

Federal Court



Cour fédérale

**Date: 20181217**

**Docket: T-1816-16**

**Citation: 2018 FC 1260**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, December 17, 2018**

**PRESENT: The Honourable Mr. Justice Bell**

**BETWEEN:**

**ANIKE MÉNARD**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the case**

[1] This is an application for judicial review, under subsection 18(1) of the *Federal Courts Act*, RSC, 1985, c F-7, of a decision of the Commissioner of the Royal Canadian Mounted Police [the RCMP] dated August 23, 2016 [the decision], pursuant to subsection 45.25(4) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [the Act]. In his decision, the Commissioner

dismissed the appeal filed by the applicant [Constable Ménard] under subsection 45.24(1) of the Act. The appeal challenged a recommendation of the Discharge and Demotion Board [the Board], which had ordered that Constable Ménard be discharged for unsuitability under subsection 45.23(1) of the *Act*.

[2] Constable Ménard challenges the Board's order, as well as the decision by the Commissioner of the RCMP. She claims that the Commissioner's decision was tainted by the flawed proceedings that took place before the Board hearing.

[3] For the reasons that follow, I allow the application for judicial review and order that both the Board's order and the Commissioner's decision be quashed, and that the issue of Constable Ménard's suitability be reconsidered.

## II. **Relevant facts**

[4] Constable Ménard was a member of the RCMP between May 26, 2008, and August 23, 2016. She successfully completed the RCMP basic training program at the RCMP academy in Regina, Saskatchewan. After completing this training, she was transferred to the Tracadie-Sheila detachment in New Brunswick, where she performed the general duties of a constable. She also successfully completed her six-month Field Coaching Program. Following surgery on her wrist on August 1, 2009, Constable Ménard was temporarily unable to perform her regular duties as a police investigator. For this reason, she had to work as a receptionist at the counter of her detachment. On August 31, 2009, Corporal Germain Léger was assigned to the position of supervisor at the Tracadie-Sheila detachment. As part of his new position, Corporal Léger was

required to review Constable Ménard's work, and after reviewing her work, he allegedly noted a number of shortcomings, which he shared with her.

[5] On September 16, 2009, Constable Ménard resumed her functions as a police investigator. She subsequently had several meetings with her superior officers concerning her unsatisfactory performance. On January 27, 2010, the performance management process was implemented. Once again, Constable Ménard had several meetings with her supervisors concerning her work performance, which had remained unsatisfactory according to the representations of the respondent. Constable Ménard was informed that if the situation did not improve, the next step would be to issue her a Notice of Shortcomings and pair her with a more experienced partner, for a period of three (3) months.

[6] On July 13, 2010, Staff Sergeant Major Hudon [S/S/M Hudon], Deputy Commissioner, Professional Standards, wrote the following, in part, to the chain of command at the Tracadie-Sheila detachment:

[TRANSLATION]

On Tuesday, July 6, 2010, I had a meeting with Inspector Roch Fortin, Commander of District 8, and Sergeant Sylvain Leclair to discuss what to do going forward. I also had a one and a half hour meeting with Constable Ménard to discuss her performance and give her an opportunity to provide explanations. It is important to note that Constable Ménard is still a probationary member (until November 2010) and that, consequently, the appropriate officer could proceed directly with issuing a Notice of Intention to Discharge. Despite this, and following the candid conversation that I had with her, as well as with Sergeant Leclerc, it is my opinion that Constable Ménard has the necessary qualities to succeed, and I believe that she will benefit from a recommendation that she be served a Notice of Shortcomings and that she subsequently be shadowed by a more experienced partner, who will be able to supervise her work effectively, for a period of three (3) months, so

that she can free herself from the lethargy in which she currently finds herself.

Constable Ménard is 40 years old. She is the mother of a 14 year-old son and worked as a server in a restaurant for several years prior to joining the ranks of the RCMP. She also has two university degrees, including one in Accounting. During our meeting, she explained that she had applied to join the Montréal police force when she was younger, but that the birth of her son required her to change her plans. She later resumed her university studies and was able to obtain the above-referenced degrees. She then applied to join the RCMP. Her service file does not indicate any major problem during her six-month training at Depot. She indicated that she was happy in the Acadian Peninsula region and that she had adapted quite well to being there. She purchased a home and a van. She indicated that she did not have any financial problems but admitted that she had to keep an eye on her spending. Her son will be returning to Montréal in a few weeks to live there with his father. Even though she finds this upsetting, she understands that this will be an opportunity for her to concentrate solely on her work, so that she can make progress in terms of trying to improve her performance. I explained to her that a Notice of Shortcomings would give her a last chance to raise her profile and improve things, and she told me that she clearly understood that.

[Emphasis added.]

[7] On August 26, 2010, Constable Ménard's doctor recommended that she take some time off work, which continued to be extended, month after month, until October 3, 2011. On November 9, 2010, while she was still on a leave of absence from work, she received a Notice of Intention to Discharge from the RCMP. She successfully contested the notice in question, and the discharge process was therefore suspended. While she was working at the Tracadie-Sheila detachment, Constable Ménard also faced two allegations of breaching the Code of Conduct, for which disciplinary action was taken against her.

[8] In July 2011, Constable Ménard was transferred to the Campbellton detachment. One of the objectives of this transfer was to offer her a [TRANSLATION] “fresh start”. On July 4, 2011, she had a meeting with her new supervisor, Corporal Benoit Jolette, as well as her mentor, Constable David Archambault, at the Campbellton detachment. At the time, Constable Archambault had approximately three (3) years of service, including his training period. During this meeting, Corporal Jolette gave Constable Ménard a Notice of Shortcomings. This notice listed requirements and tasks she was required to satisfy or improve over a period of three (3) months, as of the date of delivery of the notice. It is important to remember that she was still on sick leave when she received this notice.

[9] On October 3, 2011, she returned to work, reporting for duty at Campbellton. Between October 3 and October 30, 2011, she was accompanied by her mentor, Constable Archambault, for 11 work shifts. After these 11 work shifts, Constable Ménard patrolled alone in her police vehicle. Corporal Jolette, for his part, was transferred to the Saint-Quentin detachment after his first meeting with Constable Ménard. Saint-Quentin is located roughly 100 kilometres from Campbellton. Due to this transfer, Corporal Jolette therefore “supervised” Constable Ménard from a distance, by reviewing her work through the RCMP computer system.

[10] On April 18, 2011, S/S/M Hudon once again recommended that Constable Ménard be shadowed by a more experienced member at work—this time, in Campbellton. His correspondence in this regard reads as follows:

[TRANSLATION]

Martin,

Please find attached the French version of the Notice of Shortcomings form, as well as a copy of the Notice of Intention to Discharge concerning Constable Ménard.

The Notice of Intention to Discharge lists the Constable's alleged shortcomings, which may now be used to prepare the Notice of Shortcomings.

Notices of Shortcomings are usually prepared by the appropriate office [*sic*]. The Notice of Intention to Discharge was prepared by Jean-François Rennou [*sic*], and it would certainly prove very helpful for the preparation of this Notice of Shortcomings. Once Constable Ménard is served with the Notice of Shortcomings, we are recommending that she be shadowed by an experienced member for all or part of a period of three months. This member will supervise the constable and will have a role similar to that of the supervisors in the Field Coaching Program. If it is not possible to appoint a dedicated supervisor, a suitable colleague should assume this role by acting as a mentor for Constable Ménard. This mentor will ensure that Constable Ménard benefits from any and all practical assistance as well as any advice and supervision that she needs, to the extent reasonably practicable. This mentor should not be confused with the supervisor. To the extent possible, responsibility for each should be assumed by two different people. The role of both the supervisor and the mentor will be to help the constable and to give a general opinion concerning Constable Ménard's success or failure at the end of the period determined in the Notice of Shortcomings.

Both French and English copies of the manual on managing performance issues will be provided to the supervisor, as well as to the monitor or mentor. The parties concerned should send me electronic or paper copies of all performance reports produced by District 9, which will be placed in an electronic file here at Division Headquarters.

Please note that I am also sending a copy of this email to Inspector Landry, the officer in charge at District 9, in order to inform him of past incidents concerning this member, as well as to Counsel Rannou (area of responsibility), as his help may prove necessary for the purpose of preparing the Notice of Shortcomings concerning Constable Ménard.

Regards,

Bert.

[Emphasis added.]

[11] It is clear that despite the two (2) recommendations made by S/S/M Hudon, i.e. one in 2010 and the other in 2011, Constable Ménard was not paired with an experienced constable as recommended. It is important to mention that Constable Archambault had only three (3) years of service, only six (6) months more than Constable Ménard. Moreover, he only supervised 11 of Constable Ménard's work shifts, and prior to this experience working with Constable Ménard, Constable Archambault had never supervised or been responsible for an RCMP recruit. In other words, this was the first time that Constable Archambault had mentored another constable, and it was therefore a new experience for him.

[12] In late October and early November 2011, Constable Ménard received instructions that that she was no longer to patrol the territory accompanied by another police officer. Her testimony in this regard was confirmed by the testimony of Constable Spacek, cited later in these reasons. This directive by the management of the RCMP was diametrically opposed to the two recommendations made by S/S/M Hudon.

A. **Illegal disclosure of Constable Ménard's personal information**

[13] Before going any further in my summary of the facts, it is important to note here that before completing Constable Ménard's performance assessment, Constable Archambault received private and confidential information concerning Constable Ménard. Indeed, the full contents of the initial Notice of Intention to Discharge, including the disciplinary action taken against Constable Ménard while she was working in Tracadie-Sheila, were disclosed to

Constable Archambault without authorization. This illegal disclosure was established before the Board without being challenged. On this subject, the Commissioner concluded that Constable Archambault should not have had access to this information and that the disclosure of this information did not constitute a use consistent with the purposes for which it was obtained, within the meaning of paragraphs 7(a) and 8(2)(a) of the *Privacy Act*, RSC, 1985, c P-21.

[14] It should also be noted that this disclosure not only was illegal, but also prejudiced the perception that Constable Ménard's colleagues, and particularly her mentor, Constable Archambault, had of her. Indeed, in his final report to Inspector Landry, the officer in charge of the Campbellton detachment, Constable Archambault made reference to a situation where there had been a contradiction between Constable Ménard's statements and the statements of a complainant in the context of a case. Constable Archambault noted that the matter had involved an incident that was [TRANSLATION] "rather innocuous, where the credibility of a police officer should not be called into question". However, he added that given [TRANSLATION] "the past incidents involving Constable Ménard, there was some doubt [in his mind] about Constable Ménard's integrity".

[15] The Commissioner concluded, following the approach adopted by the Board, that the illegal disclosure of Constable Ménard's personal information did not influence the outcome of the hearing. He stated:

[TRANSLATION]

On the whole, the evidence does not support the appellant's allegations that doubts concerning her integrity negatively impacted the performance assessment process. The Board



concluded that the Appellant's performance assessment was conducted impartially and in good faith, and that in acting as it did, the Board did not commit any palpable or overriding error. Therefore, there are no grounds to intervene on appeal.

### **Service of the Notice of Discharge**

[16] On February 15, 2012, Constable Ménard had a meeting with Inspector Landry to discuss her performance. During this meeting, he advised her that he would not be recommending her retention within the RCMP and served her with an order removing her from her duties. On March 23, 2012, Constable Ménard therefore received a Notice of Intention to Discharge under section 45.19 of the Act. She requested a review of this notice by the Board under paragraph 45.19(2)(b) of the Act. The Board held a hearing in December 2012, and its decision ordering her to be discharged for unsuitability was rendered orally on February 12, 2013, and then in writing in May 2013. Constable Ménard then appealed this decision to the Commissioner, who referred the matter to the RCMP External Review Committee even before reviewing the file. The Committee recommended that the Commissioner dismiss the appeal. Further to this recommendation and after reviewing the file under section 45.26 of the Act, the Commissioner, in turn, dismissed the appeal and upheld the decision of the Board.

### **Excerpt from the stenographer's notes from the Board hearing**

[17] During the hearing before the Board, Inspector Landry was interrogated about Constable Ménard's performance, as compared with the performance of Constable Spacek. During this testimony, Inspector Landry admitted that Constable Spacek was considered to be one of the best members of the RCMP in Campbellton. The exchange reads as follows:

[TRANSLATION]

A. You are asking me to compare the performance of the two members?

Q. Yes.

A. In general or just in terms of a specific subject?

Q. In general?

A. In general? I can tell you that Constable Spacek is a junior, a very junior member, but that she is probably one of our best members in Campbellton.

Q. Really?

A. Absolutely.

[18] Given Inspector Landry's opinion about the fact that Constable Spacek could be counted among the best members of the RCMP in Campbellton, I believe that it is relevant to reproduce excerpts of the testimony she gave before the Board:

[TRANSLATION]

On one occasion, I remember that a member advised me not to help Constable Ménard (page 25, line 25, page 26, line 1-2).

[TRANSLATION]

A. Er, yes, you know, when we are sent to respond to a call, we often—you know, we—you know, we'll say, you know, we say: "23, on site" or with our computerized location systems you can also see, you know, where—where the other members are, where the other vehicles are—are parked and stationary.

Q. O.K.

So, based on your experience at work this fall with Ms. Ménard, what is your impression of the number of calls to which Officer Ménard responded?

She responded to her share of calls compared to—to everyone else.

Q. O.K.

What about her availability to assist?

Her availability?

Q. Yes?

A. Er, she came—she accompanied me to respond to calls. She responded to calls with me and other members.

Er, she never just stood there with her arms crossed. She—you know she was there—and, you know, I remember responding to a call and, er, the person was—was suicidal, and I was there with the Corporal, and she took the initiative, and it was during the first week that she had been working with us, when she had started with us, and, er, she spoke to the mother. She had a conversation with the mother, just to, er, get more information.

Q. O.K.

So, during your specific intervention with Officer Ménard, what was your impression of the way in which she approached clients?

OBJ J. LAVIGNE: Objection.

“Impression”. Needs to be grounded in the facts.

C. CHRÉTIEN: Well, I’m asking about her impression of how Constable Ménard approached clients, “during a specific intervention”.

MEMBER B. TREMBLAY: Would you like her to rephrase?

J. LAVIGNE: I’d like her to rephrase because I don’t think we can learn much from impressions.

MEMBER B. TREMBLAY: Can you perhaps rephrase without asking for an impression?

C. CHRÉTIEN: O.K.

BY C. CHRÉTIEN:

Q. So, during your specific intervention, what—you know—how did she approach clients?

A. She was, er, she had good interpersonal skills, er, she asked good questions to obtain details of—of why we were there.

Er, She had good communication skills. She is bilingual—more bilingual than I am. Er, she did not hesitate when speaking English or French. Er, she did not talk down to the client.

Er, she acted in a professional manner.

Q. O.K.

And how did you feel when you worked with her during the night shift?

She was my back up. Er, I felt—I felt safe. I had previously worked with her at night, you know.

To be clear, I trusted her enough for her to be my back up, so . . .

Q. All in all, based on your experience and the few months that you worked with her, what do you think of her abilities—her abilities as a police officer?

A. To be honest, she impressed me with how much—with what I had heard about her.

Er, you know, with what I had heard, you know, I took these assessments with a grain of salt, without judging her in that way, and after observing how she worked and her work ethic, you know, she may have been a bit lacking in some areas, er, but who hasn't slipped up when you are—when—when starting out as a member?

Er, but all in all, she impressed me with—given what I had heard.

You know, er, when I met her for the first time, I was a little wary of her, I suppose, I was a little careful in that sense and then, you know, to see her during interventions and—to see her doing her work, I said to myself: Hey! She's not so bad after all.

Q. I have no further questions. I have no more questions. Finally, relevant provisions Je n'ai pas d'autres questions. J'ai plus de questions.

Finally, the relevant provisions.

### III. Relevant provisions

[19] The relevant provisions of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, as they were prior to the amendments of June 19, 2013; of the *Privacy Act*, RSC, 1985, c P-21; and the *Public Service Employment Act*, RSC 1970, c P-32, are set out in appendices A, B and C.

#### IV. **Board's order and Commissioner's decision**

[20] In an extremely detailed decision, the Board explained why it concluded that Constable Ménard's discharge, on the ground of unsuitability, had been established [TRANSLATION] "on a balance of probabilities". The Board therefore ordered Constable Ménard's discharge under subsection 45.23(2) of the Act.

[21] In its analysis, the Board had to contend with two diametrically opposed positions concerning the procedure to follow. The appropriate officer, appointed under subsection 2(3) of the Act, claimed that the Board should show deference "towards those that had observed" Constable Ménard during the performance assessment. Constable Ménard, for her part, argued that the Board did not have any duty of deference to the decision rendered by her superiors. Indeed, Constable Ménard claimed that the Board had a duty to examine the evidence, without prejudice towards her and without showing deference to her mentor and her superiors. Constable Ménard claimed that, in the context of its functions, the Board played the role of an arbitrator by deciding whether unsuitability had been established. Constable Ménard was also of the opinion that the Board should follow the procedure applicable in an adversarial system, where all the parties start on an equal footing.

