Federal Court  Cour fédérale

Date: 20130710

Docket: T-1711-12

Citation: 2013 FC 770

Ottawa, Ontario, July 10, 2013

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

JAMES DOUGLAS MACLEOD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Commissioner of the Royal Canadian Mounted Police (the "Commissioner") pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (the Federal Courts Act). In this decision, the Commission upheld the conclusion of a Royal Canadian Mounted Police adjudication board (the "Board") that the applicant had engaged in disgraceful conduct and that if he failed to resign from the Royal Canadian Mounted Police ("RCMP") within 14 days, he would be dismissed.

PROCEDURAL HISTORY

[2] On February 1, 2006, the RCMP served notice of disciplinary proceedings on the applicant. The notice set out one allegation of disgraceful conduct, contrary to subsection 39(1) of the RCMP Code of Conduct (Part III of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361) (the "Code of Conduct"), on the grounds that the applicant had engaged in non-consensual sexual relations with the complainant, thereby committing a sexual assault upon her.

[3] The Board held the disciplinary hearing on October 20-24 and 27-28, 2008. The Board concluded that the applicant had engaged in non-consensual sexual relations with the complainant and that the allegation of disgraceful conduct was established.

[4] The applicant appealed this decision to the Commissioner. Despite the recommendation of the RCMP External Review Committee (ERC) that the decision be overturned, the Commissioner upheld the Board's decision.

FACTS

[5] On February 6, 2005, while off duty, the applicant attended a Super Bowl party at a home in Maple Ridge, British Columbia, with a friend, Al Knuttila. The party was hosted by a friend of Mr. Knuttila named Phil Weber.

[6] The complainant arrived at the party before the end of the football game. She was a friend of Mr. Weber and an acquaintance of Mr. Knuttila. She met the applicant for the first time at the party.

[7] The applicant, Mr. Weber, Mr. Knuttila and the complainant, as well as most of the other party guests, consumed alcoholic drinks at the party. At one point during the party, Mr. Knuttila brought the complainant a drink and asked her "How does that Spanish Fly taste?" and "Has that Spanish Fly kicked in yet?". The complainant responded that as soon as it did, Mr. Knuttila would be the first to know.

[8] When the football game ended at approximately 7:00 p.m., about nine people remained at the party, including the applicant, Mr. Knuttila and the complainant. Around 9:30 p.m., Mr. Weber experienced a sudden onset of nausea and vomiting, and then passed out.

[9] Later that night, the complainant, the applicant and Mr. Knuttila had sexual relations. The complainant claims she did not consent to this sexual activity. The applicant and Mr. Knuttila claim that she did consent to the sexual activity.

[10] When the applicant arrived home the following day, she researched date rape drugs on the internet and formed the belief she had been drugged and sexually assaulted. She called her doctor's office and told them she had been assaulted and believed a date rape drug had been given to her. They gave her an appointment at the end of the day.

[11] When the applicant saw her doctor later that day, he told her that there should still be sufficient time for her to go first thing the next morning to have drug tests done.

[12] The complainant obtained a urine test the following morning. The only drug that was detected was acetaminophen (Tylenol), which the complainant had taken on February 7, 2005.

[13] The applicant was charged with sexual assault under the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*) on December 10, 2005. The criminal charges were stayed.

DECISION OF THE ADJUDICATION BOARD

[14] At the disciplinary hearing, the Board heard testimony from the complainant, the applicant, Mr. Weber and Mr. Knuttila. Three other individuals who had attended the Super Bowl party also testified, as well as a friend of the complainant and a civilian member of the RCMP who was an expert in the field of forensic toxicology.

[15] The only issue before the Board was whether or not the complainant had consented to sexual relations with the applicant.

[16] The Board held that the complainant was a credible witness, despite inconsistencies in her evidence. It found that some of the inconsistencies in her evidence may have been due to the effect upon memory of the drug that was administered and some may have been due to the passage of time and its effect on memory. In contrast, the Board found that several inconsistencies in Mr. Knuttila's story were fatal to his credibility. As such, the applicant lost his one and only source of support on the issue of consent.

[17] The Board also preferred Mr. Weber's testimony that he had not merely passed out from drinking, because he had not consumed enough alcohol for that to happen, nor had he fallen asleep from exhaustion. It found that Mr. Weber had probably been sufficiently anaesthetized that there was no way he was going to wake up and that on a balance of probabilities, Mr. Knuttila and the applicant knew Mr. Weber had been drugged, as the only way Mr. Knuttila and the applicant could have carried out the sexual activity that occurred was that they knew there was very little chance that Mr. Weber was going to wake up.

