney General)*, 2015 FCA 129.

[50] However, the personal importance of the decision to the affected individual must be viewed objectively and in context, especially in light of the nature of the decision under review. The nature of the decision is an important factor in assessing the intensity of review and, thus, deserves much attention in the analysis.

[51] While in this case the promotion is of great importance to the respondent, normally we do not think of people having a "right" to a promotion. Often in promotion decisions, only a few win, many more lose, and the difference between winning and losing can legitimately turn upon fine things, sometimes subjective or subtle things. For example, usually we describe people who

have been promoted as "deserving" or "lucky." We do not say that people have been promoted because the employer was legally forced to do it.

[52] Further, a promotion decision, such as the one in this case, is not a simple one, arrived at by processing information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon the changing and evolving needs and priorities of the organization. What are the needs and priorities of the organization, both now and in the future, perhaps years later? What is the nature of the position the applicant seeks? Does the applicant have the skills, judgment, experience, reliability, integrity, character and personality to carry out the responsibilities of the position and supervise others? Does the applicant exemplify the values and culture of the organization? How does the applicant compare to others who have previously been promoted and others who now seek promotion? How will others react? The questions could go on and on.

[53] In finding that the Commissioner is entitled to a very broad margin of appreciation in this case, I do not suggest for a moment that he is anything close to immune from review. His discretion is not absolute or untrammelled. Even the broadest grant of statutory power must be exercised in good faith, in accordance with the purposes of the provision, the governing statute and the Constitution:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may

> not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

(*Roncarelli v. Duplessis*, [1959] S.C.R. 121 at page 140, 16 D.L.R. (2d) 689.)

(2) Applying the reasonableness standard in this case

[54] In this case, I conclude that the Commissioner's decision is reasonable. It was within his margin of appreciation under subsection 5(1) of the Act. It was within the range of acceptable and defensible outcomes on the facts and the law.

[55] The Commissioner had before him, among other things, the respondent's excellent record over the last fifteen years, the investigation report from the incident fifteen years ago, and the results of the Deputy Commissioner's meeting with the respondent concerning the investigation report.

[56] The respondent concedes that the investigation report was properly before the Commissioner. The report is key. It describes an unresolved conflict over what happened during the incident, pitting the respondent's word against the word of the two women. This creates a cloud of uncertainty over the respondent. Normally over time, with years of good performance, such a cloud might dissipate. But in light of the Deputy Commissioner's meeting with the respondent and the Deputy Commissioner's lack of satisfaction with the respondent's answers, it

is probably fair to say that the cloud remained in place and perhaps even thickened: Appeal Book, page 202.

[57] When the Commissioner wrote his "without prejudice" letter, he had this cloud before him and was well-aware of it: Appeal Book, pages 202 and 205. But he also had before him information about the respondent's overall performance throughout his career. The Commissioner had to weigh these things and decide whether he should accept the respondent's request that he be promoted. He decided to reject it.

[58] In his reasons, the Commissioner referred to the cloud. He mentioned that the "full nature of the events" surrounding the incident was not considered in the disciplinary proceedings. He noted that an agreed statement of facts filed in those proceedings was "silent" on the cloud.

[59] The Commissioner then charged himself as to the standard he must apply in deciding upon the respondent's request for promotion:

> A commissioned appointment within the Force requires that I exercise the utmost care at ensuring that candidates possess and model the core values of the RCMP, namely Honesty, Integrity, Accountability,… see my letterhead [sic].

[60] Within the RCMP, these terms have a particular, well-understood meaning: Appeal Book, pages 204-205. The Commissioner was incorporating by reference that meaning.

[61] Applying this, the Commissioner was not persuaded that the respondent should be promoted:

> It is my view, based on my understanding of the full nature of the events surrounding S/Sgt/ Boogaard that he does not meet the standard I would expect of a commissioned officer in the Mounted Police.

The "full nature of the events" surrounding the respondent is a reference to the cloud.

[62] As can be seen from his reasons, the Commissioner drew upon his factual appreciation and his expertise and experience in managing a police force, which is the broad power given to him under subsection 5(1) of the Act. He relied upon subjective considerations, wide policies concerning what constitutes a suitable candidate for promotion, and the larger interests of his police force—matters consistent with the purposes of subsection 5(1) and the Act. He kept front of mind the need for "utmost care" in "ensuring that candidates possess and model the core values of the RCMP." These are all matters outside of the ken of the courts, considerations well within the Commissioner's margin of appreciation.