[22] In its decision, the Board concluded that it should show deference to Constable Ménard's supervisors and evaluators. Shortly after reaching this conclusion, the Board maintained that it should [TRANSLATION] "decide, considering all the documentary evidence on record and the testimony heard during the hearing, whether the ground of unsuitability had been established . . . on a balance of probabilities". First and foremost, this presents a problematic dichotomy because it seems inconceivable to me that the Board could show deference to a previous decision but, at the same time, undertake to weigh the evidence fairly to determine whether the ground of unsuitability had been established. Such deference diminishes the value of the testimony provided by Constable Ménard, Constable Spacek and all other evidence in support of Constable Ménard. I will revisit this point later in my analysis.

[23] In his decision, the Commissioner approved of this deferential approach to the opinion of Constable Ménard's supervisors. He clearly articulated the question raised here, noting the following at paragraph 84:

[TRANSLATION]

Before rendering a decision on the merits of this appeal, it is important to discuss, on the one hand, the degree of deference that a board constituted under Part V of the Act must show towards the decision of the appellant's managers and, on the other hand, the degree of deference applicable in the context of an appeal under section 45.24 of the Act.

[24] The Commissioner cited *Ahmad v Canada (Public Service Commission Appeal Board)*, [1974] 2 FC 644, in concluding that the Board must show deference to the opinions of the managers with regard to the competence or incompetence of an employee. The Commissioner went even further and reinforced the findings of the external committee by maintaining that

[TRANSLATION] “the Board’s role was not to re-assess the member’s performance, but solely to ensure that the evidence established that the appellant received reasonable assistance, as provided in section 45.18 of the Act”.

[25] With respect to the level of deference that must be shown when reviewing the Board’s decision, the Commissioner cited *Dunsmuir v New-Brunswick*, 2008 SCC 9, and *Housen v Nikolaisen*, 2002 SCC 33, to conclude that [TRANSLATION] “considerable deference should be accorded to the Board’s decision”. Indeed, the Commissioner maintains that since the issues in dispute in this case concern an interpretation of the facts by the Board, he must show considerable deference to the Board’s decision. He also added that his intervention is only warranted if the Board’s decision falls outside a range of “possible, acceptable outcomes which are defensible in respect of the facts and the law”: *Dunsmuir*, para 47.

### **Job shadowing**

[26] Before the Commissioner and the Board, Constable Ménard explained that she had not been shadowed by a more experienced Constable for the recommended period of time. The Commissioner concluded that it was up to Constable Ménard’s supervisors to use their judgment to determine the duration of the job shadowing. The Commissioner also declared the following at paragraph 132 of his decision:

[TRANSLATION]

Given the deference that the Board should accord to the decisions made by the appellant’s managers, I conclude that the Board did not commit any palpable or overriding error in assessing the job shadowing provided to the appellant and in determining whether her supervisors had offered her reasonable assistance. Therefore, my intervention is not justified.

### **Disclosure of private and confidential information**

[27] As mentioned in paragraph 13 above, the Commissioner concluded, correctly in my opinion, that private and confidential information concerning Constable Ménard was disclosed to Constable Archambault contrary to paragraphs 7(a) and 8(2)(a) of the *Privacy Act*. This information primarily related to the performance gaps noted in Constable Ménard's work, as well as the disciplinary measures taken against her while she was working in Tracadie-Sheila. As indicated above, only supervisors were authorized to access this information. Consequently, since Constable Archambault was not Constable Ménard's supervisor, he was not authorized to access the information in question. In paragraph 173 of his decision, the Commissioner noted that Constable Archambault's final opinion had been based, in part, on his perception of Constable Ménard's level of integrity. The allegation of a lack of integrity was part of the private and confidential information disclosed to Constable Archambault.

[28] Despite this breach of privacy, the Commissioner maintains that it was not Constable Archambault's role to recommend whether Constable Ménard should be discharged. On the contrary, this authority rested with Inspector Landry and Corporal Jolette. The Commissioner noted that neither of these two officers called Constable Ménard's integrity or honesty into question in their final reports. The Commissioner also noted that the Board "did not make any reference whatsoever to Constable Ménard's integrity or honesty". In other words, the Commissioner was of the opinion that the illegal disclosure of private and confidential information concerning Constable Ménard did not have any influence on the



decision-making process, even though Constable Archambault made reference to that information.

V. **Analysis**

A. **Standard of Review**

[29] This case involves a decision by the Board and the appeal of this decision to the Commissioner. In both instances, the interpretation of the home statute was the central element. On this subject, it is my opinion that the case law clearly establishes that the applicable standard of review is reasonableness (*Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R 708; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293; *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, 416 D.L.R. (4th) 579).

[30] In the context of a judicial review, the judge must show judicial deference to the administrative decision maker. At paragraph 47, *Dunsmuir* instructs us that “reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.

[31] Deference should not be shown when there is a breach of the principles of procedural fairness, which includes the right to an impartial decision maker. Indeed, any violation of the principles of procedural fairness is an error which allows the Court, in the context of a judicial review, to intervene (*Mission Institute v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43; *Contrevenant no. 10 c Canada (Attorney General)*, 2018 CAF 150 at para 20). An impartial decision maker is a crucial requirement where the decision maker is part of a complete scheme created with the objective of ensuring respect for the principles of procedural fairness. In this case, Part V of the Act constitutes a complete scheme applicable to the discharge and demotion of members of the RCMP (*Harvey Sinclair v Canada (Attorney General)*, 2006 FC 528 [Sinclair] at para 13, 291 FTR 182; *Anderson v Canada (Attorney General)*, 2018 FC 834).

[32] I adopt as my own the following comments of the Justice Montigny, now a judge of the Federal Court of Appeal, at paragraphs 13, 14 and 15 of *Sinclair*:

[13] Part V of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-9, as amended, provides the complete scheme for the discharge or demotion of a member of the RCMP. Section 45.18(1) states that a member can be discharged on the ground of unsuitability meaning that the "... member has repeatedly failed to perform... [his] duties under this Act in a manner fitted to the requirements of the ... member's position, notwithstanding that the ... member has been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties."

[14] Before a member is discharged, the appropriate officer serves a notice in writing of the intention to recommend the discharge of the member. This notice includes particulars of the acts and omissions constituting the ground of unsuitability upon which the discharge will be based. (RCMP Act, s. 45.19). Once a member has received the Notice of Intention to Discharge he may send the appropriate officer a request in writing for a review of the

member's case by a Discharge and Demotion Board (RCMP Act, s. 45.19(4)).

[15] If a member requests a Discharge and Demotion Board, three officers of the RCMP are appointed as members of that Board (RCMP Act, s. 45.2). The Discharge and Demotion Board gives the member a full and ample opportunity in person or by counsel or a representative to appear before the Board, make representations, present documentary evidence and with leave of the Board, to call witnesses (RCMP Act, s. 45.22(3)). Following the hearing, the Discharge and Demotion Board decides whether the ground of unsuitability is established on a balance of probabilities. If the ground of unsuitability is established, the Board discharges the member (RCMP Act, s. 45.23).

B. **Procedural fairness**

[33] The situation facing Constable Ménard, her discharge, is considered to be the “capital punishment” of employment law (*Bird v White Bear First Nation*, 2017 FC 477 at para 32; *Johar v Best Buy Canada*, 2016 ONSC 5287 at para 11). In light of this principle, it is my opinion that Constable Ménard had a right to a fair and just hearing. The Board had a duty to conduct an independent assessment of the evidence in order to determine whether the appropriate officer had established the ground of unsuitability on a balance of probabilities. The Board's statement at the beginning of its decision, indicating that it had to show deference to the decision made by the appropriate officer, had the consequence of placing Constable Ménard in an unfavourable position and created a situation that raised a reasonable apprehension of bias. Consequently, the Board departed from its role as an independent decision maker.

[34] The Commissioner justified his finding by citing *Ahmed v Canada (Public Service Commission Appeal Board)*, [1974] 2 FC 644, 51 DLR (3d) 470 [*Ahmed*]. With respect, I believe that he is wrong. The decision in *Ahmed* was rendered in the early 1970s, and Canadian

society has changed dramatically since then, particularly in the area of employment and labour law. Moreover, there have been several amendments to the procedures concerning discharge and demotion within the RCMP, provided in Part V of the Act. Indeed, in an effort to create a complete scheme that will be able to respond to the demands and expectations of members of the RCMP, Parliament made amendments to Part V of the Act in 1990, 1993 and 2002. In June 2013, Part V was finally repealed.

[35] In order to illustrate the distinction between the decision rendered in *Ahmed* and the case at bar, we will review the various statutes concerned in the two cases, namely, the *Public Service Employment Act*, RSC 1970, c P-32, and the *Royal Canadian Mounted Police Act*. The relevant excerpts are reproduced in appendices A and B below.

[36] In this case, the powers and responsibilities of the Board and the Commissioner differ from those of the appeal board in *Ahmed*, where the employee did not have the right to appeal to an independent board made up of experienced officers in the context of a complete scheme. Moreover, in *Ahmed*, the appeal board did not have jurisdiction to consider the case *de novo*, as it did not have any testimonial evidence before it, or to render a decision on the balance of probabilities.

[37] By showing deference to the findings of the managers and the appropriate officer, the Board and the Commissioner deprived Constable Ménard of her right to an impartial decision maker. This breach of a principle of procedural fairness leads me to conclude that the application for judicial review should be allowed.

[38] Even if I am wrong and there was no breach of procedural fairness, it is my opinion that both the Board and the Commissioner relied on an interpretation of their home statute that was unreasonable. Indeed, if we follow the logic of their interpretation, the Board will show deference to a decision rendered by the managers of a member of the RCMP, even if there is an error in this decision. By extension, the Commissioner will also show deference to this error by according deference to the decision rendered by the Board. This is unreasonable because, on the one hand, the consequences of such an approach could prove irreversible, and on the other hand, this approach does not encourage transparency in the context of a complete scheme.

C. **Unreasonable conclusions regarding the job shadowing and the disclosure of private and confidential information**

[39] I believe that both the conclusions reached and the analyses conducted by the Board and the Commissioner concerning the issues of the job shadowing and the disclosure of private and confidential information were unreasonable. In reviewing the case at bar, it is important to keep in mind that the future of a police officer is at stake here. On two occasions, S/S/M Hudon recommended that Constable Ménard be shadowed by an experienced constable. Unfortunately, these instructions were not followed. The uncontested evidence demonstrates that Constable Archambault was not an experienced constable. Moreover, he was paired with Constable Ménard for only six (6) weeks over a period of three (3) months. Furthermore, Constable Ménard was instructed not to accompany other police officers during the period corresponding to her performance assessment, and the other police officers were advised not to work with her. Finally, I note that Constable Ménard's [TRANSLATION] "supervisor" was transferred to the Saint-Quentin detachment, located 100 km from Campbellton. I do not

believe that this was the kind of supervision that was contemplated when the decision was made to transfer Constable Ménard to Campbellton, for a [TRANSLATION] “fresh start”. Under these circumstances, the RCMP created a situation where the failure of a member was more likely than the member’s success. I believe that the conclusions, including the decision-making process used by both the Board and the Commissioner, concerning the issue of job shadowing, lack transparency and intelligibility.

[40] With respect to the issue of the disclosure of Constable Ménard’s private and confidential information, it is clear that Inspector Landry and Corporal Jolette relied on the opinion of Constable Archambault to form their own opinions. The documentary evidence clearly demonstrates that Constable Archambault received private and confidential information about Constable Ménard and that he also used this information to form his own opinions about Constable Ménard’s skills. The Commissioner concluded that the information was illegally transmitted to Constable Archambault. I agree with him on this point. However, I believe that both his conclusion and his analysis concerning the influence of this disclosure lack transparency and intelligibility. It is clear that the disclosure influenced Constable Archambault’s opinion of Constable Ménard, and that his opinion significantly influenced Inspector Landry and Corporal Jolette.

## VI. Style of cause

[41] The respondent asks this Court not to designate the RCMP as a named respondent in this case since the RCMP is not a legal entity. I agree with this position. Indeed, the RCMP is a federal government department, not a legal entity. Consequently, as established by the case law,

it cannot be named as a party in a case (*Gravel v Canada (Attorney General)*, 2011 FC 832 at para 6, 393 FTR 219; *Sauvé v Canada*, 2010 FC 217 at para 44, 186 ACWS (3d) 66).

Consequently, the Attorney General of Canada will be the only respondent in this case.

## VII. **Conclusion**

[42] For these reasons, the application for judicial review is allowed. The decisions rendered by the Board and the Commissioner are set aside. I order that the case be reconsidered. The style of cause will be amended to strike the ROYAL CANADIAN MOUNTED POLICE as a respondent.

**JUDGMENT in T-1816-16**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is allowed with costs;
2. The order of the Board and the decision of the Commissioner are quashed;
3. The issue of Constable Ménard's suitability shall be reconsidered; and
4. The style of cause for the case is amended strike the name of the ROYAL CANADIAN MOUNTED POLICE as a respondent.

“B. Richard Bell”

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Judge

Certified true translation  
This 29th day of January, 2019.  
Michael Palles, Translator



## APPENDIX A

*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10

*Loi sur la Gendarmerie royale du Canada*, L.R.C. (1985), ch. R-10

**Repealed, 2013, c 18, s 29:**  
PART V – DISCHARGE  
AND DEMOTION -  
GROUND FOR DISCHARGE  
AND DEMOTION

**Abrogé, 2013, ch. 18, art. 29 :**  
PARTIE V – RENVOI ET  
RÉTROGRADATION –  
MOTIFS DE RENVOI OU DE  
RÉTROGRADATION

Ground for discharge and  
demotion

Motifs de renvoi ou de  
rétrogradation

**45.18** (1) Any officer may be recommended for discharge or demotion and any other member may be discharged or demoted on the ground, in this Part referred to as the “ground of unsuitability”, that the officer or member has repeatedly failed to perform the officer’s or member’s duties under this Act in a manner fitted to the requirements of the officer’s or member’s position, notwithstanding that the officer or member has been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties.

**45.18** (1) Le renvoi ou la rétrogradation d’un officier peut être recommandé, ou tout autre membre peut être renvoyé ou rétrogradé, pour le motif, appelé dans la présente partie « motif d’inaptitude », qu’il a omis, à plusieurs reprises, d’exercer de façon satisfaisante les fonctions que lui impose la présente loi, en dépit de l’aide, des conseils et de la surveillance qui lui ont été prodigués pour l’aider à s’amender.

Limitation

Restriction

(2) No officer may be recommended for a demotion under this Part of more than one rank and no other member may be demoted under this Part by more than one rank or level.

(2) Un officier ou un autre membre ne peut faire l’objet, selon le cas, d’une recommandation de rétrogradation de plus d’un grade ou d’une rétrogradation de plus d’un grade ou de plus d’un échelon en vertu de la

présente partie.

#### Exceptions

(3) No inspector may be recommended for demotion under this Part and no Constable may be demoted under this Part.

R.S., 1985, c 8 (2nd Supp.), s 16.

#### Exceptions

(3) Un inspecteur ne peut faire l'objet d'une recommandation de rétrogradation, ni un gendarme être rétrogradé, en vertu de la présente partie.

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16.

#### Notice of Intention

**45.19** (1) Before any officer is recommended for discharge or demotion under this Part or any other member is discharged or demoted under this Part, the appropriate officer shall serve the officer or other member with a notice in writing of the intention to recommend the discharge or demotion of the officer or to discharge or demote the other member, as the case may be.

#### Contents of Notice

(2) A notice of intention served on an officer or other member under subsection (1) shall include

(a) particulars of the acts or omissions constituting the ground of unsuitability on which it is intended to base the recommendation for discharge or demotion or the discharge or demotion, as the case may be;

(b) where the officer or other member is not a probationary member, a

#### Avis d'intention

**45.19** (1) Un officier ne peut faire l'objet d'une recommandation de renvoi ou de rétrogradation et un autre membre ne peut être renvoyé ni rétrogradé, en vertu de la présente partie, avant que l'officier compétent ne lui ait signifié, par écrit, un avis d'intention à cet effet.

#### Contenu de l'avis

(2) L'avis d'intention visé au paragraphe (1) contient les éléments suivants :

*a)* un exposé détaillé des actes ou des omissions constituant le motif d'inaptitude devant servir de fondement à la sanction projetée;

*b)* si l'officier ou l'autre membre n'est pas un membre stagiaire, la

statement of the right of the officer or other member to request, within fourteen days after the day the notice is served, a review of the officer's or member's case by a discharge and demotion board; and

mention de son droit de demander, dans les quatorze jours suivant la signification de l'avis, la révision de sa cause par une commission de licenciement et de rétrogradation;

(c) where the officer or other member is a probationary member, a statement of the right of the officer or other member to make, within fourteen days after the day the notice is served, written representations to the appropriate officer.

c) si l'officier ou l'autre membre est un stagiaire, la mention de son droit de faire, dans les quatorze jours suivant la signification de l'avis, des observations écrites à l'officier compétent.

#### Opportunity to Examine Material

#### Possibilité d'examen de la documentation

(3) An officer or other member who is served with a notice under subsection (1) shall be given a full and ample opportunity to examine the material relied on in support of the recommendation for discharge or demotion or the discharge or demotion, as the case may be

(3) L'officier ou l'autre membre à qui est signifié l'avis visé au paragraphe (1) doit avoir toute latitude pour examiner la documentation ou les pièces présentées à l'appui de la sanction projetée.

#### Request for Review

#### Demande de révision

(4) An officer or other member, except a probationary member, who is served with a notice under subsection (1) may, within fourteen days after the day the notice is served, send to the appropriate officer a request in writing for a review of the officer's or member's case by a discharge

(4) L'officier ou l'autre membre, autre qu'un membre stagiaire, à qui est signifié l'avis visé au paragraphe (1) peut, dans les quatorze jours suivant la signification de cet avis, demander par écrit à l'officier compétent la révision de sa cause par une commission de licenciement et

and demotion board	de rétrogradation.
Request to be forwarded to designated officer	Transmission de la demande à l'officier désigné
(5) An appropriate officer shall forthwith after receiving a request under subsection (4) forward the request to the officer designated by the Commissioner for the purposes of this section.	(5) Dès qu'il reçoit la demande visée au paragraphe (4), l'officier compétent la transmet à l'officier désigné par le commissaire pour l'application du présent article.
Written Representations	Représentations écrites
(6) A probationary member who is served with a notice under subsection (1) may, within fourteen days after the notice is served, make written representations to the appropriate officer.	(6) Le membre stagiaire à qui est signifié l'avis visé au paragraphe (1) peut, dans les quatorze jours suivant la signification de cet avis, faire des observations écrites à l'officier compétent.
Notice of Decision	Avis de la décision
(7) Where an officer or other member, except a probationary member, who is served with a notice under subsection (1) does not request a review of the officer's or member's case by a discharge and demotion board within the time limited for doing so, the appropriate officer shall serve the officer or other member with a notice in writing of the decision to recommend discharge or demotion of the officer or to discharge or demote the member, as the case may be	(7) Lorsque l'officier ou l'autre membre, à l'exception d'un membre stagiaire, à qui est signifié l'avis visé au paragraphe (1) ne demande pas la révision de sa cause par une commission de licenciement et de rétrogradation dans le délai prévu, l'officier compétent lui signifie un avis écrit de la décision recommandant ou imposant la sanction visée à ce paragraphe.
Idem	Idem
(8) Where a probationary member who is served with a notice under subsection (1) does not make written	(8) Lorsque le membre stagiaire à qui est signifié l'avis visé au paragraphe (1) ne fait pas d'observations

representations to the appropriate officer within the time limited for doing so, the appropriate officer shall serve the probationary member with a notice in writing of the decision to recommend discharge of the probationary member or to discharge the probationary member, as the case may be.

écrites à l'officier compétent dans le délai prévu, l'officier compétent lui signifie un avis écrit de la décision recommandant ou imposant la sanction prévue à ce paragraphe.

Consideration of written representations

Étude des observations écrites

(9) An appropriate officer shall forthwith after receiving written representations pursuant to subsection (6) consider the representations and either

(9) Dès qu'il reçoit les observations écrites prévues au paragraphe (6), l'officier compétent étudie celles-ci et, selon le cas :

(a) direct that the probationary member be retained in the Force; or

*a)* ordonne que le membre stagiaire continue à faire partie de la Gendarmerie;

(b) serve the probationary member with a notice in writing of the decision to recommend discharge of the probationary member or to discharge the probationary member, as the case may be.

*b)* signifie par écrit au membre stagiaire la décision de recommander son renvoi, s'il est officier, ou, s'il ne l'est pas, de le renvoyer.

Effective date

Date d'entrée en vigueur

(10) A member, other than an officer, who is served with a notice under subsection (7), (8) or (9) is discharged on such day as is specified in the notice or is demoted on such day and to such rank or level as is specified in the notice, as the case may be.

(10) Un membre qui n'est pas officier et à qui est signifié un avis en vertu des paragraphes (7), (8) ou (9) est, selon le cas, soit renvoyé à la date prévue à l'avis, soit rétrogradé au grade ou à l'échelon indiqué à l'avis à la date qui y est prévue.

Definition of “probationary member”

(11) In this section, “probationary member” means a member with less than two years of service in the Force.

R.S., 1985, c 8 (2nd Supp.), s 16; 1993, c 34, s 111(F).

REVIEW BY DISCHARGE AND DEMOTION BOARD

Discharge and demotion board

**45.2** (1) Within seven days after the day a designated officer receives a request under subsection 45.19(5), the designated officer shall appoint three officers as members of a discharge and demotion board to conduct the review requested and shall serve the officer or other member requesting the review with a notice in writing setting out the names of the officers so appointed.

Qualifications

(2) At least one of the officers appointed as a member of a discharge and demotion board shall be a graduate of a school of law recognized by the law society of any province.

Applicable provisions

(3) Subsections 44(1) to (4)

Définition de « membre stagiaire »

(11) Au présent article, « membre stagiaire » s’entend d’un membre qui compte moins de deux ans de service au sein de la Gendarmerie

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16; 1993, ch. 34, art. 111(F).

RÉVISION PAR LA COMMISSION DE LICENCIEMENT ET DE RETROGRADATION

Commission de licenciement et de rétrogradation

**45.2** (1) L’officier désigné à qui est transmise la demande visée au paragraphe 45.19(5) nomme, dans les sept jours suivant la réception de la demande, trois officiers à titre de commission de licenciement et de rétrogradation pour procéder à la révision demandée, et signifie par avis écrit à l’officier ou à l’autre membre qui a demandé la révision le nom des trois officiers ainsi nommés.

Qualités requises

(2) Au moins un des trois officiers de la commission est un diplômé d’une école de droit reconnue par le barreau d’une province.

Opposition à la nomination

(3) Les paragraphes 44(1) à (4)

apply, with such modifications as the circumstances require, with respect to a notice under subsection (1) as though

s'appliquent, compte tenu des adaptations de circonstance, à l'avis visé au paragraphe (1) comme si :

(a) the designated officer serving the notice were the designated officer referred to in subsection 43(1);

a) l'officier désigné qui a signifié l'avis était l'officier désigné visé au paragraphe 43(1);

(b) the notice were a notice of hearing referred to in subsection 44(1); and

b) l'avis était un avis d'audience visé au paragraphe 44(1);

(c) the discharge and demotion board were an adjudication board.

c) la commission de licenciement et de rétrogradation était un comité d'arbitrage.

#### Eligibility limited

#### Admissibilité

(4) An officer is not eligible to be appointed as a member of a discharge and demotion board if the officer

(4) Ne peut être nommé à titre de membre d'une commission de licenciement et de rétrogradation l'officier qui :

(a) is the immediate superior officer of the member whose case is to be reviewed by the board; or

a) soit est le supérieur immédiat du membre dont la cause est révisée par la commission;

(b) is involved in the initiation or processing of the case that is to be reviewed by the board.

b) soit est mêlé à l'affaire soumise à la commission pour avoir provoqué son instruction ou y avoir participé.

#### Chairman

#### Président

(5) After the conclusion of all proceedings under this section, the designated officer shall designate one of the members of the discharge and demotion board as chairman.

(5) À l'issue des procédures en vertu du présent article, l'officier désigné nomme un des membres de la commission de licenciement et de rétrogradation à titre de président.

R.S., 1985, c 8 (2nd Supp.), s

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.),

16.	art. 16.
Powers of discharge and demotion board	Pouvoirs de la commission de licenciement et de rétrogradation
<b>45.21</b> A discharge and demotion board has, in relation to the case before it, the powers conferred on a board of inquiry, in relation to the matter before it, by paragraphs 24.1(3)(a), (b) and (c).	<b>45.21</b> La commission de licenciement et de rétrogradation possède, relativement à l'affaire dont elle est saisie, les pouvoirs conférés à une commission d'enquête par les alinéas 24.1(3) <i>a</i> ), <i>b</i> ) et <i>c</i> ).
R.S., 1985, c 8 (2nd Supp.), s 16.	L.R. (1985), ch. 8 (2 <sup>e</sup> suppl.), art. 16.
Parties	Parties
<b>45.22</b> (1) An officer or other member who sends a request under subsection 45.19(4) for a review of the officer's or member's case by a discharge and demotion board and the appropriate officer to whom the request is sent are parties to the review.	<b>45.22</b> (1) L'officier ou l'autre membre qui demande, en vertu du paragraphe 45.19(4), la révision de sa cause par une commission de licenciement et de rétrogradation ainsi que l'officier compétent à qui la demande est faite sont parties à la révision.
Material to be provided to Board	Documents à transmettre à la commission
2) A discharge and demotion board shall, prior to reviewing the case before it, be provided by the appropriate officer with the material that the officer or other member requesting the review was given an opportunity to examine pursuant to subsection 45.19(3).	(2) Avant de procéder à la révision dont elle est saisie, la commission de licenciement et de rétrogradation reçoit de l'officier compétent la documentation ou les pièces que l'officier ou l'autre membre qui a demandé la révision a eu la possibilité d'examiner conformément au paragraphe 45.19(3).
Review of case	Révision
(3) A discharge and demotion	(3) La commission de



board shall, after due notice to the officer or other member requesting the review, review the case before it and for that purpose shall give to the officer or other member a full and ample opportunity, in person or by counsel or a representative, to appear before the board, to make representations to it, to present documentary evidence to it and, with leave of the board, to call witnesses.

Idem

(4) Subject to subsection (3), a discharge and demotion board may review the case before it in the absence of the officer or other member requesting the review.

Testimony of member

(5) Notwithstanding any other provision of this Part, the officer or other member who has requested a review of the officer's or member's case by a discharge and demotion board is not compelled to testify at any hearing before the board, but the officer or member may give evidence under oath and where the officer or member does so, subsections (8) and (9) apply to the officer or member.

licenciement et de rétrogradation procède à la révision dont elle est saisie après avoir dûment avisé l'officier ou l'autre membre ayant demandé la révision; elle accorde à cet officier ou à ce membre toute latitude pour comparaître devant la commission, y produire des éléments de preuve documentaire, y faire des observations et, avec la permission de la commission, y citer des témoins, soit personnellement, soit par l'intermédiaire d'un avocat ou autre représentant.

Idem

(4) Sous réserve du paragraphe (3), la commission de licenciement et de rétrogradation peut procéder à la révision en l'absence de l'officier ou de l'autre membre qui l'a demandée.

Déposition des membres

(5) Par dérogation à toute autre disposition de la présente partie, l'officier ou l'autre membre qui a demandé une révision n'est pas tenu de témoigner aux audiences de la commission de licenciement et de rétrogradation; il peut, cependant, faire une déposition sous serment, auquel cas les paragraphes (8) et (9) s'appliquent à lui.

Representation of witnesses

(6) A discharge and demotion board shall permit any person who gives evidence at any hearing before the board to be represented by counsel or a representative.

Restriction

(7) Notwithstanding section 45.21 but subject to subsection (8), a discharge and demotion board may not receive or accept any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence.

Witness not excused from testifying

(8) In a review by a discharge and demotion board, no witness shall be excused from answering any question relating to the case before the board when required to do so by the board on the ground that the answer to the question may tend to criminate the witness or subject the witness to any proceeding or penalty.

Answer not receivable

(9) Where the witness is a member, no answer or statement made in response to a question described in subsection (8) shall be used or receivable against the witness

Représentation des témoins

(6) La commission de licenciement et de rétrogradation doit permettre aux témoins de se faire représenter par un avocat ou un autre représentant.

Restriction

(7) Par dérogation à l'article 45.21 mais sous réserve du paragraphe (8), la commission de licenciement et de rétrogradation ne peut, lors de la révision, recevoir ou accepter des éléments de preuve ou autres renseignements non recevables devant un tribunal du fait qu'ils sont protégés par le droit de la preuve.

Obligation des témoins de déposer

(8) Lors de la révision, un témoin n'est pas dispensé de répondre aux questions portant sur l'affaire dont est saisie la commission de licenciement et de rétrogradation lorsque celle-ci l'exige, au motif que sa réponse peut l'incriminer ou l'exposer à des poursuites ou à une peine.

Non-recevabilité des réponses

(9) Dans le cas où le témoin est un membre, les réponses ou déclarations faites à la suite des questions visées au paragraphe (8) ne peuvent être utilisées ni ne sont recevables

in any hearing under section 45.1 into an allegation of contravention of the Code of Conduct by the witness, other than a hearing into an allegation that with intent to mislead the witness gave the answer or statement knowing it to be false.

contre lui au cours d'une audience tenue en vertu de l'article 45.1 et portant sur l'allégation selon laquelle il a contrevenu au code de déontologie, autre qu'une audience portant sur l'allégation selon laquelle il a fait une telle réponse ou déclaration, qu'il savait être fausse, dans l'intention de tromper.

#### Adjournment

#### Ajournement

(10) A discharge and demotion board may from time to time adjourn any hearing before the board.

(10) La commission de licenciement et de rétrogradation peut ajourner ses audiences.

#### Hearing in private

#### Audiences à huis clos

(11) Any hearing before a discharge and demotion board shall be held in private, except that

(11) Les audiences tenues devant la commission de licenciement et de rétrogradation le sont à huis clos; toutefois :

(a) while a child is testifying at the hearing, the child's parent or guardian may attend the hearing; and

*a)* les parents peuvent assister au témoignage de leur enfant à l'audience ou le tuteur, à celui de son pupille;

(b) when authorized by the board, a member may attend the hearing as an observer for the purpose of familiarizing the member with procedures under this Part.

*b)* un membre peut, s'il reçoit l'autorisation de la commission, assister aux audiences à titre d'observateur afin de se familiariser avec la procédure visée à la présente partie.

#### Evidence and representations to be recorded

#### Enregistrement des témoignages et des observations

(12) All oral evidence and

(12) Les preuves testimoniales

representations before a discharge and demotion board shall be recorded and, if a party to the review by the board makes a request under subsection 45.23(6) or the decision of the board is appealed under section 45.24, a transcript thereof shall be prepared.

R.S., 1985, c 8 (2nd Supp.), s 16.

#### Decision

45.23 (1) After reviewing the case before it, a discharge and demotion board shall decide whether or not the ground of unsuitability is established on a balance of probabilities.

#### In writing

(2) A decision of a discharge and demotion board shall be recorded in writing and shall include a statement of the findings of the board on questions of fact material to the decision, reasons for the decision and a statement of the action taken by the board under subsection (3) or (4).

#### Where ground established

(3) Where a discharge and

et les observations présentées à la commission de licenciement et de rétrogradation sont enregistrées et il en est fait une transcription dans les cas où l'une des parties à la révision en fait la demande conformément au paragraphe 45.23(6) ou en appelle de la décision de la commission conformément à l'article 45.24.

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16.

#### Décision

**45.23** (1) La commission de licenciement et de rétrogradation décide si les éléments de preuve qui lui sont soumis établissent le motif d'inaptitude selon la prépondérance des probabilités.

#### Décision par écrit

(2) La décision de la commission de licenciement et de rétrogradation est consignée par écrit; elle comprend notamment l'exposé des conclusions de la commission sur les questions de fait essentielles à la décision, les motifs de cette dernière et la mention de la mesure qu'elle a imposée en vertu des paragraphes (3) ou (4).

#### Cas où les motifs sont établis

(3) Lorsque la commission de

demotion board decides that the ground of unsuitability is established, the board shall

licenciement et de rétrogradation conclut que le motif d'inaptitude est établi, elle prend l'une des mesures suivantes :

(a) recommend that the officer be discharged or discharge the other member, as the case may be, or

a) recommander le renvoi de l'officier ou renvoyer l'autre membre, selon le cas;

(b) recommend that the officer be demoted or demote the other member, as the case may be,

b) recommander la rétrogradation de l'officier ou rétrograder l'autre membre, selon le cas.

but the board shall not take the action referred to in paragraph (a) if the notice of intention served on that officer or other member was a notice to recommend demotion of the officer or to demote the other member, as the case may be.

Toutefois, la commission n'impose pas la mesure visée à l'alinéa a) si l'avis était un avis d'intention signifié à cet officier ou autre membre recommandant ou prononçant la rétrogradation.

Where ground not established

Cas où les motifs ne sont pas établis

(4) Where a discharge and demotion board decides the ground of unsuitability is not established, the board shall direct that the officer or other member be retained in the Force at the present rank or level of the officer or other member.

(4) Lorsque la commission de licenciement et de rétrogradation conclut que le motif d'inaptitude n'est pas établi, elle ordonne que l'officier ou l'autre membre continue à faire partie de la Gendarmerie en conservant son grade ou échelon actuel.

Copy of decision to parties

Signification de la décision

(5) A discharge and demotion board shall serve each of the parties to the review by the board with a copy of its decision.

(5) La commission de licenciement et de rétrogradation signifie copie de sa décision à chacune des parties à la révision.

Delivery of transcript on

Remise de la transcription sur

request

demande

(6) A party to a review by a discharge and demotion board shall be furnished, without charge, with a copy of the transcript of any hearing before the board, if that party so requests in writing within seven days after the day the decision of the board is served on that party.

(6) Les parties à la révision reçoivent gratuitement une copie de la transcription des audiences tenues devant la commission, s'ils en font la demande par écrit dans les sept jours suivant la signification de la décision de la commission.

R.S., 1985, c 8 (2nd Supp.), s 16.

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16.

APPEAL

APPEL

Appeal to Commissioner

Appel interjeté devant le commissaire

**45.24** (1) A party to a review by a discharge and demotion board may appeal the decision of the board to the Commissioner, but no appeal may be instituted under this section after the expiration of fourteen days from the later of

**45.24** (1) Chacune des parties à la révision peut en appeler de la décision de la commission de licenciement et de rétrogradation devant le commissaire et elle dispose à cet effet :

(a) the day the decision is served on that party, and

*a)* de quatorze jours à compter de la date où la décision lui a été signifiée;

(b) if that party requested a transcript pursuant to subsection 45.23(6), the day that party receives the transcript.

*b)* si elle a réclamé la transcription visée au paragraphe 45.23(6), de quatorze jours à compter de la date où elle l'a reçue, lorsque cette date est postérieure à celle visée à l'alinéa *a)*.

Grounds of appeal

Motifs d'appel

(2) An appeal lies to the Commissioner on any ground

(2) Le commissaire entend tout appel, quel qu'en soit le

of appeal.	motif.
Statement of appeal	Mémoire d'appel
(3) An appeal to the Commissioner shall be instituted by filing with the Commissioner a statement of appeal in writing setting out the grounds on which the appeal is made and any submissions in respect thereof.	(3) Un appel est interjeté devant le commissaire par le dépôt auprès de lui d'un mémoire d'appel exposant les motifs de l'appel ainsi que l'argumentation y afférente.
Statement served on other party	Signification du mémoire à l'autre partie
(4) A party appealing a decision of a discharge and demotion board to the Commissioner shall forthwith serve the other party with a copy of the statement of appeal.	(4) L'appelant signifie sans délai à l'autre partie copie du mémoire d'appel.
Submissions in reply	Réplique écrite
(5) A party who is served with a copy of the statement of appeal under subsection (4) may, within fourteen days after the day the statement is served, file with the Commissioner written submissions in reply, and if that party does so, that party shall forthwith serve a copy thereof on the party appealing.	(5) La partie à qui copie du mémoire d'appel est signifiée peut y répliquer par le dépôt auprès du commissaire, dans les quatorze jours suivant la date de la signification, d'argumentations écrites dont elle signifie copie sans délai à l'appelant.
R.S., 1985, c 8 (2nd Supp.), s 16.	L.R. (1985), ch. 8 (2 <sup>e</sup> suppl.), art. 16.
Reference to committee	Renvoi devant le Comité
<b>45.25</b> (1) Before the Commissioner considers an appeal under section 45.24, the Commissioner shall refer the	<b>45.25</b> (1) Avant d'étudier l'appel, le commissaire le renvoie devant le Comité.

case to the Committee.

Request by member

Demande du membre

(2) Notwithstanding subsection (1), the officer or other member whose case is appealed to the Commissioner may request the Commissioner not to refer the case to the Committee and, on such a request, the Commissioner may either not refer the case to the Committee or, if the Commissioner considers that a reference to the Committee is appropriate notwithstanding the request, refer the case to the Committee.

(2) Par dérogation au paragraphe (1), l'officier ou l'autre membre dont la cause est portée en appel devant le commissaire peut lui demander de ne pas la renvoyer devant le Comité; le commissaire peut accéder à cette demande, ou la rejeter s'il estime plus indiqué un renvoi devant le comité.

Material to be furnished to committee

Documents à transmettre au Comité

(3) Where the Commissioner refers a case to the Committee pursuant to this section, the Commissioner shall furnish the Committee Chairman with the materials referred to in paragraphs 45.26(1)(a) to (e).

(3) En cas de renvoi devant le Comité conformément au présent article, le commissaire transmet au président du Comité les documents visés aux alinéas 45.26(1)a) à e).

Applicable provisions

Dispositions applicables

(4) Sections 34 and 35 apply, with such modifications as the circumstances require, with respect to a case referred to the Committee pursuant to this section as though the case were a grievance referred to the Committee pursuant to section 33.

(4) Les articles 34 et 35 s'appliquent, compte tenu des adaptations de circonstance, aux affaires renvoyées devant le Comité conformément au présent article, comme s'il s'agissait d'un grief renvoyé devant ce même Comité conformément à l'article 33.

R.S., 1985, c 8 (2nd Supp.), s.16

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16.



## Consideration of appeal

**45.26** (1) The Commissioner shall consider an appeal under section 45.24 on the basis of

(a) the material that the officer or other member was given an opportunity to examine pursuant to subsection 45.19(3),

(b) the transcript of any hearing before the discharge and demotion board whose decision is being appealed,

(c) the statement of appeal,

(d) any written submissions made to the Commissioner, and

(e) the decision of the discharge and demotion board being appealed,

and the Commissioner shall also take into consideration the findings or recommendations set out in the report, if any, of the Committee or the Committee Chairman in respect of the case.

## Decision on appeal

(2) The Commissioner may dispose of an appeal under

## Étude de l'appel

**45.26** (1) Le commissaire étudie l'affaire portée en appel devant lui en se fondant sur les documents suivants :

*a)* la documentation ou les pièces que l'officier ou l'autre membre a eu la possibilité d'examiner conformément au paragraphe 45.19(3);

*b)* la transcription des audiences tenues devant la commission de licenciement et de rétrogradation dont la décision est portée en appel;

*c)* le mémoire d'appel par lequel l'affaire est portée en appel devant lui;

*d)* les argumentations écrites qui lui ont été soumises;

*e)* la décision de la commission de licenciement et de rétrogradation dont il est interjeté appel.

Il tient également compte, s'il y a lieu, des conclusions ou des recommandations exposées dans le rapport du Comité ou de son président.

## Décisions rendues en appel

(2) Le commissaire peut prendre l'une des mesures

section 45.24 by

suivantes :

(a) dismissing the appeal and confirming the decision being appealed;

a) rejeter l'appel et confirmer la décision portée en appel;

(b) allowing the appeal and ordering a new review of the case by a discharge and demotion board; or

b) accueillir l'appel et ordonner une nouvelle révision de la cause par une commission de licenciement et de rétrogradation;

(c) where the appeal is taken by the officer or other member whose case was reviewed by the discharge and demotion board, allowing the appeal and

c) lorsque l'appel a été interjeté par l'officier ou l'autre membre dont la cause a été révisée par la commission de licenciement et de rétrogradation, accueillir l'appel et :

(i) directing that the officer or other member be retained in the Force at the present rank or level of the officer or other member, or

(i) soit ordonner que l'officier ou l'autre membre continue à faire partie de la Gendarmerie et conserve son grade ou échelon actuel,

(ii) recommending that the officer be demoted or demoting the other member, as the case may be.

(ii) soit recommander la rétrogradation de l'officier ou rétrograder l'autre membre, selon le cas.

New review

Nouvelle révision

(3) Where the Commissioner orders a new review of a case by a discharge and demotion board pursuant to subsection (2), a discharge and demotion board shall be appointed in accordance with this Part and the new review shall be conducted in accordance with this Part as if it were the first review of the case.

(3) Lorsque le commissaire ordonne une nouvelle révision conformément au paragraphe (2), une commission de licenciement et de rétrogradation est nommée conformément à la présente partie, et cette révision se fait conformément à la présente partie comme s'il s'agissait de la première révision de la

	cause.
Copy of Decision	Signification de la décision
(4) The Commissioner shall as soon as possible render a decision in writing on an appeal, including reasons for the decision, and serve each of the parties to the review by the discharge and demotion board and, if the case has been referred to the Committee pursuant to section 45.25, the Committee Chairman with a copy of the decision.	(4) Le commissaire rend, dans les meilleurs délais, une décision écrite et motivée, et en signifie copie à chacune des parties à la révision faite par la commission de licenciement et de rétrogradation, ainsi qu'au président du Comité lorsque l'affaire a été renvoyée devant le Comité conformément à l'article 45.25.
Commissioner not bound	Non-assujettissement du commissaire
(5) The Commissioner is not bound to act on any findings or recommendations set out in a report with respect to a case referred to the Committee under section 45.25, but if the Commissioner does not so act, the Commissioner shall include in the decision on the appeal the reasons for not so acting.	(5) Le commissaire n'est pas lié par les conclusions ou les recommandations contenues dans un rapport portant sur une affaire qui a été renvoyée devant le Comité conformément à l'article 45.25; s'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.
Commissioner's decision final	Caractère définitif de la décision du commissaire
(6) A decision of the Commissioner on an appeal under section 45.24 is final and binding and, except for judicial review under the Federal Court Act, is not subject to appeal to or review by any court.	(6) La décision du commissaire portant sur un appel interjeté en vertu de l'article 45.24 est définitive et exécutoire et, sous réserve du contrôle judiciaire prévu par la <i>Loi sur la cour fédérale</i> , n'est pas susceptible d'appel ou de révision en justice.
Rescission or amendment of decision	Annulation ou modification de la décision

(7) Notwithstanding subsection (6), the Commissioner may rescind or amend the Commissioner's decision on an appeal under section 45.24 on the presentation to the Commissioner of new facts or where, with respect to the finding of any fact or the interpretation of any law, the Commissioner determines that an error was made in reaching the decision.

R.S., 1985, c 8 (2nd Supp.), s 16; 1990, c 8, s 68.

#### STAY OF EXECUTION OF DECISION

Stay of execution of decision

**45.27** (1) Where a decision to recommend that an officer be discharged or demoted or to discharge or demote any other member is rendered under section 45.23, the execution of the decision is stayed until after the expiration of the time within which an appeal may be taken under section 45.24.

Idem

(2) Where an appeal is taken under section 45.24 in relation to a decision described in subsection (1), the execution of the decision is stayed until after the appeal is disposed of.

R.S., 1985, c 8 (2nd Supp.), s 16.

(7) Par dérogation au paragraphe (6), le commissaire peut annuler ou modifier la décision à l'égard d'un appel interjeté en vertu de l'article 45.24 si de nouveaux faits lui sont soumis ou s'il constate avoir fondé sa décision sur une erreur de fait ou de droit.

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16; 1990, ch. 8, art. 68.

#### SURSIS À L'EXÉCUTION DE LA DÉCISION

Sursis à l'exécution de la décision

**45.27** (1) Il est sursis à l'exécution de toute décision rendue en vertu de l'article 45.23 recommandant le renvoi ou la rétrogradation d'un officier ou renvoyant ou rétrogradant un autre membre, jusqu'à l'expiration du délai accordé pour interjeter appel en vertu de l'article 45.24.

Idem

(2) Il est sursis à l'exécution de toute décision visée au paragraphe (1) jusqu'à ce qu'il ait été statué sur l'appel dont elle a fait l'objet en vertu de l'article 45.24.

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16.

## RESIGNATION

Resignation from force

**45.28** Nothing in this Part shall be construed as preventing a discharge and demotion board or the Commissioner from offering a member against whom a ground of unsuitability has been established pursuant to this Part the opportunity of resigning from the Force.

R.S., 1985, c 8 (2nd Supp.), s 16.

## DÉMISSION

Démission

**45.28** La présente partie n'a pas pour effet d'empêcher une commission de licenciement et de rétrogradation ou le commissaire d'offrir au membre contre qui un motif d'inaptitude a été établi conformément à la présente partie la possibilité de démissionner de la Gendarmerie.

L.R. (1985), ch. 8 (2<sup>e</sup> suppl.), art. 16.

## APPENDIX B

*Privacy Act*

**7** Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;

**8 (2)** Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was

*Loi sur la protection des renseignements personnels*

**7** À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci :

a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins

**8 (2)** Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants

a) communication aux fins auxquelles ils ont été

obtained or compiled by the institution or for a use consistent with that purpose

recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins

## APPENDIX C

*Public Service Employment Act*, RSC 1970, c P-32

*Loi sur l'emploi dans la Fonction publique*, S.R.C. 1970, c. P-32

Delegation of authority

Délégation par le sous-chef

6. (5) Subject to subsection (6) a deputy head may authorize one or more persons under his jurisdiction to exercise and perform any of the powers, functions or duties of the deputy head under this Act including, subject to the approval of the Commission and in accordance with the authority granted by it under this section, any of the powers, functions and duties that the Commission has authorized the deputy head to exercise and perform.

6. (5) Sous réserve du paragraphe (6), un sous-chef peut autoriser une ou plusieurs personnes placées sous son autorité à exercer l'un des pouvoirs, fonctions ou devoirs que lui confère la présente loi, y compris, sous réserve de l'approbation de la Commission et en conformité de l'autorité par elle attribuée en vertu du présent article, l'un des pouvoirs, fonctions et devoirs que la Commission a autorisé le sous-chef à exercer.

...

[ ... ]

Incompetence and Incapacity

Incompétence et incapacité

31. (1) Where an employee, in the opinion of the deputy head, is incompetent in performing the duties of the position he occupies or is incapable of performing those duties and should

31. (1) Lorsque, de l'avis du sous-chef, un employé est incompetent dans l'exercice des fonctions de son poste, ou qu'il est incapable de remplir ces fonctions, et qu'il devrait

(a) be appointed to a position at a lower maximum rate of pay, or

a) être nommé à un poste avec un traitement maximum inférieur, ou

<p>(b) be released,</p> <p>the deputy head may recommend to the Commission that the employee be so appointed or released, as the case may be.</p> <p>(2) The deputy head shall give notice in writing to an employee of a recommendation that the employee be appointed to a position at a lower maximum rate of pay or be released.</p> <p>(3) Within such period after receiving the notice in writing mentioned in subsection (2) as the Commission prescribes, the employee may appeal against the recommendation of the deputy head to a board established by the Commission to conduct an inquiry at which the employee and the deputy head concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,</p> <p>(a) notify the deputy head concerned that his recommendation will not be acted upon, or</p> <p>(b) appoint the employee to a position at a lower maximum rate of pay, or release the employee,</p> <p>accordingly as the decision of the board requires.</p> <p>(4) If no appeal is made against</p>	<p><i>b) être renvoyé,</i></p> <p>le sous-chef peut recommander à la Commission que l'employé soit ainsi nommé ou renvoyé, selon le cas.</p> <p>(2) Le sous-chef doit donner à un employé un avis écrit de toute recommandation visant la nomination de l'employé à un poste avec un traitement maximum inférieur ou son renvoi.</p> <p>(3) Dans tel délai subséquent à la réception de l'avis mentionné au paragraphe (2) que prescrit la Commission, l'employé peut en appeler de la recommandation du sous-chef à un comité établi par la Commission pour faire une enquête au cours de laquelle il est donné à l'employé et au sous-chef en cause, ou à leurs représentants, l'occasion de se faire entendre. La Commission doit, après avoir été informée de la décision du comité par suite de l'enquête,</p> <p><i>a) avertir le sous-chef en cause qu'il ne sera pas donné suite à sa recommandation, ou</i></p> <p><i>b) nommer l'employé à un poste avec un traitement maximum inférieur ou le renvoyer,</i></p> <p>Selon ce qu'a décidé le comité.</p> <p>(4) S'il n'est interjeté aucun</p>
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a recommendation of the deputy head, the Commission may take such action with regard to the recommendation as the Commission sees fit.

(5) The Commission may release an employee pursuant to a recommendation under this section and the employee thereupon ceases to be an employee.

appel d'une recommandation du sous-chef, la Commission peut prendre, relativement à cette recommandation, la mesure qu'elle estime opportune.

(5) La Commission peut renvoyer un employé en conformité d'une recommandation formulée aux termes du présent article; l'employé cesse dès lors d'être un employé.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

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