[18] The Board further held that mere consumption of alcohol could not account for the complainant having lost consciousness or for the feelings of helplessness or paralysis she said she experienced as she came in and out of consciousness on the bed. The Board found that the applicant and Mr. Knuttila knew they would be met with no resistance from the complainant.

[19] Furthermore, the Board determined that on a balance of probabilities, Mr. Knuttila knew that the complainant and Mr. Weber had been drugged because of his comments earlier in the evening to the complainant about "Spanish Fly". The applicant knew that the complainant had been drugged because Mr. Knuttila would have told him so. There was no other satisfactory explanation for what happened to both the complainant and Mr. Weber that night.

[20] The Board found that the single most cogent and convincing item of evidence on the issue of consent was the tampon the complainant had inserted in her vagina, prior to the party, to address spotting she was experiencing after a colposcopy. The Board accepted the procedure would have resulted in some discomfort or pain during sex and accepted the complainant's explanation that she

knew about the discomfort because she had had the procedure done before. The Board found it improbable that a woman experiencing the discomfort normally associated with a colposcopy would choose to engage in sexual intercourse at all, let alone in the vigorous fashion described by Mr. Knuttila and the applicant in their testimony.

[21] The Board concluded that the allegation was established and that it was proven that the sexual assault was facilitated by the administration of a drug.

[22] The Board directed the applicant to resign within 14 days, in default of which he would be dismissed from the RCMP.

RECOMMENDATION OF THE RCMP EXTERNAL REVIEW COMMITTEE

[23] The applicant appealed the decision of the Board to the Commissioner. Before considering the appeal, the Commissioner had to refer the matter to the ERC, an independent civilian body. The ERC reviewed the Board's decision and issued a non-binding recommendation to the Commissioner.

[24] The ERC found that the Board erred by stating that in general terms the complainant was a credible witness and the applicant was not. In its opinion, both witnesses had inconsistencies in their testimony, and the complainant's inconsistencies were more numerous and more significant than those of the applicant. The Board was wrong to make blanket findings of credibility. Instead, all the testimony had to be evaluated against context and probabilities. The ERC noted that the Board made no specific finding with respect to the credibility of Mr. Weber.

[25] The ERC was also of the view that there was no clear and cogent evidence to support the Board's finding that on the basis of the complainant's description of how she felt during the sexual activity, there was no other satisfactory explanation other than she had ingested a hallucinogenic-type drug without her knowledge. There was no evidence regarding the alleged administering of the drug, the expert evidence did not support the Board's finding, the complainant's evidence about her symptoms was not clear and the related finding that Mr. Weber was also drugged was not supported by the evidence either.

[26] As the Board's finding that it was more likely than not that the complainant and Mr. Weber had been given a hallucinogenic-type drug without their knowledge coloured all of the Board's findings and conclusions, the ERC recommended that on the basis of this error alone the Commissioner allow the appeal.

[27] In addition to allowing the appeal, the ERC recommended that pursuant subsection 45.16(2) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (the "Act"), given the passage of time and the fact that the factual record was sufficiently complete, the Commissioner also make the finding that the Board should have made rather than order a new hearing. The ERC recommended that the Commissioner find the allegation of sexual assault was not established.

[28] If the Commissioner found that it was more likely than not the complainant did not consent, the ERC recommended that the Commissioner still find that the allegation of sexual assault had not been established, as the ERC found that the applicant took reasonable steps to ascertain whether or

not the complainant was consenting to him being included in the sexual activity that was already taking place and his belief that this activity was consensual was not reckless.

DECISION OF THE RCMP COMMISSIONER

[29] The Commissioner disagreed with the ERC's recommendations. He concluded that the Board did not commit a palpable and overriding error in finding that the complainant did not consent to the sexual relations, as it was unlikely that the complainant would have engaged in sexual intercourse voluntarily in light of the discomfort it would cause following the medical procedure she had recently undergone. Furthermore, if the sexual relations had been consensual, the complainant would have removed the tampon she was wearing due to spotting caused by the procedure.

[30] Nor did the Commissioner find any palpable or overriding error in the Board's findings that the complainant and Mr. Weber had been drugged. The Commissioner found it was reasonable for the Board to find that Mr. Knuttila knew they had been drugged because of his comments earlier in the evening about "Spanish Fly". As for the fact that no drugs were detected in the complainant's urine, the expert witness testified that this did not necessarily mean that no drugs were ingested, as a low dose of drugs may have been eliminated in the 36 hours that had elapsed before the sample was taken. Moreover, the expert witness testified that some of the memory-related issues reported by the complainant were not consistent with what would normally be the effects of the amount of alcohol she said she had consumed. Thus, the Commissioner found it was open to the Board to find that nothing else other than the administration of a drug could satisfactorily account for what happened.

[31] The Commissioner did not see a contradiction between the Board's conclusion and the evidence of the expert witness, as the latter did not exclude the possibility that the complainant and Mr. Weber had been drugged.

[32] As for the Board's conclusion that the applicant knew that the complainant and Mr. Weber had been drugged, the Commissioner found support for this finding in the applicant's testimony that he was unconcerned about Mr. Weber's presence in the bed and had no concerns about Mr. Weber waking up. The explanation offered by Mr. Knuttila and the applicant for why they went into Mr. Weber's bedroom was also unbelievable. Further, the complainant and Mr. Weber had mixed drinks from the same source and both experienced extreme symptoms.

[33] The Commissioner agreed with the Board that the complainant was a credible witness, notwithstanding the inconsistencies in her evidence. Some inconsistencies may have been due to the memory effects of a drug or alcohol and others may be attributed to the passage of many years between the incident and her testimony at the disciplinary hearing.

[34] The Commissioner also concluded that, even if the applicant was unaware that the complainant had been drugged, the applicant did not have an honest but mistaken belief that she had consented, because his behaviour was insufficient in terms of obtaining or ascertaining her consent. He noted that the complainant had consumed alcohol, that she was already engaging in sexual activity with Mr. Knuttila and that they were in Mr. Weber's bedroom uninvited, with Mr. Weber seemingly unconscious in the bed next to them, while a party was going on in Mr. Weber's house. The Commissioner found that in the circumstances, the complainant's response, described by the

applicant as looking at him, giving a soft nod, and smiling, was too ambiguous to form the basis of an honest but mistaken belief in her consent.

[35] As such, the Commissioner dismissed the appeal.

ISSUES

[36] This application for judicial review raises three issues:

1. Did the Commissioner err by accepting the Board's finding that the complainant and Mr. Weber had been drugged?
2. Did the Commissioner err by accepting the Board's finding that the complainant was credible?
3. Did the Commissioner err by concluding that the applicant did not have an honest but mistaken belief that the complainant had consented?

LEGISLATIVE SCHEME

[37] Under section 43 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (the Act), an appropriate officer shall initiate a formal disciplinary hearing where it appears that a member of the RCMP has contravened the Code of Conduct and the appropriate officer is of the opinion that informal disciplinary action would not be sufficient.

[38] After the appropriate officer serves the member alleged to have contravened the Code of Conduct with a written notice that includes the allegation or allegations, as well as disclosure of evidence that is intended to be produced at the hearing. The hearing is conducted by a three member

adjudication board. Pursuant to subsection 45.12(1) of the Act, after considering the evidence submitted at the hearing, the adjudication board decides whether or not each allegation of contravention of the Code of Conduct contained in the notice of the hearing is established on a balance of probabilities. Where an allegation is established, the board shall impose one or more of the sanctions set out in subsection 45.12(3) of the Act.

[39] A party may appeal the Board's finding of a contravention of the Code of Conduct or the sanction the Board imposed to the Commissioner pursuant to subsection 45.14(1) of the Act. Before the Commissioner considers an appeal under section 45.14, the Commissioner must refer the case to the ERC. The ERC reviews the Board's decision and provides a recommendation to the Commissioner.

[40] On appeal, pursuant to section 45.16, the Commissioner must consider the record of the hearing before the Board, the statement of appeal, any written submissions, and the findings or recommendations of the ERC. Under subsection 45.16(6), the Commissioner is not bound to act on any findings or recommendations set out in the ERC report, but if he does not, he shall include in his decision his reasons for not doing so.

[41] In the recent case of *Elhatton v Canada (Attorney General)*, 2013 FC 71 at para 47 [*Elhatton*], my colleague Mr. Justice Donald Rennie found that the Commissioner should not intervene in credibility findings unless the trier of fact made a palpable or overriding error or made findings of fact that were clearly wrong or unsupported by the evidence.

[42] Pursuant to subsection 45.16(7) of the Act, a decision of the Commissioner is final and binding and is subject only to judicial review under the Federal Courts Act.

STANDARD OF REVIEW

[43] In the case at bar, the standard for reviewing the Commissioner's decision is that of reasonableness (*Pizarro v Canada (Attorney General)*, 2010 FC 20 at para 48 [*Pizarro*]; *Elhatton*, above, at para 29).

[44] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). In assessing whether a decision is reasonable, the reviewing court may consider the evidence that was before the decision-maker (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15).

[45] Although the Commissioner is entitled to considerable deference under the reasonableness standard (*Elhatton* at para 29), deference does not mean that the Court is subservient to the Commissioner's determinations. Rather, deference requires a respectful attention to the reasons offered or which could be offered in support of a decision (*Dunsmuir* at para 48).

[46] This Court is permitted to intervene and grant relief under the threshold grounds set out under section 18.1 of the Federal Courts Act (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 36 [*Khosa*]). Paragraph 18.1(4)(d) provides that the Federal Court may grant relief

if it is satisfied that the decision-maker "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[47] In *Khosa* at para 46, the Supreme Court observed that paragraph 18.1(4)(d) of the Federal Courts Act provides legislative precision to the reasonableness standard of review of factual issues:

> [46] More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.

ARGUMENTS AND ANALYSIS

1. Did the Commissioner err by accepting the Board's finding that the complainant and Mr. Weber had been drugged?

Applicant's arguments

[48] The applicant submits that there was no evidence to support the Board's conclusion that the complainant had been drugged and that the Commissioner erred by upholding this finding.

[49] The Board concluded that drugs had been administered because there was "no other satisfactory explanation for what happened to both Mr. Weber and [the complainant] that night". This finding rests on speculation and was based on nothing more than the complainant's description of how she felt and her belief that she had been drugged. There was no evidence regarding any administration of a drug or the presence of a drug at the party. The analysis of the complainant's urine did not indicate the presence of a drug. According to the expert evidence, the urine test made it impossible to determine with any certainty if a drug was involved.

[50] Moreover, the applicant argues Mr. Knuttila's evidence that he joked about "Spanish Fly" with the complainant does not reasonably lead to an inference that he was aware of or participated in administering a drug to the complainant. Such an inference is not supported by the evidence. The expert stated that "Spanish Fly" is not a reference to a drug, but a substance mythologized as an aphrodisiac.

[51] According to the applicant, the Commissioner's reliance on the fact that the complainant and Mr. Weber received drinks from the same source cannot reasonably support his finding that they were both drugged. There was no evidence Mr. Knuttila ever provided drinks to Mr. Weber, nor any evidence that other guests that drank from the blended drinks experienced any of the symptoms reported by Mr. Weber or the complainant.

[52] Finally, and most significantly for the applicant, the Board's conclusion that drugs had been administered to the complainant was contrary to the expert opinion, yet the Board's only reason for rejecting the expert evidence was that "nothing else can satisfactorily account for what happened". The ERC found this was an error and brought this to the attention of the Commissioner, citing *Pizarro*, above, at para 56.

[53] For his part, the Commissioner concluded that because the test of the complainant's urine did not, in itself, rule out the possibility that the applicant had ingested a drug, there was no contradiction between the Board's conclusion and the expert's opinion. The applicant submits that this conclusion was made without regard to the material before the Commissioner, as it was clear on

the face of the record that the Board had disregarded uncontradicted expert evidence that the complainant's symptoms could not be explained by oral ingestion of a drug.

[54] The applicant submits that the absence of an explanation satisfactory to the Commissioner or the Board for the complainant and Mr. Weber's symptoms does not elevate the theory that they were drugged from the realm of conjecture and speculation. Given the significance of the finding that the complainant had been drugged to the issue of consent, the applicant argues that the Commissioner's decision should be quashed.

Respondent's arguments

[55] The respondent submits that while the Board's finding that the complainant and Mr. Weber had both been drugged was supported only in part by the expert's evidence, the Commissioner reasonably found that the Board's conclusions regarding drug use were not inconsistent with the expert's opinion and did not constitute a palpable and overriding error. In response to the applicant's argument that a low does of Ketamine would be inconsistent with the Board's finding that a "sufficiently large dose" of Ketamine had been administered, the respondent argues that there is no inherent contradiction between a dose sufficiently large enough to affect the complainant, a number which would likely be consistent with recreational use, but not at levels where Ketamine is used as an anaesthetic.

[56] The respondent further submits that Mr. Weber's evidence respecting the amount of alcohol he had consumed was inconsistent with his apparent complete blackout. Furthermore, the expert evidence was that while vomiting was a "low frequency report", that 3% of users indicate issues

with vomiting with Ketamine use. Therefore, the association of vomiting and Ketamine use was unlikely but not impossible.

Analysis

[57] For the reasons below, I am of the opinion that the Commissioner erred in upholding the Board's finding that the complainant and Mr. Weber had been drugged, as there was no clear and cogent evidence to support this finding.

[58] First, as noted by the ERC, and I agree, the expert evidence before the Board was that the sudden onset of memory loss could not be rationalized with the oral ingestion of a drug. The complainant testified at the hearing that before going to the bedroom to check on Mr. Weber, she felt fine and did not feel drunk, dizzy, out of control, or have any other warning signs before she experienced sudden memory loss. The expert testified on the issue as follows:

> In my opinion, if someone ingests a drug orally, and certainly there are reports in the scientific literature, because of the slow nature of absorption from the stomach to the – through the liver, finally around the body up into the brain, the individual usually has some early signs that things are changing for them. So they do have memory of certain earlier experiences prior to the maximum effect of the drug.
>
> The drug under consideration at this point in the preliminary hearing was the drug Ketamine and there are reports in the literature that individuals can determine that the drug is beginning to effect them. They begin to feel tingling in the limbs, some numbness; they begin to experience some sensory changes.
>
> All of these things were absent in terms of the evidence of [the complainant] and therefore in my opinion there were some difficulty in – in rationalizing ingestion of a drug orally but not having any signs and symptoms that something was going wrong until an obvious profound effect; that is, the loss of consciousness or loss – complete loss of memory.

> So in my opinion there were some concerns regarding how those two (2) things can be rationalized, and in my opinion they cannot. I would have expected someone to have some signs that a drug was ingested involuntarily and some things were changing, particularly a hallucinogenic-type drug such as Ketamine.

[59] In my view, it was unreasonable for the Commissioner to find that there was no contradiction between the Board's conclusion and the expert's opinion. The Commissioner stated the following on the matter:

> [106] I disagree with the ERC's finding (at paras. 100-103 of the ERC report) that the Board erred by reaching a conclusion contrary to the evidence of the expert witness without sufficient reasons, thereby committing the error described in *Pizarro*. I do not see a contradiction between the Board's conclusion and the evidence of the expert witness. The latter did not exclude the possibility that [Mr. Weber] and the Complainant had been drugged. In fact, it was based on the symptoms they reported that she focused her attention on the drug named Ketamine. The expert also noted that just because no drug had been found in the Complainant's urine sample did not preclude that she may have ingested a drug.

[60] This conclusion was made without regard to the material before the Commissioner, as it was clear on the face of the record that the Board had disregarded uncontradicted expert evidence that the complainant's symptoms could not be explained by the oral ingestion of a drug. The Board needed good reasons to make a finding that was contradicted by the expert's evidence (*Pizarro*, above, at para 56). The Board's reasoning that nothing else could satisfactorily account for what happened does not meet the threshold of clear and cogent evidence that the complainant had been drugged without her knowledge.

[61] Furthermore, the Commissioner made a finding regarding the dosage given to the complainant that was inconsistent with one of the Board's findings on the issue. The Commissioner held that the fact that no drugs were detected in the complainant's urine did not necessarily mean that no drugs were ingested, because it was possible that a low dose of drugs was administered and that no trace of the drugs remained in the 36 hours that had elapsed between the time of the incident and the time the sample was taken. However, the Board found that based on the complainant's description of her symptoms, she had been "violently affected" by being drugged and that a "sufficiently large dose of a drug with both hallucinogenic and anaesthetic properties could have induced this reaction". As noted by the applicant, the Commissioner did not explain the inconsistency between the Board's conclusion that the complainant had a dose of a drug large enough to explain her symptoms and the Commissioner's finding that the drug was not detected in the complainant's urine 36 hours after it was administered to her because it was a small dosage.

[62] Moreover, there was no evidence regarding the alleged administration of a drug or the presence of a drug at the party. It was unreasonable for the Commissioner to uphold the Board's finding that because Mr. Knuttila had joked about "Spanish Fly" with the complainant, he knew that both the complainant and Mr. Weber had been drugged. It was not open to the Board to suggest that a man planning to commit a drug-facilitated sexual assault would broadcast that fact by making a joke about "Spanish fly" in front of other party guests. Furthermore, the complainant's own recollection of the sexual activity involved actions that someone could not do if they were paralyzed. For example, she stated that she was on top of the applicant in a straddling position while the applicant and she had vaginal sex.

[63] The Board essentially found that the complainant had been drugged because any other explanation for the sexual activity was implausible. However, the consideration of plausibility is largely subjective and requires the decision-maker to refer to relevant evidence which could refute their implausibility conclusions and explain why such evidence does not do so (see *Hassan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1136 at para 13 citing *Leung v Canada (Minister of Employment and Citizenship)*, [1994] FCJ 774 at paras 14-16).

[64] Accordingly, I agree with the applicant that the Board erred by starting with the conclusion that the complainant was telling the truth, and based on this finding, held that she must have been drugged. Rather, the Board should have first determined whether, based on the evidence, it could be established that she had been drugged, and in light of that evidence, determine whether her version of events was plausible.

[65] Furthermore, as noted by the ERC, the complainant admitted that the sexual activity would have looked consensual to an onlooker, that the day after the incident, she had doubts about whether she had consented or not to the activity, and except for the hallucinogenic effects, her symptoms, including fragmented memory and loss of inhibition, were consistent were the consumption of alcohol. Thus**,** even if the complainant's testimony was credible, there was no clear and cogent evidence before the Board to support her theory that she had been given a drug without her knowledge.

[66] Finally, it was entirely speculative for the Commissioner to uphold the Board's finding that the applicant knew the complainant and Mr. Weber were drugged. The Commissioner upheld the finding for the following reasons:

> [107] As for the Board's conclusion that the [applicant] knew that [Mr. Weber] and the Complainant had been drugged, I find support for this finding in the [applicant's] testimony that he was unconcerned about [Mr. Weber's] presence in the bed and had no concerns about [Mr. Weber] waking up. I also find the explanation offered by [Mr. Knutilla] and the [applicant] for why they went into [Mr. Weber's] bedroom unbelievable. Further, I note that the Complainant and [Mr. Weber] had mixed drinks from the same source and both experienced symptoms that were extreme, which corroborates the Complainant's evidence and lends support to the Board's finding.

[67] This explanation is insufficient. The Commissioner ignored the absence of any evidence to support the Board's finding that Mr. Knuttila had told the applicant that the complainant had been drugged. Furthermore, the Commissioner does not acknowledge the fact that Mr. Weber reported different symptoms than the complainant. Mr. Weber said he had no hallucinogenic symptoms, but complained of a sudden onset of nausea and vomiting, and then passed out. The expert evidence was that it was difficult to determine with any certainty the basis for Mr. Weber's upset stomach, vomiting and "hungover" feelings. In fact, the expert testified before the Board that nausea is not highly expected to be a symptom of lower doses of Ketamine:

> CROSS-EXAMINATION OF EXPERT WITNESS BY CHERI EKLUND, REPRESENTATIVE OF CORPORAL MACLEOD : …And you would agree with me that nausea is not a sign of an onset of the ingestation of Ketamine either?
>
> EXPERT WITNESS: At higher doses people – or what would be considered higher doses people have reported nausea and vomiting; there are some reports that people experience that with Ketamine. But one (1) of the reports I read indicated that about 3 percent of the users indicate issues with vomiting, and so it's a low frequency

> report. It's not that it has never happened but it's certainly not highly expected with that drug in lower doses.

[68] The Commissioner's reliance on the fact that the complainant and Mr. Weber received drinks from the same source cannot reasonably support his finding that they were both drugged. The complainant's evidence was that she received drinks from Mr. Weber and Mr. Knuttila during the game, and from Mr. Weber after the game, who had blended drinks for several guests in one batch. There was no evidence that Mr. Knuttila ever provided drinks to Mr. Weber.

[69] The remaining testimony of the applicant noted by the Commissioner at paragraph 107 of his decision, which was that the applicant entered Mr. Weber's bedroom looking for Mr. Knuttila and participated in sexual activity with the complainant and Mr. Knuttila despite the fact that Mr. Weber was seemingly unconscious in the bed beside them, is not in itself clear and cogent evidence that the applicant knew that the complainant and Mr. Weber were drugged.

[70] Thus, it was unreasonable for the Commissioner to uphold the Board's finding that the complainant and Mr. Weber had been drugged. I agree with the applicant that given the significance of the finding to the Commissioner's decision as a whole, this error is crucial and therefore is sufficient to quash the Commissioner's decision. As such, it is not necessary to address whether the Commissioner erred by upholding the Board's finding that the complainant was credible.

2. Did the Commissioner err by concluding that the applicant did not have an honest but mistaken belief that the complainant had consented?

[71] As this matter will be remitted to the Commissioner for redetermination, I will give some direction to the Commissioner regarding his conclusion that the applicant did not have an honest but mistaken belief that the complainant had consented.

[72] The test for consent to sexual activity under the *Criminal Code* was set out in *R. v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*].

[73] The first question in the test for consent is whether subjectively, the complainant consented to the sexual activity (*Ewanchuk* at para 26). This question is purely one of credibility (*Ewanchuk* at paras 29 and 30). The second question is whether the person accused of the sexual assault was reckless or wilfully blind to a lack of consent on the part of the person touched (*Ewanchuk* at para 42).

[74] The Supreme Court specified that the question was whether the complainant communicated consent to engage in the sexual activity at issue:

> 46 In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.
>
> 47 For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. […] [Emphasis added]

[75] Therefore, in the case at bar, if the applicant believed that the complainant communicated consent to engage in the sexual activity in question, he was not reckless or wilfully blind to a lack of consent, and the allegation that the complainant had not consented to the sexual activity is not established.

[76] The ERC brought this issue to the attention of the Commissioner and found that the applicant took reasonable steps to ascertain whether or not the complainant was consenting to him being included in the sexual activity that was already taking place and his belief that this activity was consensual, was not reckless. However, the Commissioner found that in the circumstances, the complainant's response, described by the applicant as looking at him, giving a soft nod, and smiling, was too ambiguous to form the basis of an honest but mistaken belief in her consent. The Commissioner provided the following reasons for this finding:

> [109] …Even if I were to accept that [the applicant] was unaware that [the complainant] had been drugged, I would find his behaviour when he approached the Complainant in the bedroom insufficient in terms of obtaining or ascertaining her consent. In the circumstances of this case, where: the Complainant had consumed alcohol; the Complainant was already engaged in sexual activity with [Mr. Knuttila]; they were in [Mr. Weber's] bedroom uninvited, with [Mr. Weber] lying in the bed next to them, seemingly unconscious, while a party was going on in his house; it was incumbent on the [applicant] to go further than he did in order to unequivocally obtain the Complainant's consent. The latter's response (described by the [applicant] as looking at him, giving him a soft nod, and smiling) was too ambiguous in these circumstances to form the basis of an honest but mistaken belief in consent.
>
> [Emphasis added]

[77] In my view, this finding is unreasonable. In the circumstances, a soft nod accompanied by smiling would not have been ambiguous in terms of consenting to the applicant's advances. As for

the circumstances themselves, clearly the complainant's flirtatious behaviour is not an indication in itself that she had consented to the sexual activity. However, the behaviour is relevant to considering whether the applicant honestly believed that the complainant had consented through her actions, yet the Commissioner's decision ignored the evidence on this issue that was provided by other guests who were in attendance at the party.

[78] Furthermore, the Commissioner failed to consider the evidence suggesting that the complainant also exhibited consent to the sexual activity through her conduct. The complainant testified that she remembered being on top of the applicant while having vaginal sex with him and that the activity would have appeared consensual. Although the complainant testified she could not tell the applicant to stop because she could not speak and that she could not move the way she wanted to, which was to get off, the complainant's behaviour in this regard seems to support the applicant's position that he had an honest but mistaken belief in consent. In my view, the Commissioner erred by failing to consider this evidence in his analysis of the issue.

CONCLUSION

[79] For these reasons, the application for judicial review is allowed with costs. The matter will be referred back to the Commissioner for redetermination in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed with costs; and

2. The matter is referred back to the Commissioner for redetermination in accordance with these reasons.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1711-12
STYLE OF CAUSE:	*James Douglas MacLeod v The Attorney General of Canada*
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 25, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	TREMBLAY-LAMER J.
DATED:	July 10, 2013

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