Federal Court  Cour fédérale

**Date: 20140404**

**Docket: T-1691-12**

**Citation: 2014 FC 331**

**Ottawa, Ontario, April 04, 2014**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**SHELLEY GORDON**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Shelley Gordon (the "Applicant") seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision of the Commission for Public Complaints Against the RCMP (the "Commission"). In that decision, dated August 6, 2012, Mr. Ian McPhail, Q.C., Interim Chair (the "Interim Chair") of the Commission found that the RCMP's investigation and disposition of a complaint filed by the Applicant was reasonable in the circumstances.

[2] The Attorney General of Canada (the "Respondent") is the Respondent on this application, pursuant to subrule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

BACKGROUND

[3] The Applicant is the wife of Corporal Michael Kerkowich, a Member of the RCMP. On March 22nd, 2011, she attended a meeting at the RCMP's offices in Prince Albert, Saskatchewan concerning a grievance that her husband had filed against his supervisor. The Applicant's husband, three other members of the RCMP and a public service employee were also present at that meeting.

[4] The meeting was chaired by Superintendent Dave Fenson. He asked that the public service employee take notes and record the meeting with a tape recorder. The Applicant was unaware that the meeting had been recorded until she found a transcript of the recorded meeting included in a package of documents her husband received in November 2011 with respect to his grievance. The Applicant claims that consent for the recording was never obtained from her or any of the other participants in the meeting. On January 31st, 2012 she filed a complaint with the Commission, alleging that the Superintendent in charge of the meeting had surreptitiously recorded the meeting and had used that recording in subsequent proceedings.

[5] The Applicant also complained that the recording of the meeting, without her consent, violated section 184 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "Code"). She further claimed the distribution of the recording and its transcription violated section 193 of the Code and section 7 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA").

[6] The Applicant's complaint was investigated by Sergeant Robert Lutzko of the RCMP. During the investigation, the Applicant and the other participants of the meeting were interviewed. The interviews were recorded and the recordings were transcribed.

[7] Superintendent Fenson and the public service administrative assistant said that the participants of the meeting were informed that the meeting would be recorded. These two individuals said that the recording device, a digital recorder, was in plain view on the table.

[8] Sergeant Lutzko interviewed the Applicant and her husband, a member of the RCMP. The Applicant told Sergeant Lutzko that she was never told that the meeting would be recorded. Her husband said that there was no discussion, before or during the meeting, about a recording and further, that he did not notice a recording device in the room.

[9] Staff Sergeant Mayrs told Sergeant Lutzko that he was aware that notes were being made of the meeting and that he did not see a recording device on the table.

[10] The other RCMP member, Sergeant Rabut, told Sergeant Lutzko that he saw the public service administrative assistant and assumed that she would be taking notes, although he did not see her do so, since he was taking his own notes. He was not aware that the meeting would be recorded.

[11] The Applicant argues that the Interim Chair unreasonably preferred the evidence of Superintendent Fenson and the public service employee over the evidence of the other four

attendees of the meeting and that accordingly, the factual findings in the final decision are unreasonable.

[12] On April 11th, 2012 Chief Superintendent Randy Beck sent the Applicant the results of the investigation and advised that he was unable to support the Applicant's allegation that the meeting had been surreptitiously recorded.

[13] On May 3rd, 2012 the Applicant's counsel wrote to the Commission and asked for a review of the results of the investigation and the findings of Chief Superintendent Beck. Counsel alleged a number of errors of fact and law in the investigation and in the Chief Superintendent's conclusion that he was unable to support the allegation. On August 16th, 2012, the Interim Chair issued his decision in which he found that the RCMP's disposition of the Applicant's complaint was reasonable in the circumstances.

