

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110204**

**Docket: A-94-10**

**Citation: 2011 FCA 43**

**CORAM: SHARLOW J.A.  
LAYDEN-STEVENSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**COMMANDER GEORGE LEONARD ZIMMERMAN**

**Appellant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on February 2, 2011.

Judgment delivered at Ottawa, Ontario, on February 4, 2011.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

SHARLOW J.A.  
LAYDEN-STEVENSON J.A.

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**Respondent**

**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] The appellant, Commander Zimmerman, appeals from the judgment dated December 22, 2009 of Justice Boivin of the Federal Court: 2009 FC 1298. The Federal Court judge dismissed Commander Zimmerman's application for judicial review.

[2] In his application for judicial review, Commander Zimmerman challenged the decision of the Chief of the Defence Staff dismissing a grievance he brought under section 29 of the *National*

*Defence Act*, R.S. 1985, c. N-5. Commander Zimmerman grieved the decision of the Chief of the Defence Staff denying him a promotion to the rank of Colonel / Captain (Navy) in the Canadian Forces Chaplain Branch.

[3] For the reasons set out below, I would allow the appeal, set aside the judgment of the Federal Court, allow the application for judicial review, quash the decision of the Chief of the Defence Staff, and remit the matter to him for determination in accordance with these reasons.

**A. Preliminary point: the statutory authority of the Chief of the Defence Staff**

[4] In this Court, counsel for Commander Zimmerman objected to the involvement of the Chief of the Defence Staff in adjudicating the grievance because he would be adjudicating upon his own conduct. That appears to be so, but under the legislation the Chief of the Defence Staff is to decide on promotions and to determine grievances and in these circumstances he cannot delegate either task: see sections 29.11 and 29.14 of the Act and subsection 7.12(2) of the *Queen's Regulations and Orders for the Canadian Forces*. Absent constitutional objection, and none has been raised here, these provisions are law. Therefore, the fact that the Chief of the Defence Staff adjudicated the grievance in this case is not a ground for granting Commander Zimmerman's application for judicial review.

**B. The process for promotions**

[5] The process for promotions is set out in the Act. Once eligible candidates are identified and nominated, they are assessed by an “appropriate authority” under section 11.02 of the Act. The appropriate authority recommends candidates for promotion. The Chief of the Defence Staff may, but is not obliged, to promote a candidate who is recommended by an appropriate authority.

[6] In Commander Zimmerman’s case, the “appropriate authority” was the Interfaith Committee on Canadian Military Chaplaincy. In 2002, but not in 2003, the interfaith committee received a ranking of candidates produced by the Chaplain Selection Board. The interfaith committee was entitled to consider those rankings but was not bound by them. The end product of the interfaith committee’s deliberations was a recommendation to the Chief of the Defence Staff that a particular person receive a promotion.

**C. The denial of promotions to Commander Zimmerman in 2003 and 2004**

[7] In 2002 the Chaplain Selection Board ranked Commander Zimmerman the first of two candidates, but the interfaith committee recommended the other candidate for promotion, and that promotion was approved by the Chief of the Defence Staff in 2003.

[8] In 2004, Commander Zimmerman again was nominated for a promotion. There was no Chaplain Selection Board in 2004, so his nomination went directly to the interfaith committee, along

with nominations of other candidates. Again, a candidate other than Commander Zimmerman was recommended for promotion, and that promotion was approved.

**D. Commander Zimmerman's grievance**

[9] In 2005, Commander Zimmerman launched his grievance. In his grievance, he challenged a number of aspects of the promotion procedures followed in 2003 and 2004 and questioned whether candidate assessments were fair, competent, impartial and conducted with due diligence. He also offered a number of specific concerns about the promotion process that was followed in his case.

[10] Under section 29.11 of the Act, the Chief of the Defence Staff determines grievances. In certain circumstances, before determining the grievance, the Chief of the Defence Staff must refer it to an external and independent board, the Canadian Forces Grievance Board, for a review: section 29.14 of the Act and subsection 7.12(2) of the *Queen's Regulations and Orders*. That happened here.

**E. The Canadian Forces Grievance Board's review**

[11] The Canadian Forces Grievance Board released its findings and recommended to the Chief of the Defence Staff that Commander Zimmerman's grievance be upheld and that a remedy be given.

