

Federal Court



Cour fédérale

Date: 20110209

Docket: T-369-09

Citation: 2011 FC 149

Ottawa, Ontario, February 9, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

LIEUTENANT-COLONEL R.D. MCILROY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

THE PROCEEDINGS

[1] Lieutenant-Colonel R.D. McIlroy (the Applicant) has applied for Judicial Review of a decision dated January 22, 2009 in which the Chief of Defence Staff (the CDS) denied his application for Redress of Grievance (the Decision). The application is made pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] As well, the Respondent brings a motion (the Motion) to strike the Affidavit of Brigadier-General Robert P. Alden sworn on April 17, 2009 (the Alden Affidavit).

THE FACTS

[3] This case concerns events which occurred in the late summer and fall of 2005. At that time, the Applicant was serving as a Staff Officer in a G3 position with 1 Canadian Mechanized Brigade Group (1 CMBG), Headquarters (HQ) in Alberta.

[4] The Applicant's annual reviews in the Canadian Forces are called Personnel Evaluation Reports (PER). The PER signed May 30, 2005 covered the period from April 1, 2004 to March 31, 2005. In that time, L. Col. S.B. Schreiber, was the Applicant's supervisor. LCol. Schreiber, who was Chief of Staff at HQ, wrote the following highly complimentary report in the Applicant's PER:

Maj McIlroy has clearly MASTERED the skills required of a Major. He began the reporting period with an outstanding report from CFCSC, where he was recommended for immediate promotion and future unit command appointments. He then successfully assumed the broad responsibilities of 1 CMBG G3 at a time of unprecedented op tempo for this formation. He displayed outstanding initiative, attention to detail, and professional knowledge in leading the re-write of the formation field SOPs. He demonstrated a rare high level of initiative and insight in his work on the formation op plan, and in developing an urban operations equipment and training package. He was highly adept at leading change, and was integral to the development and war gaming of the Brigade and Area inputs into the Army High Readiness Model. His written and verbal communications skills are excellent, and he conveys complex information in a forthright, cogent, and simple manner. He worked very hard at developing effective and important training for both the Headquarters, and the Brigade at large, and he was instrumental in co-ordinating the largest individual training cycle ever conducted within 1 CMBG. He leads through excellent personal example of a superlative work ethic and minute attention to detail. Maj McIlroy

has clearly demonstrated the ability to deal with multiple complex tasks simultaneously, and was an excellent formation G3. As a result, Maj McIlroy was ranked as the top Major in the 1 CMBG.

[5] The reviewing officer for the PER was Col. T.J. Grant. He was then in command of the Applicant's Brigade. He was also very impressed with the Applicant. He wrote:

Maj McIlroy has outstanding potential beyond the next rank. He is an intelligent and dedicated officer who leads through excellent personal example. He is my best major. He is deeply committed to his professional development, and is currently completing courses which will result in the granting of both an honours BA and Masters degrees by summer 2005. His communication skills are excellent, and he maintains a French profile of BBB current as of Feb 2003. He is a master of deliberate and detailed planning, and can be relied upon to organize complex tasks, such as formation training, with aplomb. He is a highly conscientious administrator who consistently demonstrates exceptional knowledge of CF and Departmental policies and procedures. He is highly dedicated to all aspects of the profession of arms, and enjoys mentoring his subordinates, as demonstrated by his input into the Staff professional development periods. He maintains an outstanding level of physical fitness, and was an important member of the Squadron Soccer team. Intelligent, dedicated, and possessing a keen sense of purpose and initiative, Major McIlroy has clearly demonstrated that he is ready to assume the duties of a Lieutenant-Colonel. He has 15 years to serve. He is strongly recommended for command of an infantry battalion.

[6] The PER included an additional review by BGen Beare. He said:

Maj McIlroy ranked 2 of 116 Majors in LFWA [Land Forces Western Area]. An outstanding performer, he should command an infantry battalion. He has excellent potential, and his career needs to be managed accordingly. He should be promoted immediately.

[7] The Applicant was on personal and academic leave from early April to August 8, 2005. He took courses offered by the Royal Military College in Kingston, Ontario, via distance learning and was awarded a Masters degree in Defence Studies. During that five month period, he returned to his duties at HQ for two weeks in June to assist with preparation for the upcoming handover of

command of the Brigade. BGen Fraser assumed command of the Brigade and of Canadian Task Force, Afghanistan, in July 2005.

[8] On October 14, 2005, the Applicant's brigade began a Brigade Training Event (the BTE). It was a field exercise held in Alberta shortly before the Brigade's deployment to Afghanistan. The Applicant expected to participate in the Afghanistan mission in a G5 position.

[9] On October 15, 2005, 36 hours into the BTE, BGen Fraser dismissed two officers. One was the Applicant. He was removed from his G3 position and ordered to leave the field (the Removal). BGen Fraser took this step at the suggestion of Major General Leslie and with the agreement of other senior officers in the chain of command. Following his Removal, the Applicant was assigned to a desk job and became the Deputy Commanding Officer of the Canadian Forces Base/Area Support Unit (CFB/ASU) in Edmonton. The Applicant did not deploy to Afghanistan.

[10] On November 15, 2005, the National Post newspaper published an article which included an interview with BGen Fraser about his upcoming command in Afghanistan (the Article). The Article referred to the recent firing and reassignment of senior officers under BGen Fraser's command and quotes BGen Fraser saying that he was deploying with his "A Team". However, the names of those "fired" were not mentioned in the Article. Nevertheless, the Applicant says that anyone familiar with the BTE and the Removal would know that the Article referred, in part, to him.

[11] Two months after the Removal, BGen Fraser, as reviewing officer, signed a Personal Development Review (PDR) for the Applicant. It was dated December 15, 2005 and it covered the

period from April 1 to November 1, 2005. The PDR was also signed by the Applicant and by Lieutenant Colonel S.B. Schreiber in his capacity as the Applicant's Supervisor. PDRs are prepared to address specific performance issues.

[12] On page one, the PDR indicates that, after his study leave, the Applicant ably completed several assignments. However, it records that, during the BTE, it was observed that "...his heart was not fully in the job."

[13] On page two of the PDR, BGen Fraser and LCol Schreiber provided further reasons for the Removal under the heading "Areas for Development":

Maj McIlroy's greatest strength – his deliberate and methodical approach – also became his chief weakness. He appeared to be uncomfortable or unhappy living in the relatively turbulent and high tempo environment endured by 1 CMBG HQ throughout the last year, and especially the Summer-Autumn 05 timeframe. He follows direction closely and deliberately, expects others to do the same, and can become very unhappy when they do not. He became increasingly frustrated with what he perceived to be a lack of planning or deliberate analysis during the BTE, and felt left out of the loop on many key decisions. Moreover, he felt his input was unappreciated and unwanted, and that he had been marginalized within the HQ by the COS [Chief of Staff LCol Schreiber] and Comd. [BGen Fraser]. As a result, he was increasingly frustrated and unhappy in his role as G3, and had difficulty hiding these feelings. This undermined the Comd's confidence in Maj McIlroy, and led to his replacement as G3 1 CMBG, and his move into a position that will be more conducive to fully exploiting Maj McIlroy's significant capability and experience.

[14] In the section of PDR headed "Strengths" the Applicant was described in the following terms:

Maj McIlroy demonstrated a rare high level of dedication to his professional development, as demonstrated by his relentless pursuit

of his undergraduate and Master's degree. He was an able mentor to his subordinates, although his sometimes direct demeanour can take some getting used to. He has a superlative eye for detail and is methodical and deliberate in his approach to problems. He has a wealth of experience, and is extremely practical and pragmatic in his approach to problems. He has a tremendous confidence in his own considerable ability and judgement, but this often makes it difficult for him to accept a decision that is contrary to his opinion or advice. He demonstrated excellent concern for the welfare and development of his subordinates, and was respected by his branch and throughout the HQ. In short, he is a highly capable officer who has demonstrated significant strengths in the area of planning, training, and analysis.

[15] The section of PDR headed "Action Plan" read:

Move to DCO ASU Edmonton.
Should be employed as a long-term planner at the operational / strategic level i.e. – G5 for an Area / Formation HQ. Employment as CO of a Unit / School / Base / ASU.

[16] The Applicant's next regular PER covered the period from April 2005 to March 2006. It made no reference to the Removal. It simply described his work as G3 of 1 CMBG HQ and his contributions as DCO of CFB/ASU in Edmonton in very positive terms. The PER included a recommendation by his reviewing officer that the Applicant command a unit or a school, and BGen Grant, who had become the Commander of Land Forces Western Area, recommended the Applicant for command of an infantry battalion. Such a promotion would have returned the Applicant to the field where he very much wished to serve.

[17] In June 2006, eight months after the Removal, the 2006 Promotion Selection Board promoted the Applicant to Lieutenant Colonel. On promotion, he was posted to another desk job at Land Force Doctrine and Training System Headquarters in Kingston, Ontario. He became the Senior Staff Officer, Director Army Doctrine.

[18] Following his promotion to LCol the Applicant's PERs continued to improve and, in his 2007/2008 PER, he was described as "ready" for promotion and a recommendation was made that he be given command of a unit. This would have been the field command that the Applicant had hoped to receive. However, no such promotion was made and the Applicant resigned from the Canadian Forces effective June 1, 2009.

THE GRIEVANCE

[19] The grievance is dated February 14, 2006 (the Grievance). It enclosed statements from twelve members of the Canadian Forces (the Applicant's Witnesses). As well, the Applicant described his concerns as follows:

- a. I was dismissed from the G3 position without cause, without even attempted substantiation and without compliance with Canadian Forces policies;
- b. My dismissal from the position of G3 was aggravated by completion in a personally and unnecessarily hurtful manner and in a manner producing the most negative effect possible upon my reputation and standing within the Canadian Forces (CF);
- c. Dismissal from the position imposes an effectively insurmountable obstacle upon my opportunities for command, prejudicing my Regimental recommendation for a command appointment and thus, preventing achievement of a life goal. Unless corrected the result is an effective and wrongful termination of my military career;
- d. Dismissal from my position was further aggravated by the public, nation wide, and unjustified statements made by Brigadier General (BGen) Fraser to National Post writer Chris Wattie leading to his article published in the 15 November 2005 edition (reference C). This was again personally and unnecessarily hurtful and a most grievous and injurious act against my personal

reputation and standing within the Canadian Forces and against my personal reputation and potential employment outside of the Armed Forces; and

- e. The Personnel Development Review (PDR) completed on my performance is flawed, not in keeping with CF policy (reference D), and appears to be a wrongful effort to retroactively validate my dismissal from the position of G3 (reference E).

THE INVESTIGATION

[20] The investigation was conducted by the Directorate Special Grievances Enquiries and Investigations (the Grievance Authority). It undertook a fact finding exercise which involved taking statements from BGen Fraser and LCol Schreiber.

[21] BGen Fraser provided his statement dated May 7, 2008 approximately 2½ years after the BTE. It provided further reasons for BGen Fraser's concerns about the Applicant. It mentioned, for the first time, that the Applicant had not worked well with members of his team and that BGen Fraser had discussed this issue with the Applicant. The statement reads as follows:

- BGen Fraser took over the Brigade in July 2005.
- In August 2005, the Brigade HQ, and brigade units were in the field conducting preparatory training for Afghanistan (this was an operational evaluation conducted by various other agencies).
- It became apparent that the G3 (Maj McIlroy as he then was) was not fitting in with the team, and BGen Fraser had discussions with the G3 about this issue.
- It also became apparent that some of the other Staff Officers (SOs) were compensating for Maj McIlroy.
- Commanding officers in the Brigade were bypass him and contracting other Brigade officers.
- The result of Brigade Staff Officers and Commanding Officers adjusting their activities meant that additional pressure was being put onto the shoulders of other individuals.

- The G3 had difficulties working with others, which led to interpersonal problems that affected the entire team.
- This was noted by numerous individuals in the chain of command (CoC), including Area Commander Bridagier-General Grant and Lieutenant-General Leslie. For the good of the whole team, the G3, along with another individual, were removed from the team by BGen Fraser. This had no bearing on recommendation for promotion of the G3.
- BGen Fraser spoke with CoC, and G3's Regimental Guard and explained what was going to happen – all understood that this was necessary.
- The timelines to make the decision were very compressed as the Brigade was on its way to Afghanistan.
- There was no time to provide any notice of intent to move him, and for the G3 to provide comments – the decision had to be made, and was supported by the CoC. The G3 was given the reasons noted above at the time of the removal from the position.
- The G3 was a SO at the time, and was moved from one SO position to another SO position.
- BGen Fraser spoke with Brigade staff after the removal of the members from the team, and indicated that it was not about who was better or worse, but about team cohesion and who fit better at that time. In addition, it was also about the right team in theatre at the time for the particular challenges ahead.
- BGen Fraser continued to believe that Maj McIlroy was a good staff officer who could contribute to the CF. He recommended Maj McIlroy's promotion.
- Concerning the National Post article dated November 2005, BGen Fraser did not name any individuals, and the point he made in the article was that he had a strong team with him capable of dealing with the Afghanistan challenges.

[22] LCol Schreiber's statement is dated April 10, 2008. He made no mention of any failure by the Applicant to work well with others on his team. He said:

- From the outset, it needs to be stated that I consider LCol McIlroy a highly competent and skilled officer, and that the decision to remove him from the G3 position in the HQ, and the timing, although unfortunate, was done in the best interests of both LCol McIlroy, and, more importantly, the Task Force. His removal was never meant to be career ending, although it was understood at the time by the parties involved that such drastic action would naturally create a

- significant negative impact on not just the professional reputation of LCol. McIlroy, but also HQ 1 CMBG;
- Up to that point, both the previous Bde Comd (Col. Now MGen Grant) and BGen Fraser had been highly supportive of Rob's professional development. Despite a period of unprecedented op tempo within the Bde, LCo. McIlroy was given the opportunity to take extended academic leave throughout the spring and summer of 2005 to complete his Master's degree;
 - The written reasons for LCol McIlroy's removal from the G3 position are contained in, and were provided to him, in his PDR dated December 2005;
 - Given his deliberate, methodical, and detailed approach, it was assessed that LCol McIlroy was better suited for planning (G5) as opposed to operations (G3), and he was scheduled to move into the G5 in the Multi-National Brigade Headquarters at the end of the Brigade Training Event (BTE) October 2005. Moreover, given that the HQ was transforming into a multinational entity, the position that LCol McIlroy was filling (G3) was at the time allocated to another nation (it subsequently changed);
 - As the G3, LCol McIlroy did not always agree with decisions taken by the Commander 1 CMBG, BGen Fraser, and his disagreement, at times, was obvious. This caused friction between the two;
 - Ultimately, the friction led to BGen Fraser's decreased confidence in LCol McIlroy. The Area Commander, BGen Grant had also sensed the friction and supported BGen Fraser's eventual action;
 - LCol McIlroy and I spoke about his frustration with working for BGen Fraser, although I did not consider this any form of "formal counselling."
 - During the final, and very stressful, October 2005 BTE, senior General Officers were present to assess the Headquarters. It became apparent that confidence had been lost in LCol McIlroy by the leadership. As a result, MGen Leslie, one of the senior General Officers present, recommended to BGen Fraser that he consider LCol McIlroy's removal from the G3 position;
 - BGen Fraser then decided to remove LCol McIlroy, which for the removal to occur, had to be done that particular week given the very tight timelines before leaving for Afghanistan;
 - BGen Fraser ruled out moving LCol McIlroy into another position within the HQ because he sought to avoid putting LCol McIlroy into what he thought might be a personally embarrassing position;

- The same day that LCol McIlroy was removed from the G3, his replacement was brought in to get him up to speed, as they were leaving the following week for Afghanistan;
- The same was done with another senior officer in the HQ, the G4, who was replaced in a similar manner at the same time;
- Given the very limited timeframe, there simply was no time to provide the opportunity to LCol McIlroy to correct his deficiencies – the move had to be completed immediately;
- This was a very difficult decision for BGen Fraser, one that he did not take lightly. A great deal of consideration went into it in the hours leading up to the removal;
- Although acknowledged that the manner in which the removal was executed was not ideal, it was the only option at the time. However, it was not intended to be career-catastrophic, and there remained a career, and a place, in the CF for LCol McIlroy.

[23] Once this evidence was assembled it was analyzed, together with the Grievance, and a document called a synopsis was prepared (the Synopsis). It was dated July 22, 2008 and it disclosed to the statements and made a recommendation to the CDS. The Synopsis was provided to the Applicant and, in a letter dated August 29, 2008, he responded to its contents and conclusions (the Response). The Synopsis and the Response were forwarded to the CDS for a decision.

THE DECISION

[24] The CDS set aside BGen Fraser's decision to remove the Applicant on the basis that he had not been afforded procedural fairness at the time of the Removal. Specifically, the CDS concluded that the Applicant had not been given notice and an opportunity to make representations before the decision to remove him was made.

[25] The CDS then made his own decision about the reasonableness of the Removal and determined that it had been reasonable in the circumstances. He therefore denied the Grievance. He also concluded that the grievance process had afforded the Applicant the procedural fairness which had been lacking at the time of the Removal because he had been given an explanation and an opportunity to respond.

[26] The CDS concluded that the Removal had not had a negative impact in the long term on the Applicant's prospects for promotion to command of an infantry battalion. He observed that the Applicant had no entitlement to such a promotion and that he was a valued member of the Canadian Forces.

[27] The CDS also considered the Article and concluded that it was not clear that BGen Fraser had told the reporter about the firing of two officers. It was also not clear that BGen Fraser used the word "firing" because, while other comments attributed to him appeared in quotation marks in the Article, there were no such marks around that word.

THE REMEDIES SOUGHT

[28] On this application, the Applicant asks for:

- a. An order quashing or setting aside the Decision save and except for the finding that LCol McIlroy was denied procedural fairness;
- b. An order making the determinations set out in the subparagraphs below and granting appropriate relief accordingly, or alternatively directing the Chief of the Defence Staff to reconsider the Redress of Grievance in accordance with proper principles of procedural fairness, natural justice, the proper application of law and the proper exercise of his jurisdiction, and

hence to issue a new decision granting Redress of Grievance, making the determinations set out in the subparagraphs below and granting appropriate relief accordingly. In particular, LCol McIlroy requests:

- (i) a determination that LCol McIlroy (then Major McIlroy) was dismissed without cause or justification from the G3 position by Brigadier General David Fraser [“BGen Fraser”] during an exercise Brigade Training Event [BTE] on October 15, 2005 [the “Dismissal”];
- (ii) a determination that the Dismissal resulted in the effective termination of LCol McIlroy’s career as a field operational infantry officer, by irreparably prejudicing his consideration for a battalion command he was otherwise situated to be appointed to and by relegating him permanently to a desk job;
- (iii) a determination that the wrongfulness of the Dismissal was aggravated by the Dismissal being carried out in a public and humiliating manner, and by its subsequent publicization in the national media by BGen Fraser;
- (iv) a determination that LCol McIlroy’s personal development report [PDR] of December 15, 2005 should be expunged;
- (v) a determination that the regimental succession boards held in November 2005, and subsequent army processes for the appointment of command positions ought to have been reconvened and reconsidered without reference to the Dismissal or the PDR of December 15, 2005, and without the participation of BGen Fraser and Brigadier General Grant [“BGen Grant”];
- (vi) a determination that LCol McIlroy ought to have been reassigned to an appropriate

field operational position equivalent in status and operational skill requirements to the position from which he was dismissed pending determination of the Redress of Grievance and/or a command appointment;

- (vii) a determination that the impropriety of the Dismissal ought to have been acknowledged and communicated to those Canadian Forces personnel who had participated in the BTE and more generally throughout the Canadian Forces;
- (viii) a determination that, in view of the failure of all the foregoing on a timely basis that would have permitted restoration of L.Col McIlroy's career, monetary compensation should have been awarded; and
- (ix) a determination fixing the amount of monetary compensation to be paid to LCol McIlroy in the amount of \$500,000.00.

THE STANDARD OF REVIEW

[29] Both parties say that decisions made by the CDS on a grievance filed under section 29 of the *National Defence Act*, RS 1985, c. N-5 are reviewable on a standard of reasonableness. In this regard, they cite *Moodie v Canada (Minister of National Defence)*, 2009 FC 1217, 356 FTR 304 at paragraph 18. I have reviewed Mr. Justice Near's decision and agree that reasonableness should be the Standard of Review.

THE APPLICANT'S SUBMISSIONS

[30] Counsel for the Applicant criticized the Decision for being based on contradictory and incomplete evidence. He said that:

- There was a failure to properly investigate in that no statements were taken from MGen Leslie, who recommended the Removal, or from BGen Grant, who told the Applicant that he was removed because BGen Fraser did not receive adequate communications during the BTE. As well, no statements were taken from the Applicant's Witnesses about LCol Schreiber's statement that friction developed when the Applicant made known his disagreements with BGen Fraser's decisions. The Applicant is also critical of the fact that no questions were asked of LCol Schreiber about, for example, which decisions made by BGen Fraser were the subject of the disagreements.
- The applicant was denied access to relevant information
- These points, together with the delay in processing the Grievance, disclose bias.

CONCLUSIONS

[31] Taken as a whole, the evidence discloses that the Applicant had excellent planning and organizational skills which included "minute attention to detail" and a mastery of "deliberate and detailed planning". However, the evidence also discloses that, as the date of deployment to Afghanistan approached, the Applicant became frustrated and unhappy with his new Commanding Officer because he was not being consulted and because he felt that there was inadequate planning

for the mission. He also disagreed with decisions made BGen Fraser and he let his feelings show. These problems caused friction between the Applicant and BGen Fraser and it ultimately led to BGen Fraser's loss of confidence. His view of the Applicant was shared by other senior officers during the BTE.

[32] The fact that the Applicant had wide ranging and fundamental criticisms of the operation of the Brigade, the validity of the BTE and the preparations for Afghanistan is disclosed in his Response to the Synopsis. Therein, he said:

10...During the work-ups for the deployment to Afghanistan I raised concerns over the following specific issues, all of which were within my purview to comment upon and in accordance with the requirements of carrying out my job as G3:

- a. Manning of the Brigade Rear Headquarters;
 - b. Manning of the Brigade Headquarters for Brigade Training Event (BTE);
 - c. Manning for the mission in Afghanistan;
 - d. **Lack of training focus and the validity of BTE;**
 - e. Training focus of the Brigade staff and perceived weaknesses within the staff;
 - f. Training focus of the Brigade Headquarters Signals Squadron;
 - g. **Insufficient focus on counterinsurgency and specifically the mission in Afghanistan;**
 - h. The continual revamping of the Headquarters structure and lack of establishment of standard operating procedures (a concern echoed by Major Tollas response to question 8 and 10, and Major Wright questions 9, 12 and 13 at Reference B);
 - i. **Inadequate training preparations for the mission;**
 - j. Poor planning cycles; and
 - k. The relationship between BGen Fraser and LCol Hope.
- [my emphasis]

11. On the two occasions I did have a chance one-on-one to BGen Fraser I raised the following mission preparation concerns:

- a. **Lack of a training focus and the validity of BTE;**

- b. Insufficient focus on counterinsurgency and specifically the mission in Afghanistan; and**
- c. Inadequate preparations for the mission.**

[my emphasis]

[33] The evidence shows that the Applicant was openly unhappy about the BTE and the Afghanistan mission, which was under BGen Fraser's command, and that he publicly and repeatedly criticized BGen Fraser's decisions and the adequacy of the preparations for the mission. In my view, this evidence was sufficient to support the CDS' conclusion that the Removal was reasonable based on a loss of trust. However, the CDS also relied on BGen Fraser's evidence that the Applicant had not been working well with his team in the fall of 2005. That problem was not mentioned by LCol Schreiber in his statement and was not referred to in the PDR. Further, none of the Applicant's Witnesses observed a teamwork problem. I have therefore concluded that it was not reasonable for the CDS to have relied on this evidence as a justification for the Removal without confirming its accuracy with BGen Fraser, as it does seem possible, given the passage of time, that he may have confused the two officers he removed from the field during the BTE. That said, I have determined that this error is not material because, even if there were no teamwork problems, the other evidence was sufficient to justify the loss of confidence.

BIAS

[34] I have concluded that the length of time taken to process the Grievance is not indicative of bias against the Applicant. The record shows that the delays were caused by staff shortages and by the fact that the Applicant's Grievance did not meet the criteria for priority processing because he was still employed. As well, the fact that the Applicant received redacted versions of documents

about the BTE does not disclose bias because it was a sensitive exercise. Finally, although the Applicant asked the CDS to assist him in his efforts to obtain documents, that was not CDS' role and his failure to help therefore does not suggest bias.

[35] The Applicant also submits that the investigation was incomplete and that this discloses bias.

[36] On reviewing the evidence, I have identified the following unanswered questions:

1. Why was there no statement from BGen Grant or BGen Fraser elaborating on BGen Grant's statement to the Applicant on October 16, 2005 which suggested that the Removal occurred because BGen Fraser had not received adequate communications during the BTE?
2. Why did no one ask LCol Schreiber why his statement and the PDR said nothing about the Applicant's alleged failure to function well as a team member before the BTE?
3. Why did no one ask BGen Fraser why the PDR did not mention the Applicant's failure to work well with other members of his team?

[37] In a perfect world, the investigation would have provided answers to these questions.

However, the CDS had evidence from the two senior officers who were best placed to describe the Removal, and their evidence was sufficient to allow him to conclude that the Removal was reasonable. It is clear that the Senior Officers lost confidence in the Applicant because of his openly critical attitude. In these circumstances, I cannot conclude that the investigation was biased.

THE APPLICANT'S FURTHER SUBMISSIONS

[38] Since I have concluded that CDS' Decision was reasonable, it is not necessary to address the Applicant's submissions about remedies. However, as the Applicant appeared to feel strongly about several other issues, I will comment on them in *obiter*. They are:

- (i) The manner of his Removal and the Article;
- (ii) The impact of the Removal on his opportunity for promotion;
- (iii) The CDS' treatment of the Applicant's Witnesses;

(i) The Manner of his Removal and the Article

[39] I am satisfied that the Removal was not accomplished during the BTE for the purpose of maximizing its negative impact on the Applicant. The Response shows that the problems between BGen Fraser and the Applicant had been developing for some time. As well, the Grievance relates that before the BTE, LCol Schreiber had suggested that the Applicant be less critical of BGen Fraser and had told the Applicant that BGen Fraser was considering not taking him to Afghanistan. However, it is clear that before the BTE, no decision had been made about the Applicant's deployment.

[40] In my view, it was only during the stress of the BTE, that BGen Fraser and other members of the chain of command recognized that the Applicant's attitude towards his Commanding Officer meant that he could not remain in the field.

[41] Lastly, I should note that, in spite of the Removal, the Applicant was highly valued for his performance in the areas of planning and training and it was recognized that he had important ongoing contributions to make to the Canadian Forces. This explains why BGen Fraser recommended the Applicant for his subsequent promotion to the rank of LCol.

[42] Regarding the Article, BGen Fraser's statement did not mention whether or not he used the word "firing" and whether or not he was the source of the reporter's information about the removals. The CDS concluded that BGen Fraser had not used the word firing because the word was not in quotation marks. In my view, given that quotation marks were used extensively and given the absence of any evidence about the source of the information about the removals, the CDS conclusion was reasonable.

[43] However, even if BGen Fraser had told the reporter about the Removals and used the word "firing", he was entitled to tell the truth as part of his effort to persuade the public that only his best officers were deploying to Afghanistan. I have difficulty understanding the Applicant's anger about the Article because members of the Canadian Forces who had been at the BTE presumably knew of the Applicant's Removal so the Article did not provide them with new information and, without the names of those "fired", the general public would not have known the Applicant was not a member of the "A Team".

(ii) The Impact of the Removal on the Applicant's Opportunity for Promotion

[44] The evidence was not clear about whether the Applicant was considered for promotion in 2007. The CDS concluded that two scenarios were possible. Either the Applicant's name was not

put forward for promotion or it was put forward but he was not selected. The CDS determined that, given the Removal, the fact that he was either not proposed or not promoted was a consequence of the Removal. The Applicant does not take issue with this conclusion.

[45] However, the CDS also concluded that the Removal had had no long term impact because, in 2008, the Applicant's name was put forward for promotion to a command appointment with excellent recommendations. The CDS said that the fact that he was not selected could not be attributed to the Removal.

[46] In my view, this conclusion was not reasonable because, in reaching it, the CDS did not consider the Applicant's evidence that he was told by Col Simms that, beyond 2008, he would not be considered for a battalion command and that, without having served in Afghanistan, he would not have the experience needed for such a promotion. As well, many of the Applicant's Witnesses said that they thought his prospects for promotion were poor. However, this is not a material error because, since the Removal was reasonable, so were its consequences.

(iii) The CDS' View of the Applicant's Witnesses

[47] On this topic, the CDS said:

As mentioned earlier, you objected to the statements provided by BGen Fraser and LCol Schreiber and reaffirmed that their views and decisions were biased. You asserted that more than ten people who provided their statements in your grievance have backed up your point of view. I have taken those statements into consideration and I note that they come mostly from peers and co-workers who were not necessarily aware of the global situation leading to your dismissal and were not necessarily privy to the concerns raised by BGen Fraser

and LCol Schreiber. Your removal was essentially a trust issue. Because I am faced with conflicting points of view, I must weigh the evidence provided by your superiors, and the opinions provided by you and your peers. The question of trust between a TFC [Task Force Commander] and his key staff is crucial to the success of a mission as a whole. It is primarily a top-down relationship. In your case, given the circumstances and the importance of the mission in Afghanistan, I will give more weight to the arguments provided by your chain of command concerning the loss of confidence in your abilities as G3 than to those of your peers or yours. The evidence shows that BGen Fraser had lost his trust in your ability to be his G3. In doing so, he had to take action. He chose to remove you from your position. On the balance of probabilities, I find that BGen Fraser's decision, as TFC, to remove you from the G3 position was reasonable in the circumstances.

[48] In my view, the CDS' conclusion on this issue was reasonable because the Applicant's Witnesses were not in the best position to observe and understand how Senior Officers were reacting to the Applicant's criticisms of both the preparations for the Afghanistan mission and the related decisions made by BGen Fraser.

THE MOTION

[49] The Applicant argued the application before me without reference to the Alden Affidavit.

[50] Accordingly, an order will be made allowing the Respondent's motion to strike the Alden Affidavit because it was not necessary for the disposition of this application.

[51] However, the order will be made without prejudice to the Applicant's ability, if so advised, to seek leave to file the Alden Affidavit as fresh evidence on appeal.

COSTS

[52] The Respondent sought costs. However, given the significant delay (three years) in the resolution of the Grievance, in circumstances in which the Applicant reasonably considered time to be of the essence and repeatedly communicated that fact to the Grievance Authority, I have decided to exercise my discretion against an award of costs.

JUDGMENT

THIS COURT’S JUDGMENT is that:

- (i) This application for judicial review is dismissed; and
- (ii) The Alden Affidavit is struck from the record without prejudice to the Applicant’s ability to seek leave to introduce it on appeal.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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ATTORNEY GENERAL OF CANADA

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REASONS FOR : SIMPSON J.

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