[63] On this evidentiary record, the Commissioner was entitled to find as a fact that a cloud still exists over the respondent stemming from the unresolved issues in the investigation report and the respondent's answers to the Deputy Commissioner during the meeting. The opacity of that cloud and whether it is outweighed by the respondent's overall performance record are matters of judgment for the Commissioner. Given the very broad margin of appreciation we must afford the Commissioner in this case, I cannot second-guess the Commissioner on these matters.

[64] It is true that the Commissioner could have placed greater weight upon the respondent's overall performance record and could have reached a different conclusion. But reviewing courts conducting reasonableness review do not reweigh the evidence before the administrative

decision-maker. This is particularly the case where, as here, the margin of appreciation that must be afforded to the decision-maker is very broad.

[65] The respondent submitted that, despite the foregoing, the Commissioner's decision was unreasonable. He offered several submissions.

– I –

[66] The respondent submits that by the time of the Commissioner's decision, the cloud over him had dissipated. The grievance proceedings and the actions of the prosecuting officer in the disciplinary matter resolved much of the uncertainty disclosed in the investigation report about the incident with the women. He adds that the adjudication board did not find that he was bargaining with the women.

[67] The respondent's submission echoes one he made to the Commissioner. In one of his letters to the Commissioner, he asserted that the prosecutor in the disciplinary proceedings "expressly considered [the] allegations…and dismissed them as unfounded without even putting them before an RCMP Adjudication Board": Appeal Book at page 193.

[68] The Federal Court accepted this submission. It seems to have regarded the operation of the disciplinary process under the Act as fettering the Commissioner's power to promote. It found that the "appropriate officer [the prosecutor in the disciplinary proceedings] and the adjudication board already decided what happened on that day in 2000," the day of the incident

(at paragraph 78). For good measure, the Federal Court added that the Commissioner had no business revisiting the incident and substituting his judgment for that of those involved in the disciplinary proceedings (at paragraph 78). As a result, the Commissioner could not circumvent the disciplinary proceedings (at paragraph 80).

[69] On this, I disagree with both the respondent and the Federal Court. The Commissioner was entitled to continue to have regard to all information concerning the respondent, including the investigation report and the respondent's meeting with the Deputy Commissioner.

[70] I do not agree that the Commissioner should have found that earlier proceedings in this matter have resolved the uncertainty regarding what happened between the respondent and the women. In fact, on this record, the Commissioner could not have so found:

- Earlier grievance proceedings have considered the unacceptable spreading in the workplace of gossip—conduct constituting "workplace harassment"—about the incident but have not commented on the incident itself.

- The disciplinary proceedings did not deal with the issue at all. In his reasons, the Commissioner noted that they proceeded on the basis of an agreed statement of fact that did not resolve the uncertainty regarding what happened between the respondent and the women.

- The prosecutor in the disciplinary proceedings "discounted" the "matter concerning the prostitutes" but exactly why is unknown. The investigation report suggests that the availability or willingness of the women to participate in the disciplinary proceedings might have been a problem.

[71] It is true that the women's account of the incident in the investigation report has never been proven. But in making his promotion decision, the Commissioner is not limited to considering facts that a judge would regard as proven. He is not a judge determining whether charges are proven or a cause of action made out.

[72] Instead, he is a public official sitting at the helm of a police force that needs public confidence to sustain it, trying to work through the complex calculus of deciding which of many candidates ought to be recommended for promotion, erring on the side of caution or, as the Commissioner put it, exercising "utmost care." In that exercise, he is permitted to rely on concerns as long as they are articulable and have an air of reality.

– II –

[73] The respondent points out that the Commissioner went beyond finding a cloud over the respondent. He found the women's account of the incident to be true. The respondent suggests that this conclusion was not open to the Commissioner on this record.

[74] On this, the Federal Court agreed with the respondent. It noted that the Commissioner regarded "the allegations [concerning the incident] against the [respondent] as if they had actually been proven": Federal Court's reasons at paragraph 80.