[12] It expressed many concerns about the entire promotion process in 2003 and 2004 and specifically how the interfaith committee made its recommendations. In particular, for 2003, it found that there was no record as to how or why the interfaith committee decided not to recommend Commander Zimmerman for promotion, even though the Chaplain Selection Board had ranked him first. In its view, “there is no indication of the criteria or other guidelines that might have been applied and there is no record as to what was said at the meeting.” In 2004, it found that “although there was more military input in this particular process..., it remains unclear as to what criteria were ultimately used to select the 2004 nominee.” Nothing in the record casts any doubt on the validity of these observations by the Canadian Forces Grievance Board.

[13] The Canadian Forces Grievance Board also found it “troubling” that the Chief of the Defence Staff accepted the interfaith committee’s recommendations “without question.” In its view, the Chief of the Defence Staff “has the responsibility to satisfy himself that the recommendation was formulated after a fair process and having regards [sic] to appropriate criteria.” The Board concluded that it was unfair to adopt the recommendation of the interfaith committee without question and without knowing the specific criteria it applied.

#### **F. The Chief of the Defence Staff’s ruling on the grievance**

[14] The Chief of the Defence Staff dismissed Commander Zimmerman’s grievance. He found that he could not determine whether the process followed in 2003 and 2004 was fair, competent, impartial and conducted with due diligence because of the absence of information available to him

regarding what the interfaith committee did and exactly how and why it reached its promotion recommendations. In essence, the interfaith committee's failure to create or keep information relating to the promotion process led directly to the dismissal of Commander Zimmerman's complaints relating to the fairness of the promotion process.

[15] Despite the absence of information available to the Chief of the Defence Staff regarding what the interfaith committee did and exactly how and why it reached its promotion recommendations, he was nevertheless able to declare in his decision that he was "certain" that the interfaith committee nominated the "best possible candidate" in the years in question. He did not address the Canadian Forces Grievance Board's finding that in 2003 and 2004 the interfaith committees' promotion recommendations were accepted without question. However, he did state that there was an unbroken tradition of Chiefs of the Defence Staff accepting the promotion recommendations of the interfaith committee.

[16] In his decision, the Chief of the Defence Staff did not take issue with any of the factual findings that the Canadian Forces Grievance Board made. He agreed with its conclusion that the promotion process suffered from lack of transparency. Nevertheless, he dismissed the grievance.

#### **G. The application for judicial review and the appeal to this Court**

[17] Commander Zimmerman brought an application for judicial review challenging the dismissal of his grievance. The Federal Court judge dismissed the application. He found that the

Chief of the Defence Staff, in dismissing the grievance, reached an outcome that was within the range of outcomes available to him.

[18] In this Court, Commander Zimmerman raises several grounds for allowing the appeal. In my view, it is necessary to deal with only one.

## **H. Analysis**

[19] The Federal Court judge found that the standard of review of the decision of the Chief of the Defence Staff is the deferential standard of reasonableness. He also found that the decision of the Chief of the Defence Staff to dismiss the grievance was reasonable, especially in light of the paucity of evidence before the Chief of the Defence Staff to allow him to decide otherwise.

[20] In this Court, on an appeal from judicial review, we are to determine whether the judge selected the correct standard of review and applied the standard correctly: *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] D.T.C. 5046 at paragraphs 18-19.

[21] In my view, the Federal Court judge was correct when he held that the standard of review is the deferential standard of reasonableness. I agree substantially with his reasoning in support of that holding (at paragraphs 23-25 of his reasons). However, I disagree with the Federal Court judge on whether the decision of the Chief of the Defence Staff was reasonable. In my view, it was not reasonable and should be set aside.

[22] Under section 29.11 of the Act, the Chief of the Defence Staff was obligated to decide the merits of Commander Zimmerman's complaint in the grievance and to provide reasons why he was departing from the findings and recommendations of the Canadian Forces Grievance Board.