DECISION UNDER REVIEW

[14] The decision under review was made by the Interim Chair. The Interim Chair noted at the outset that the review was based on the Applicant's complaint and request for review, the public complaint investigation file, and the RCMP's final report. He noted that during their interviews with the investigator, both the Superintendent in charge of the meeting and the public service employee responsible for recording the meeting indicated that the Superintendent had informed those present that notes were being taken and the meeting was being recorded. They both also indicated that the recorder was kept in plain view at all times during the meeting. The public

service employee noted that, because of her inexperience, she started the tape recorder late and missed recording the Superintendent's warning about notes and the recording of the meeting.

[15] The other four people who attended the meeting noted in their interviews that they were unaware that the meeting was being recorded, although they were aware the public service employee was taking notes.

[16] The Interim Chair went on to note that with respect to the Applicant's concerns that the recording violated PIPEDA, that legislation does not apply to the RCMP. With respect to her submissions about a contravention of the Code, he did not have jurisdiction to determine whether the actions complained of constituted a violation of the Code. The Interim Chair noted that its mandate is to determine whether the RCMP's disposition of a particular public complaint is reasonable in the circumstances.

[17] Nevertheless, the Interim Chair went on to say that the provisions of the Code cited by the Applicant did not apply to the complaint at hand. He found that since the Code sections refer to intercepts or recordings made without consent from the originator or recipient of the communication, and the audio recording was made with the knowledge of at least two of the intended recipients of the communication, it did not fall into the category of prohibited intercepts under the Code.

[18] The Interim Chair also found that the Applicant's concerns about the use of the transcript are best addressed within the RCMP grievance process. He found that process to be a more appropriate forum than the public complaints process to address evidentiary issues. As a result, the Interim Chair was satisfied that the RCMP's disposition of the Applicant's complaint was reasonable in the circumstances.

## ISSUES

[19] The Applicant challenges the decision on several grounds. The principal grounds are a breach of procedural fairness arising from reliance upon a deficient investigation and second, unreasonable findings of fact based upon a selective assessment of the evidence.

[20] There are two subsidiary issues, that is the interpretation of certain provisions of the Code by the Interim Chair and the reasonableness of his conclusion regarding the use of the recorded meeting as evidence in a grievance process involving the Applicant's husband.

## DISCUSSION AND DISPOSITION

[21] A breach of procedural fairness is reviewable on the standard of correctness; see the decision in *Sketchley v. Canada (Attorney General) (F.C.A.)*, [2006] 3 F.C.R. 392 at paragraph 53. The Interim Chair's assessment of the facts is reviewable on the standard of reasonableness; see the decisions in *L'Ecuyer v. Canada* (2009), 365 F.T.R. 244 at paragraph 36; *Dunsmuir v. New*

*Brunswick*, [2008] 1 S.C.R. 190 at paragraph 53. The standard of review for the Interim Chair's interpretation of the Code is correctness; see the decision in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283 at paragraph 14.

[22] Before addressing the merits of this application for judicial review, it is useful to briefly outline the RCMP complaints process.

[23] The Commission is an independent body established pursuant to section 45.29 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the "Act"). Pursuant to section 45.35 of the Act, the Commission is responsible for handling complaints from the public concerning the conduct of any person employed to perform a function under the Act.

[24] The complaint is first submitted to the Commissioner of the RCMP and investigated. This process is governed by the rules established by the Commissioner under section 45.38 of the Act. Pursuant to section 45.4 of the Act the results of the investigation and any action taken are sent to the complainant in the form of a report. If the complainant is dissatisfied with the outcome of the investigation and report, he or she can refer their complaint to the Commission for review, in accordance with section 45.41.

[25] Pursuant to section 45.42 of the Act, the Commission Chairman is to review every complaint referred to the Commission under section 45.41. If after review the Chairman is satisfied with the results of the investigation, he or she will communicate their findings in a report to the

complainant, the individual complained of and the Minister of Public Safety and Emergency Preparedness as required by subsection 45.42(2).

[26] If after review the Commission is not satisfied with the results of the investigation, pursuant to subsection 45.42(3) it can send a report to the Minister of Public Safety and Emergency Preparedness with findings and recommendations about the complaint or request the Commissioner of the RCMP to conduct a further investigation into the complaint. The Commission can also investigate the complaint further on its own choice, or institute a hearing to inquire into the complaint.

[27] The Applicant argues that the investigation of the complaint was deficient, and since the Interim Chair relied on a deficient investigation, a breach of procedural fairness resulted.

[28] In my opinion, there was no breach of procedural fairness with respect to the decision.

[29] The decision under review is that of the Interim Chair, not of the Chief Superintendent who assessed the results of the initial investigation. The duty of the Commission, according to the Act, is to review the complaint and its resolution and determine whether it has satisfactorily been dealt with. See the decision in *L'Ecuyer*, *supra*; aff'd by the Federal Court of Appeal in *L'Ecuyer v. Canada* (2010), 425 N.R. 360.

[30] The Interim Chair reviewed the investigation and the disposition of the complaint to determine whether or not it was disposed of satisfactorily. The Interim Chair held that it was. In the result, I am satisfied that there was no breach of the duty of procedural fairness.

[31] The findings of fact made by the Interim Chair were reasonable, having regard to the material before him. These findings are that two people at this meeting were aware that the meeting was being recorded. At least two people were aware that notes were being taken. I agree with the Respondent that the Interim Chair did not ignore or disregard the evidence of the Applicant, her husband and the two other RCMP officers. The Interim Chair clearly acknowledged the evidence of these individuals when he reviewed the complaint and made his findings of fact. The Interim Chair was mandated to weigh the evidence before him. He had the authority to choose to accept the evidence of Superintendent Fenson and the public service administrative assistant.

[32] I am satisfied that the Interim Chair fairly weighed the evidence of all witnesses and concluded, on the basis of the evidence, that there was consent for a recording for the purposes of the Code.

[33] The Interim Chair's crucial finding was that the investigation and disposition of the complaint was reasonable in the circumstances. The factual assessments made by the Interim Chair in reaching this conclusion were grounded in the record and were reasonable.

[34] The Interim Chair correctly noted that it has no jurisdiction to decide whether or not there has been a breach of the Code. The Commission is mandated to review investigations into complaints filed by members of the public against members of the RCMP. The Commission is not tasked with considering if criminal charges may be laid, pursuant to the Code.

[35] Further, in my opinion, the Interim Chair's interpretation of the Code in this case is irrelevant to the disposition of this application for judicial review.

[36] I disagree with the Applicant's argument that the Interim Chair tried to resolve the complaint by offering a remedy that was unavailable, that is the grievance process. The Interim Chair's reference to that process as the proper place to determine evidentiary issues suggests that he was referring to any objection the Applicant may have to the use of the recording as evidence in future grievance proceedings. The Interim Chair was of the view that the grievance process is a more appropriate forum to address that issue. That conclusion was reasonable.

[37] In any event, the issue was not determinative of the Interim Chair's decision. Any deficiency in that regard does not render the entire decision unreasonable. The key finding of the decision under review was that the investigation and disposition of the Applicant's complaint

was reasonable in the circumstances. Having regard to the record before the Interim Chair, I am satisfied that the conclusion was reasonable.

[38] The application for judicial review is dismissed. In the exercise of my discretion pursuant to Rule 400 of the Rules, I make no order as to costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed. In the exercise of my discretion, pursuant to the *Federal Court Rules*, SOR/98-100, I make no order as to costs.

"E. Heneghan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1691-12 |
| **STYLE OF CAUSE:** | SHELLEY GORDON v<br>THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | SASKATOON, SASKATCHEWAN |
| **DATE OF HEARING:** | SEPTEMBER 12, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HENEGHAN<br>J. |
| **DATED:** | APRIL 4, 2014 |

**APPEARANCES:**

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| Marcus R. Davies | FOR THE APPLICANT |
| Don Klaassen | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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