[75] I tend to agree. In my view, it is not possible for the Commissioner to believe the women's account solely on the basis of the investigation report. As I have said, the investigation report describes a conflict between the accounts of the respondent and the women concerning the incident. It does not resolve that conflict.

[76] Did the respondent's unsatisfactory answers during his meeting with the Deputy Commissioner cause the Commissioner to believe the women's account? The Commissioner's reasons do not say. But the reasons must be viewed in light of the record, including the evidence concerning this meeting: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraph 15. Perhaps the meeting led the Commissioner to make the comments he did.

[77] Whether the Commissioner was too unequivocal in his conclusions about the incident is not the issue before us. It is not our task to decide what happened in the incident fifteen years ago.

[78] Rather, we are to assess whether the Commissioner reached a decision within his margin of appreciation. For the reasons set out above, reading the Commissioner's reasons in light of the

record, the Commissioner had an acceptable and defensible basis on the facts and the law to deny the respondent promotion.

– III –

[79] The respondent emphasizes the harshness of the Commissioner's decision. After all, the alleged incident was fifteen years ago. And he suggests that had the issues in the investigation report been put to him long ago, he might have been able to rebut the concerns.

[80] To some extent, this last submission runs counter to the evidence in the record. The respondent had an opportunity to obtain any available evidence in support of his position when he was charged in the disciplinary proceedings. And, in any event, the investigation report shows that the availability of the women to tell their story to anyone, including the respondent, was questionable at best.

[81] But harshness is beside the point. Under reasonableness review, judges cannot interfere on the basis of their personal views about the harshness or otherwise of the decision. Instead, judges must restrict themselves to this question: bearing in mind the margin of appreciation that the decision-maker must be afforded, is the decision acceptable and defensible on the facts and the law? In assessing acceptability and defensibility, judges draw upon the legislation and case law bearing on the problem, the nature of the decision under review, the evidentiary record, judicial understandings of the rule of law and factors affecting the decision-maker's margin of appreciation—not freestanding policies, personal views or emotions divorced from those

considerations. The effects of a decision—including harshness—may be an indicator or a badge that a decision is unreasonable based on any of those things: see, *e.g.*, *Delios*, above at paragraph 27; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152 at paragraph 69; *Farwaha*, above at paragraph 100; *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 at paragraph 87. But by itself, harshness is not relevant.

– IV –

[82] The respondent also advances an argument based on bad faith. He submits that "[i]t is unfair and outright abusive for the RCMP to investigate an allegation against an RCMP member, elect not to proceed with it, but then secretly store the information away to be held against the member over a decade later": Respondent's Memorandum of Fact and Law, paragraph 46.

[83] This overshoots the mark. On the evidence before us, all that happened was the gathering of information relevant to the decision whether the respondent should be promoted, including an investigation report that was on file. There is nothing nefarious or abusive about this. Indeed, as part of the promotion process the respondent signed a consent allowing the RCMP to use any information it had on file, including the investigation report.

– V –

[84] Finally, in his memorandum of fact and law the respondent expresses concern about procedural fairness. However, the respondent seems to advance this as a concern about the substantive use of the investigation report, a concern I have already addressed.

[85] In any event, the respondent was afforded procedural fairness. The investigation report—the main obstacle to his promotion—was put to him in the meeting with the Deputy Commissioner. He had a chance to respond and he did so. If he were caught by surprise, he could have asked for more time but he did not. The record discloses no request for a further meeting. The respondent has not suggested that the meeting was itself procedurally unfair.

[86] For the foregoing reasons, I conclude that the Commissioner's decision was reasonable.

E. Proposed disposition

[87] Therefore, I would allow the appeal, set aside the judgment dated November 21, 2014 of the Federal Court in file T-1548-14 and dismiss the application for judicial review, with costs here and below.

"David Stratas"

J.A.

"I agree
A.F. Scott J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-556-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE O'KEEFE DATED NOVEMBER 21, 2014, NO. T-1548-13	
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. STAFF SERGEANT WALTER BOOGAARD
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 3, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	SCOTT J.A. BOIVIN J.A.
DATED:	JUNE 22, 2015

APPEARANCES:

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Paul Champ Bijon Roy	FOR THE RESPONDENT

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