[23] As mentioned in paragraph 9 above, Commander Zimmerman complained about deficiencies and unfairness in the promotion procedures in 2003 and 2004, questioned the manner in which the candidate assessments were done in those years and stated specific concerns about the promotion process that applied to him. Because the Chief of the Defence Staff found that he did not have sufficient information about what the interfaith committee did and exactly how and why it reached its promotion recommendations, he did not grapple with the substance of Commander Zimmerman's complaints, questions and concerns.

[24] I note that some of the specific concerns raised by Commander Zimmerman did not depend on information about what the interfaith committee did and exactly how and why it reached its promotion recommendations – some of his concerns could and should have been adjudicated. But they were not. As for Commander Zimmerman's other complaints relating to the promotion process and the candidate assessments, the lack of information relating to the interfaith committee was highly relevant to Commander Zimmerman's complaints of deficiencies and unfairness and should have been adjudicated. But they were not. Using the language of reasonableness review, the failure to deal with any of Commander Zimmerman's complaints was not within the range of options available to the Chief of the Defence Staff.

[25] The Attorney General submitted that the Chief of the Defence Staff was not obligated to deal in his decision with all of the issues placed before him: *Morphy v. Canada (Attorney General)*, 2008 FC 190, 323 F.T.R. 275; *Smith v. Canada (Chief of the Defence Staff)*, 2010 FC 321. In the context of an assessment of whether reasons for a decision are adequate, it is true that there are occasions where a decision-maker need not deal with every last issue raised by the parties. But that is different from the problem here. The issues raised in Commander Zimmerman's grievance were simply not dealt with.

[26] There is a further basis for finding the decision unreasonable. The main reason for not accepting any aspects of Commander Zimmerman's grievance was the lack of information about what the interfaith committee did and exactly how and why it reached its promotion recommendations. In the words of the decision, "no evidence allows me to conclude as to its fairness or unfairness." But the absence of evidence about what the interfaith committee did and exactly how it reached its promotion recommendations raised issues of fairness and called into question whether the interfaith committee had any criteria at all for its promotion recommendations. This should have been considered and adjudicated upon. After all, despite the same lack of information, the Canadian Forces Grievance Board had no problem making factual findings and recommending that Commander Zimmerman's grievance be upheld and a remedy be given.

[27] Finally, as noted in paragraph 16 above, the Chief of the Defence Staff did not contest the essential underpinnings of the Canadian Forces Grievance Board's recommendation that the

grievance should be upheld. He did not contest the factual findings of the Canadian Forces Grievance Board. He even agreed with the Board's finding that the promotion process lacked transparency. Other than raising the issue of lack of available information, he did not criticize the Canadian Forces Grievance Board's recommendation that the grievance should be upheld. In light of this, and given the evidentiary record before him, it was not open to him to dismiss Commander Zimmerman's complaints about the promotion process.

[28] At the hearing of this appeal, we invited counsel to make submissions regarding whether any directions should be given to the Chief of the Defence Staff if the decision were quashed and remitted to him for reconsideration. Counsel for the Attorney General submitted that due to the passage of time and the fact that the matter had already been examined thoroughly by the Chief of the Defence Staff, the matter should be remitted to the Chief of the Defence Staff for a determination only on the issue of remedy.

[29] Therefore, I would allow the appeal, set aside the judgment of the Federal Court, allow the application for judicial review, quash the decision of the Chief of the Defence Staff, and remit the matter to him with a direction to allow the grievance and to determine the remedy that should be given to Commander Zimmerman. I would grant Commander Zimmerman his costs here and below.

[30] I wish to thank counsel for their submissions which were very helpful to the Court.

"David Stratas"

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J.A.

"I agree  
K. Sharlow J.A."

"I agree  
Carolyn Layden-Stevenson J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-94-10

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE BOIVIN DATED  
DECEMBER 22, 2009**

**STYLE OF CAUSE:** Commander George Leonard  
Zimmerman v. The Attorney  
General of Canada

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 2, 2011

**REASONS FOR JUDGMENT BY:** Stratas J.A.

**CONCURRED IN BY:** Sharlow J.A.  
Layden-Stevenson J.A.

**DATED:** February 4, 2011

**APPEARANCES:**

Michel W. Drapeau FOR THE APPELLANT

Julia Barss FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Michel Drapeau Law Office FOR THE APPELLANT  
Ottawa, Ontario

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada