Federal Court  Cour fédérale

Date: 20110622

Docket: T-1634-10

Citation: 2011 FC 745

Ottawa, Ontario, June 22, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

MR. JORDAN J. MCBAIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision, dated August 30, 2010, of the Director General of the Canadian Forces Grievance Authority (the Final Grievance Authority), denying the applicant's grievance seeking to set aside and destroy all documentation relating to the applicant's being placed on "counselling and probation" for drug abuse, namely, anabolic steroids.

[2] The case is brought to this Court pursuant to article 29.15 of the *National Defence Act*, R.S.C., 1985, c. N-5, which provides that a decision of a final authority is final and binding except for judicial review before this Court.

BACKGROUND

[3] Between September 2004 and April 2005, the applicant was completing his final year of an engineering and management program at McMaster University in Hamilton. At the same time, he was enrolled in the Regular Officer Training Plan in the regular force of the Canadian Forces, as a member of its London Area Support Unit. The applicant's Commanding Officer (the Commanding Officer) was the major in charge of London's Area Support Unit.

[4] During that same time, the applicant was under severe emotional stress caused in part by his mother's suffering deteriorating health from a terminal illness. Some time in September of 2004, the applicant states that, likely as a result of his emotional distress, he had a confrontation with a close friend and former roommate, Mr. Jeff Lindner, while they were doing group work for a university course.

The investigation into steroid use

[5] On October 4, 2004, military police in London received information from Mr. Lindner's father that the applicant was using anabolic steroids and possibly engaged in other questionable behaviour**.** The military police decided to launch an investigation into these allegations. On October 6, 2004, military police in Hamilton interviewed Mr. Lindner. The investigator's report of the interview demonstrates that Mr. Lindner corroborated his father's information regarding the

applicant's steroid use. He provided significant detail of the timing of the applicant's use, although he stated that he had not personally witnessed any of it, as well as changes that Mr. Lindner had noticed in the applicant's appearance and behaviour, including increased aggression. Mr. Lindner also stated, however, that he was concerned about harming the applicant's military career and stated that he believed the military had been a positive force in the applicant's life.

[6] On October 7, 2004, the results of this investigation were verbally communicated to the applicant's Commanding Officer in London. That same day, the applicant was ordered to report to his Area Support Unit in London on October 8. He was not told the reason for the meeting.

[7] At that time, another friend of the applicant's informed him that the military police had been conducting an investigation into his alleged drug use. After learning of this, the applicant suspected that Mr. Lindner was the military police's source for this information, and confronted Mr. Lindner, who related the details of his interview with the military police to the applicant.

The meeting and order for urine sample

[8] On October 8, 2004, the applicant met with the Adjutant of the London Area Support Unit (the Adjutant), who informed the applicant of the allegations of his steroid use. There is some dispute over what information the Adjutant provided to the applicant. The applicant submits that the Adjutant informed him that he had "very convincing evidence" that the applicant had been using steroids, but not of any of the evidence that had been obtained to substantiate that allegation. The applicant further submits that the Adjutant informed him that he had only two options: (1) admit his steroid use and therefore be immediately placed on "counselling and probation," or (2) deny the

allegations and consequently be given an opportunity to confront the evidence that had been collected. The applicant states that he was left with the impression, first, that he would only become aware of the case against him if he denied the allegations, and, second, that he risked being released from the military if he provided a urine sample that tested positively for steroids.

[9] In contrast to the applicant's statements, in an email response, dated October 8, 2006, to the grievance analyst assigned to the applicant's file (see details regarding the applicant's grievance below at paragraph 19), the Adjutant stated that he had informed the applicant of all of the evidence, but not of its source:

> I explained to him that someone he knew very well had told the MPs [military police] that he was using steroids. I told him that this person had said he was shown a vial of steroids by him. I explained that this person had provided details of the steroid use that he stated were told to him by the member (McBain). I told him the three types of steroids that were indicated in the initial report to HMCS Star (Equipoise, Sustanon, and D-Bol). I then explained the process to him and the CF Drug Control Program (CFAO 19-21). I asked him if he wanted a copy and he said no and indicated that he was fairly familiar with it based on his training.

[10] The Adjutant also stressed that he repeatedly told the applicant that no criminal or disciplinary charges were being contemplated, and that the most likely administrative action that would be taken for first time steroid use, if proven, would be "counselling and probation" and not release. The Adjutant stated that the applicant had confronted him regarding the constitutionality of mandatory urine testing.

[11] Immediately following his meeting with the Adjutant, the applicant was taken to meet his Commanding Officer. The applicant states that his meeting with his Commanding Officer was

largely the same as with the Adjutant, and that he was again not given a summary of the evidence against him.

[12] At both meetings, the applicant refused requests to provide a urine sample for analysis. He also refused to either confirm or deny the allegations made against him.

[13] Following his meeting with the applicant, the applicant's Commanding Officer signed an order requiring the applicant to provide a urine sample for analysis. The applicant complied with the order. In response to the grievance officer's request for information, in an email dated October 25, 2006, the applicant's Commanding Officer stated that he believed he had "reasonable grounds" for ordering the urine analysis because of the results of the investigation and the applicant's refusal to confirm or deny the allegations against him:

> Based on the available information, and his lack of disclosure, I had reasonable grounds in ordering a test for cause.

The applicant admitted to steroid use and apologized

[14] After leaving the meetings, the applicant confronted Mr. Lindner. According to the applicant, during the course of the confrontation he threatened to commit suicide. According to the Adjutant's report of the events, London's military police received a call by Mr. Lindner's father, who informed them that the applicant had kicked in Mr. Lindner's apartment door and, failing to find Mr. Lindner inside, tracked him down at the university. They were told that the applicant had uttered threats against Mr. Lindner and his father. He also informed them that the applicant had threatened to commit suicide. The military police apparently told Mr. Lindner's father to call

Hamilton police. The applicant denies that he threatened anyone but himself, and in later proceedings Mr. Lindner's father denied that the applicant had threatened him or his son.

[15] By letter dated October 8, 2004, addressed to the applicant's Commanding Officer, the applicant confessed that he had been using steroids and apologized for not admitting his mistake:

> I keenly regret not accepting the offer of help you put forward to me today; while I did not lie about my involvement with the use of anabolic steroids, I was not straightforward.
>
> I knew to a certainty that the urine analysis would reveal positive use of anabolic steroids as I had been ingesting them up to this date. Frustration with my friend, Jeff Lindner, led me to be irrationally stubborn in this respect. I was not able to come forward because I felt I would be validating his violation of my confidence. A confrontation with him the night before, revealed most of the details of the investigation that led to the MP's conclusions. I should have been able to admit my mistake openly in spite of this, as it was my mistake and not his.

Hamilton Police – Criminal charges against the applicant

[16] On October 9, 2004, the applicant again sought out Mr. Lindner at his home and again uttered suicide threats and allegedly threats against Mr. Lindner or his father. Hamilton police were called, and the applicant was detained by police and kept in a psychiatric ward until midnight, when he was released upon the police finding that he did not pose a threat to himself or to others. The applicant has consistently stated that he only ever threatened suicide and never threatened anyone else, including Mr. Lindner and his father.

[17] A report, dated October 15, 2004, in the military police report states that on October 13, 2004, the applicant was released from Hamilton Police Service custody on a recognizance containing conditions prohibiting the defendant from contacting Mr. Lindner or any member of his

immediate family, staying at least 100m away from the residence or known places of employment of Mr. Lindner or his family, and from consuming any alcohol, drugs, or carrying weapons. The applicant had been charged with Forcible Entry and Mischief Under $5000. The military police report states that the details of the charge were not available to it, because the Hamilton Police Service had specific guidelines for release of their reports that prevented them from gaining access.

Meeting with the Commanding Officer at which the applicant showed remorse

[18] The applicant's Commanding Officer stated in his response to the grievance officer that the applicant's father came to Hamilton following the applicant's arrest. Following his release from custody, the applicant and his father met with the applicant's Commanding Officer in London. The Commanding Officer stated that he came away from that meeting with a very positive impression:

> 3. ….Later that day I had an opportunity to meet with the member and his father in my office. I explained the likely outcome of the positive test for steroid use, but stressed that since he admitted to using the substance all factors would be taken into consideration. At that meeting I had the impression that he was very remorseful and that this would be the wake up call he needed to get his life back on track. My impression following that meeting was that he was relieved that this was all out in the open and that he would start fresh. A bright young man who had a critical lapse in judgment but definitely something that could be corrected through counselling and strong parental support. His father has a police background so I had confidence that he would assist.
>
> 4. Throughout my involvement with SLt McBain my impression was that he was a young man who had unresolved issues and family pressures including a sick mother. The drug use, in my opinion, was definitely out of character as a review of his file indicated at the time that he was an outstanding individual, highly recommended for the Canadian Forces. Given these mitigating factors and the fact that he appeared truly remorseful, my recommendation to Ottawa at the time was that he be retained in the CF and put on C&P [counselling and probation] with medical and social work follow up….

The applicant agreed to being placed on counselling and probation

[19] The military body that had the authority to respond to the applicant's illicit steroid use was the Director Military Careers Administration and Resource Management 5, which is now known as the Director Military Careers Administration (the Director Military Careers Administration or the Director). By letter dated December 16, 2004, the Director informed the applicant that an administrative review was being conducted in order to "determine the suitability of CF members for further service in the CF." An administrative review is not a criminal or disciplinary review.

[20] Included with the letter was a disclosure package that informed the applicant of the reasons for the administrative review and of his rights to make written representations in response to the disclosure. The disclosure stated that the applicant "by his own admission, clearly violated the Canadian Forces Drug Policy as detailed in QR&O Chapter 20 and CFAO 19-21." The package also included the positive result of the urine analysis. The report noted, however, a number of mitigating factors, including that it was a first-time offence, that it was only personal use, that he did not use while on duty nor pose an immediate danger to operational readiness, security or safety, that it is unlikely that he would repeat the use, and that his conduct and performance was otherwise satisfactory. The disclosure did not include the military police report that had been generated as part of the investigation, nor inform the applicant of the existence or contents of notes and a DVD that were generated pursuant to that investigation. There is no evidence that the Director had that evidence in its possession, and none of that evidence informed the Director's decision. The disclosure stated that the Commanding Officer recommended that the applicant be put on "counselling and probation", as opposed to release from service. The disclosure report concludes that it recommends the same, for the above reasons.

[21] By letter dated January 21, 2005, the applicant agreed with the recommendation that he be placed on counselling and probation:

> I am attaching this letter as a correction to information found in my disclosure package. I agree with the recommendation of retention on counselling and probation.

The applicant's corrections were to the revelations in the disclosure material that stated that the applicant had threatened Mr. Lindner and his father. To the contrary, the applicant stated that he had only ever threatened to harm himself by committing suicide, and that no one else had anything to fear.

[22] On March 7, 2005, the applicant was placed on counselling and probation for a period of one year. In its decision, the Director stated its conclusions, including numerous factors suggesting that the applicant ought to be retained in the Canadian Forces. The Director therefore made the following recommendation:

> It is recommended that OCDT McBain be retained in the Canadian Forces, but that he is placed on Counselling and Probation for a period of one year, for illicit drug involvement.

[23] In May of 2005, the applicant was transferred from London's Area Support Unit to the Canadian Forces Naval Engineering School in Halifax. As part of the transfer process, the applicant's Commanding Officer in London sent a very positive and supportive letter to his new Commanding Officer. In that letter, the Commanding Officer described the investigation and outcomes relating to the applicant's steroid use. The respondent's affiant has sworn that "This is not unusual practice with the CF, especially when the member at issue is on C&P status."

[24] The Commanding Officer stated in his letter that the applicant was confronted with the allegations of his steroid use and that a urine test was ordered because the applicant "initially chose to deny" the allegations, but that he quickly recanted and took full responsibility. The Commanding Officer explained that he found that applicant to be "very remorseful and wanting desperately to continue his career as an officer in the CF." He explained that follow-up testing was required for one year, but that the mechanism of such testing would have to be determined because of the difficulties associated with testing for steroids. Finally, the Commanding Officer described some of the applicant's personal situation:

> 4. OCdt McBain also had to deal with the tragic loss of his mother, which only added to the stress. He remarkably pulled through the difficult school year successfully, in spite of what has transpired. He has fully accepted responsibility for his actions and every indication is that he will come through all of this a better person and fine officer.

The applicant's grievance

[25] On June 16, 2005, the applicant submitted a grievance to his new Commanding Officer, alleging unfair treatment during the course of the investigation into his steroid use. The applicant sought "the cancellation of C&P [his placement on counselling and probation], a full disclosure of the evidence forming the grounds for the order, and the removal of any documentation from any file held on me on this matter."

[26] The applicant's Commanding Officer referred his grievance to the Director Military Careers and Administrative Resources (the Initial Grievance Officer) on June 23, 2005. Although the usual time limit for submitting such a grievance was six months, the applicant requested and was granted

an extension to this time period due to the applicant's plea of emotional incapacitation as a barrier to earlier submission.

[27] By letter dated July 14, 2005, the Initial Grievance Officer sent the applicant's Commanding Officer an acknowledgement of receipt of the applicant's grievance submission, and a request for extension of time in which to reach a decision. The letter states that although the Queen's Regulations and Orders 7.07(1) requires that an initial grievance officer communicate a decision within 60 days, the Initial Grievance Officer is overwhelmed with grievances, and so requests the applicant's permission to provide a decision at a later time. The applicant granted this permission.

[28] The applicant states that following a request under the *Privacy Act*, R.S.C. 1985, c. P-21 (the Privacy Act) he was sent, in August of 2005, a redacted version of the military police report that had been written regarding the investigation into his use of steroids. He states that this was the first time that he learned of the grounds that had supported the October 8, 2004, order for his urine analysis.

[29] Following his receipt of the redacted military police report in August, the applicant sent, on August 23, 2005, a revised grievance to the Initial Grievance Officer. He agreed to again extend the time in which the Initial Grievance Officer could consider his submission beyond the 60 day limit.

[30] On June 9, 2006, the applicant again revised his grievance. In this revision, he exercised his right, as provided by section 7.07(2) of the Queens Regulations and Orders, to request the Initial Grievance Officer to refer his grievance to the Chief of the Defence Staff for final determination. On June 19, 2006, the Initial Grievance Officer forwarded the applicant's grievance, as per the

applicant's request. Pursuant to section 29.14 of the *National Defence Act*, the Chief of Defence Staff delegated his authority as final authority to the Canadian Forces Grievance Adjudicator (the Final Grievance Authority). Pursuant to section 29.15 of the *National Defence Act*, a decision by a Final Grievance Authority in the grievance process is final and binding, except for judicial review before this Court.

[31] As mentioned above, the Final Grievance Authority contacted the Adjutant and Commanding Officer for synopses and then further explanations of the events, in emails dated September and October of 2006.

[32] The applicant further revised his grievance on August 14, 2006, September 11, 2006, February 1, 2007, and September 7, 2007. The applicant also provided written responses to the comments of the Adjutant and Commanding Officer. He first provided these comments on February 3, 2007, and revised his representations on September 7, 2007.

[33] On April 9, 2007, the applicant requested that he be granted an oral hearing before the Final Grievance Authority. This request was denied by email dated May 25, 2007.

[34] On October 3, 2007, the Final Grievance Authority exercised its discretion, pursuant to section 29.12(1) of the *National Defence Act*, to refer the applicant's grievance to the Canadian Forces Grievance Board (the Board). The Board is an arms-length body established by section 29.16 of the *National Defence Act* with a mandate to investigate and review grievances referred to it by

the Chief of Defence Staff. The Board can only make non-binding recommendations to the Chief of Defence Staff, and has no enforcement authority of its own.

Review of the applicant's grievance by the Board and applicant's voluntary release from the Canadian Forces

[35] By letter dated December 11, 2007, the applicant was informed that the Board had begun a preliminary review of his grievance. It enclosed the grievance file that the Board possessed, as part of the Board's disclosure process. Included in that file was a minimally redacted version of the military police's investigation into the applicant's steroid use, that included information that had not been disclosed as part of the redacted military police report sent to the applicant following his Privacy Act request.

[36] As a result of this new disclosure, the applicant learned, for the first time, of the existence of a DVD recording of the military police's interviews into his drug use. The applicant therefore submitted a Privacy Act request for the DVD. He was told that the DVD had been lost, and submitted a complaint alleging misconduct by the military police in losing the DVD. Following another long series of applications, on May 21, 2009, the applicant received a final report of an investigation conducted by the Military Police Complaints Commission, which found that there had been wrongdoing but no specific fault:

> …there was an overall failing on the part of members of the military police at ASU London to properly lodge and safeguard the DVDs as well as produce proper documentation. However, the Commission finds no evidence to indicate the military police knowingly or improperly interfered with the DVDs or acted in a manner which would discredit the military police.

The Commission recommended better training and review procedures.

[37] On April 9, 2007, the applicant submitted a request for an oral hearing before the Board.

[38] In December of 2007 the applicant received a promotion, back-dated to a time prior to the counselling and probation order.

[39] Meanwhile, the applicant had initiated another complaint. Just prior to the Board beginning its preliminary review, on November 27, 2007, the applicant submitted a complaint to the Deputy Provost Marshall for Professional Standards, alleging that the military police of London's Area Services Unit had violated Canadian Forces Administrative Order 19-44 by failing to instigate suicide intervention once they learned of the applicant's suicide threats in October of 2004. On March 20, 2008, the Deputy Provost Marshall (Professional Standards) informed the applicant of its finding that the applicant's complaint could not be substantiated.

[40] On May 5, 2008, the applicant completed a voluntary release from the Canadian Forces. He states that he decided to request that he be released from the service because of his "dismay and disgust" at the way in which his mental health condition had been handled by the Commanding Officer. He also felt that he had limited prospects for professional development within the Canadian Forces. He states that his advancement in the military was harmed by his being placed on counselling and probation because although he received a promotion that promotion was late and his pay suffered as a result of his temporary counselling and probation status.

[41] Since leaving the military, the applicant had earned a Masters degree and entered a Ph.D program in the Department of Engineering at Laurentian University.

[42] On September 25, 2008, the Board released its decision. The Board carefully reviewed the history of the applicant's grievance, the applicant's submissions, and the remedies that the applicant requested. The Board found that the only error committed in the process faced by the applicant was that he had not been provided with the military police report of its investigation immediately after that report became available. The Board found, however, that this error was immaterial because the Commanding Officer had not relied on the report in making the order for urine analysis, because it had not been available at the time of that order. Moreover, because the applicant ultimately received the report at a later stage, the Board found that the breach of procedural fairness was cured. The Board found that the fact that the DVD mentioned in the military police report was lost did not affect the process. The Board found that QR&O article 20.11 is an administrative provision and does not engage the applicant's rights under sections 7 or 8 of the Charter. The Board found that no oral hearing was required.

[43] The Board therefore recommended that the Chief of Defence Staff deny the applicant's grievance. As stated above, in this case the Chief of Defence Staff delegated his authority to the Final Grievance Authority.

[44] By letter dated October 16, 2008, the applicant provided the Final Grievance Authority with his response to the findings of the Board. In addition to his submissions, the applicant requested that the Final Grievance Authority hold his grievance in abeyance until the Military Police Complaints Commission had finalized its investigations into the lost DVD and the military police's failure to initiate suicide intervention.

[45] Once he had received the reports of the two Military Police Complaints Commissions, the applicant resumed the processing of his grievance. He submitted his final submissions to the Final Grievance Authority on August 19, 2009.

[46] The Final Grievance Authority considered the applicant's submissions and issued its decision on August 30, 2010. It is this decision that is under review on this application.

The decision under review

[47] The Final Grievance Authority dismissed the applicant's grievance. In a letter dated August 30, 2010, the Final Grievance Authority first summarized the steps that had led to its consideration of his grievance, including the independent review by the Board and the various revisions submitted by the applicant. The Final Grievance Authority stated that it was considering the applicant's October 16, 2008, letter and all of the applicant's subsequent submissions as the applicant's representations before it.

[48] The Final Grievance Authority reviewed the applicant's submissions and the relief that he sought. The Final Grievance Authority's exposition of these submissions is thorough and demonstrates a consideration of the lengthy record of this grievance. The Final Grievance Authority's decision comprises 37 single-spaced pages (the respondent advised the Court that "this was the longest grievance decision in the Canadian Forces' history that anyone could remember").

[49] The Final Grievance Authority agreed with the Board regarding the admission of the applicant's grievance beyond the six-month time limit imposed by QR&O article 7.02.

[50] The Final Grievance Authority then considered the applicant's submissions regarding the validity and constitutionality of the Canadian Forces' drug control program contained in Chapter 20 of the QR&O and amplified in CFAO 19-21. I will summarize the Final Grievance Authority's findings on each of the issues raised by the applicant:

1. ***Vires* of QR&O Chapter 20**: First, it considered whether Chapter 20 of the QR&O was *ultra vires* the Governor in Council. The Final Grievance Authority found that section 12(1) of the National Defence Act provides the Governor in Council with "broad authority" to "create regulations for the control and administration of the CF." Section 12(1) states as follows:

   > The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.

   The Final Grievance Authority found that the Canadian Forces' drug control program was within the broad authority of section 12(1) and that it is therefore authorized at law.

2. **Section 2 of the Canadian Bill of Rights**: Second, it considered whether Chapter 20 of the QR&O was unlawful because it violated section 2 of the *Canadian Bill of Rights*, S.C. 1960, c. 44, which provides, among other things, that unless it states otherwise, no law in Canada is to be read so as to "abrogate, abridge or infringe" any of the rights or freedoms contained in the Bill of Rights. The Final Grievance Authority found that there were no rights or freedoms that Chapter 20 operated to abrogate, abridge or infringe, and so the Bill of Rights was not contravened.

3. **The *Privacy Act***: Third, the Final Grievance Authority considered whether Chapter 20 contravened the requirements of the *Privacy Act*. In a 1990 report, *Drug Testing and Privacy* (Ottawa: Privacy Commission, 1990), the Privacy Commissioner of Canada had stated that "Public safety remains the only valid reason for implementing drug testing programs. Operational effectiveness and the (perhaps unattainable) goal of a substance-abuse free CF are not, in the absence of significant public safety concerns, sufficient justifications under the *Privacy Act* for drug testing."

   The Final Grievance Authority found that Chapter 20's purpose, as expressed in article 20.03 (Purpose), included, among other purposes, the safety of members of the Canadian Forces and public and the health of the same, as well as the security of defence establishments and classified information. The Final Grievance Authority further stated that the health and safety purpose was bolstered by the Note to Article 20.11 of the QR&O, which states that the aim of the testing

provided for in Article 20.11 is "to promote the purposes specified in article 20.03(Purpose)…so that, if the testing detects the presence of ad rug in the urine sample, appropriate administrative and disciplinary action can be taken to prevent further use and reduce any dangers associated with the previous use." The Board concluded that the health and safety concerns addressed by Chapter 20 were legitimate justifications and did not violate the *Privacy Act*.

4. **Whether the release provisions of the QR&O are Quasi-Criminal**: Fourth, the Final Grievance Authority considered whether the fact that the applicant could have been released from the Canadian Forces pursuant to QR&O Chapter 15 as a result of his violating Chapter 20 meant that a violation of section 20 is a "quasi-criminal" act. If a violation were quasi-criminal, then the applicant submitted that he should be granted the protections given in a criminal proceeding.

   The Final Grievance Authority concluded that despite any stigma that may be attracted by a release from the Canadian Forces, the release provisions of the QR&O are "clearly administrative" and do not attract criminal safeguards: they are contained in Chapter 15 (Release) of Volume 1 of the QR&O, a Volume entitled "Administration." They do not create offences under the Canadian Forces Code of Service Discipline and do not set out disciplinary punishments associated with release. The Final Grievance Authority found that the cases submitted by the applicant in support of his position did not assist it in determining the question. It found, moreover, that members who are released for involvement with illicit drugs are usually released under the "honourable release" provisions of Chapter 15.

5. **Conscriptive Evidence**: Fifth, the Final Grievance Authority considered whether urine constitutes "conscriptive evidence" – that is, "evidence that incriminates an individual accused of a crime and which the accused is compelled to provide as part of a criminal process in violation of his or her rights". The Final Grievance Authority stated that "Conscriptive evidence must be excluded to ensure a fair trial." The Final Grievance Authority found, however, that because the applicant's urine had been collected as part of an administrative process and without any intention of initiating any criminal charges, the concept of conscriptive evidence had no application to the applicant's grievance.

6. **Necessity of a Warrant**: The Final Grievance Authority found that section 273.2 of the National Defence Act did not apply to the provision of urine granted by the applicant. As a result, the Final Grievance Authority found that it did not matter whether the definition of property in that section included urine. Instead, article 20.11 of the QR&O, allows for urine testing when there are reasonable grounds, without requiring a warrant. Moreover, it found that regardless of the classification of the applicant's urine as property or otherwise, the applicant's grievance impugned only the urine test and his confession and, therefore, raised issues only of the constitutionality of those laws.

7. **Security of the Person**: Seventh, the applicant argued that the threat of disciplinary action for failing to submit to a drug test or for testing positive for drugs involved his

right to security of the person as guaranteed under both the Bill of Rights and the Canadian Charter of Rights and Freedoms. The Final Grievance Authority dismissed the case law that the applicant had submitted in support of his submissions as distinguishable on its facts. Both cases submitted by the applicant dealt with the interests of inmates when they were faced with discipline for the results of randomly-made requests for drug tests. The Final Grievance Authority found that key distinguishing features were that (1) article 20.11 requires reasonable grounds for the drug testing request, and (2) the applicant's liberty was never at stake, nor were disciplinary or criminal charges contemplated.

The Final Grievance Authority concluded that section 7 of the Charter was not invoked because the applicant's life, liberty and security were never threatened. The Final Grievance Authority found that economic insecurity that may result from release from the Canadian Forces was not enough to threaten "security" as contemplated by section 7. The Final Grievance Authority further found that the section of the Bill of Rights that protects "life, liberty, security of the person and the enjoyment of property" was not invoked for the same reasons.

8. **Exclusion of the Urine Test**: Despite having found that the applicant's Charter rights were not engaged, and, therefore, that the question of the exclusion of the applicant's evidence for having been seized without "due process of law" was not raised, the Final Grievance Authority next considered whether procedural fairness required that the evidence of the applicant's urine test results and confession not be considered.

    Exclusion for Bias: First, the Final Grievance Authority considered whether rticle 20.11 created an actual or apprehended institutional bias by involving a commanding officer at multiple stages in the investigatory and outcome determinations of a drug use investigation. The Final Grievance Authority found that the applicant had "misapprehended the scope" of the article. It found that under article 20.11, commanding officers neither order investigations nor supervise them. In the applicant's case, the Final Grievance Authority found that the person who had ordered the investigation to begin was the non-commissioned member in charge of London's Area Services Unit military police detachment. That non-commissioned member had ordered a detachment of London's military police to investigate the applicant. While the Commanding Officer decided on the reasonable grounds regarding the applicant's drug use and providing the basis for his order for the provision of a urine sample, that decision was made in consideration of the administrative measure being contemplated, and not in the process of an investigation of an offence or the adjudication of any complaint. Moreover, the Final Grievance Authority found that it was the Director Military Careers Administration who held the authority for all administrative action for illicit drug use and, as an independent decision maker, determined whether counselling and probation or some other administrative action was appropriate.

The Final Grievance Authority found that article 20.11 is clear regarding the required actions of a commanding officer, and of the tests that the commanding officer must consider when determining whether a drug test can be ordered.

Exclusion for Violation of Procedural Fairness – no reasonable grounds: Second, the Final Grievance Authority considered whether the Commanding Officer violated procedural fairness by failing to consider whether (1) he had "reasonable grounds" for ordering the test, or (2) the timing of the test was one in which drugs could "reasonably be detected by urine testing," as required by article 20.11(1). The Final Grievance Authority considered the various materials available to the Commanding Officer in deciding whether it was reasonable to expect the urine test to detect drugs. It found it reasonable to conclude that the Commanding Officer had received, as part of the oral report given to him by the military police who had interviewed Mr. Lindner the night before the Commanding Officer's meeting with the applicant, Mr. Lindner's account of the type of drugs used by the applicant and the frequency of that use. The Final Grievance Authority concluded that this information constituted sufficient reasonable grounds.

The Final Grievance Authority found further that the Commanding Officer was not told of the fact that it is difficult to detect steroids by urine testing, even though this information had been conveyed to the Adjutant. Moreover, the Final Grievance Authority found that even if the Commanding Officer had known of this difficulty, he would likely still have made the order, because he suspected that the applicant had used them very recently. The Final Grievance Authority found that such a conclusion was reasonable:

> Since I have already concluded that your CO was made aware of Jeffery Lindner's information by the MP on 7 October 2004, your CO would have figured that you had injected steroids as recently as Friday 8 October 2004 or the prior Thursday. Based on your CO's figured recency of your steroid use, together with his knowledge from CFAO 19-21 Annex B, paragraph 18, that it is impossible to be precise concerning the length of time following drug use during which a substance could be detected by urinalysis, I find that your CO had grounds to believe that your steroid use could reasonably be detected through urinalysis.

Exclusion for Procedural Fairness – fettered discretion: Third, the Final Grievance Authority considered whether the Commanding Officer had fettered his own discretion when he considered the applicant's refusal to respond to his questions at the interview on October 8, 2004, as part of his

grounds for ordering the urine test. The Final Grievance Authority found that the Commanding Officer erred by considering the applicant's refusal to confirm or deny his alleged steroid use as a component of whether he had reasonable grounds to order the urine test. Nevertheless, the Final Grievance Authority found that because it was unclear how much weight the Commanding Officer had put on this factor, it was enough that it had found that the Commanding Officer had enough information from other sources to give him reasonable grounds. Thus, the Final Grievance Authority found that the impact of the Commanding Officer's error on this point was immaterial to the decision to order the urine analysis:

> As stated in the previous section, I have concluded that your CO had reasonable grounds to believe that you had used prohibited drugs, and that he reasonably believed that your steroid use could be detected through urinalysis. Although your silence during the interviews with your Adjutant and CO on the issue of your alleged drug use should not have been taken into consideration, I cannot determine from your grievance file the level of extent, or weight, that your silence had was an element or basis of the reasonable grounds which your CO developed. In the absence of such a determination, I defer to my above-stated conclusion that your CO had reasonable grounds to order your provision of a urine sample for urinalysis, notwithstanding your silence regarding the allegations of your alleged drug use.

The Final Grievance Authority found that the Commanding Officer's consideration of the applicant's silence was not a violation of any Charter right: the right to silence is a component of section 7 of the Charter, which the Final Grievance Authority had already found was not relevant in this case because the applicant's life, liberty and security were not at stake.

Exclusion for Procedural Fairness – improper involvement of commanding officer: Fourth, the Final Grievance Authority considered whether the Commanding Officer had violated section 273.4 of the *National Defence Act*, which, as stated above, prohibits a commanding officer who supervises an investigation from issuing a warrant related to that investigation unless no other commanding officer is readily available to issue the warrant. The Final Grievance Authority held that because it had found that the applicant's Commanding Officer neither ordered the investigation into his drug use nor supervised that investigation, section 273.4 did not apply. Moreover, the Final Grievance Authority found that section 273.4 only applies to warrants that are authorized by section 273.3 of the *National Defence Act*. The Final Grievance Authority found that section 273.3, which deals with searches of quarters, lockers, storages spaces or personal or

movable property, does not apply to urine, which the Final Grievance Authority had already found was not "property" within the meaning of section 273.3.

Exclusion for Lack of Legal Authority: Fifth, the Final Grievance Authority considered whether QR&O article 20.11 in fact authorizes a commanding officer to order a urine test. The Final Grievance Authority found that it did, and quoted from the Note to QR&O article 20.11, which states that it authorizes testing in cases where there are reasonable grounds in order to promote the purposes specified in article 20.03. The Final Grievance Authority found that the clarity of this section was not impacted by the fact that section 273.4 of the *National Defence Act* provides a different process for the issuance of a warrant.

Exclusion for Improper Search or Seizure: Sixth, the Final Grievance Authority considered whether section 8 of the Charter requires that a warrant be issued prior to the issuance of an order for the provision of urine for testing. The Final Grievance Authority found, relying on the Supreme Court of Canada's decision in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, that section 8 requires that searches be "reasonable", which means that they must be authorized by a law that is itself reasonable and must be conducted in a reasonable manner. The Final Grievance Authority found that QR&O article 20.11 is a law that authorizes the order for urinalysis, that the article is reasonable because it is an administrative and not a criminal or quasi-criminal provision, and so "the balancing of individual privacy and societal needs will have a lower threshold." The Final Grievance Authority found that the search itself was reasonable.

9. **Exclusion of Letter of Confession**: Ninth, the Final Grievance Authority considered whether the applicant's letter of confession should be excluded from consideration, in determining whether the urine test ought to have been ordered or whether he ought to have been placed on counselling and probation.

Exclusion for Violation of Section 2(d) of the Bill of Rights and Section 10 of the Charter: The Final Grievance Authority considered whether section 2(d) of the Bill of Rights or section 10 of the Charter, which provide protection against self-incrimination and the right to counsel, were violated by the commanding officer's acceptance of the applicant's letter of confession. The Final Grievance Authority found that neither section was engaged by the order. Section 10 of the Charter was not triggered because the applicant had been neither arrested nor detained. The Final Grievance Authority found that since section 10 of the Charter was not triggered, section 2(d) of the Bill of Rights was not violated, because there was, again, no right that had been infringed.

Exclusion for Undue Influence or Involuntary Confession: The Final Grievance Authority recognized that the applicant was in a precarious mental

state when he prepared and emailed his letter of confession on October 8, 2004, because of his mother's failing health and the stress of the drug investigation. The Final Grievance Authority found that the rule prohibiting the use of involuntary confessions in prosecutions of criminal or disciplinary proceedings did not apply to administrative proceedings. Moreover, the Final Grievance Authority found that even if it did apply, the confession was not "involuntary" within the definition of that rule. The Final Grievance Authority found that the applicant was not mentally incapable of making rational decisions based on his state of mind on that day. The Final Grievance Authority found that the applicant's allegation that he had been threatened with release should he fail to confess or show remorse was insufficiently supported by the evidence, and that there was no evidence that the applicant was unduly influenced by any such alleged threat (footnotes omitted):

> I see that you have provided a statutory declaration, dated 2 February 2007, in order to strengthen your position in relation to what transpired between you and your Adjutant on 8 October 2004. However, you make no mention on the issue of release in this declaration. Since your contention regarding the threat of your release is insufficiently substantiated, to the point where I cannot make a final determination regarding its validity, I cannot conclude that this issue unduly influenced you, such that your 8 October 2004 confession was involuntarily composed.

Exclusion for Violation of the Right to Counsel: The Final Grievance Authority found that there is no requirement in QR&O Chapter 20 for a member to have legal counsel prior to being ordered to provide urine, although such assistance was occasionally provided during certain administrative proceedings.

10. **Suicide Ideation:** The Final Grievance Authority considered whether the Commanding Officer or his staff had violated CFAO 19-44 by failing to immediately intervene in the applicant's suicide. CFAO 19-44 states that an intervention, including confrontation, therapeutic consultation and hospitalization, should begin when signs of potential suicidal behaviour are first observed. The Final Grievance Authority found that the Adjutant was aware of the applicant's suicide ideation by at least mid-afternoon of October 10, 2004, at which time he took appropriate action by involving the relevant chaplain. The Final Grievance Authority found that between October 9 and October 10, the Adjutant was aware only that the applicant was "mad" and not that he was suicidal. Moreover, it found that the applicant's threat of suicide was made in relation to the potential loss of his military position, and that because he had not yet lost that position there was no imminent threat of suicide nor need for immediate intervention. The Final Grievance Authority concluded that the Adjutant's actions accorded with CFAO 19-44.

11. **Reversal of the Administrative Action:** The Final Grievance Authority considered the applicant's submissions that his placement on counselling and probation be reversed.

    Denial of the Applicant's Legitimate Expectations of Fair Conduct: The Final Grievance Authority considered whether CFAO 19-21 gave rise to a "legitimate expectation" that the applicant would be treated "fairly", especially by being given a written summary of the evidence underpinning the urinalysis order and an opportunity to respond to that evidence. The Final Grievance Authority repeated its findings that the Commanding Officer had complied with the requirements of article 20.11 and that the Adjutant had provided the applicant with an oral summary of the grounds on which the order for provision for urine was based. Nevertheless, the Final Grievance Authority found that "the doctrine of procedural fairness demands that since the procedure under CFAO 19-21 Annex B, paragraph 24 was not followed, you should have been given the opportunity to make representations to this non-compliance." The Final Grievance Authority characterized this as a "technical oversight" and found that the provision of the required summary in oral form was sufficient. It further found that the applicant had been given a reasonable opportunity to respond by being asked to explain himself at his meetings with the Adjutant and the Commanding Officer.

    Violation of CFAO 26-17 (Recorded Warning and Counselling and Probation): CFAO 26-17 required that a commanding officer disclose all of the information substantiating the proposed order, prior to issuing a counselling and probation decision. The Final Grievance Authority found that the applicant had received a disclosure package on December 16, 2004, which included the information that was used by the Director Military Careers in deciding to order counselling and probation, namely, the results of the urine analysis and the applicant's letter of confession. Moreover, the applicant received additional disclosure in a letter dated January 21, 2005.

    Violation of QR&O article 20.07 (Testing Order): The Final Grievance Authority considered whether QR&O article 20.07 had been violated because the applicant had not been shown a copy of the order to be issued. The Final Grievance Authority found that although he had not requested a copy of the order, the applicant had received a copy of the written order prior to his provision of the urine.

    Failure to Cure Breaches: The Final Grievance Authority found that because there had been no breach of procedural fairness, the question of "curing" any breach was not relevant.

    Lost DVD Recordings: The Final Grievance Authority considered whether the loss of the DVD recording of the military police's initial interview of Mr. Lindner breached procedural fairness. The Final Grievance Authority concluded that the DVD had not been used by the Commanding Officer in

> forming his reasonable grounds – it was not mentioned in the oral report provided to him, and he had not seen the final military police report prior to issuing the order. The Final Grievance Authority therefore found that the DVD did not need to be disclosed to the applicant, so questions regarding its loss were not relevant to determining the issues of this application.
>
> **Improper Purpose**: The Final Grievance Authority considered whether the Commanding Officer had recommended counselling and probation for an improper purpose—namely, as a "wake up call." Paragraph 5 of CFAO 26-17 states that counselling and probation is an administrative policy designed to raise inadequate performance to an acceptable standard, and is a serious step towards correction of a member's deficiencies. In his email response to the grievance officer's inquiries, the Commanding Officer had described his October 13 or 14 meeting with the applicant and his father:
>
> > At the meeting I had the impression that he was very remorseful and that this would be the wake up call he needed to get his life back on track.
>
> The Final Grievance Authority found that this statement was not meant to express the Commanding Officer's rationale for recommending counselling and probation. Moreover, the Final Grievance Authority repeated its finding that it was the Director of Military Careers and not the Commanding Officer who made the decision to place the applicant on counselling and probation. Thus, there was no improper purpose that had led to the administrative action.
>
> **Referral to Another Commanding Officer**: The Final Grievance Authority repeated its finding that the applicant's Commanding Officer had not been the decision-maker with respect to the decision to place the applicant on counselling and probation. There was therefore no question regarding whether the matter ought to have been referred to a different commanding officer.

[51] The Final Grievance Authority concluded that the Canadian Forces' drug control program is legally valid and constitutional, and that the applicant's Commanding Officer acted in a reasonable manner and followed the relevant administrative orders, legal procedures, and principles of natural justice, except insofar as he failed to give the applicant a written summary of the evidence against him on October 8, which was not a material breach of procedural fairness.

[52] The Final Grievance Authority found that it also did not have the power to grant the applicant all of the remedies that he sought. Pursuant to QR&O article 19.41, the Final Grievance Authority cannot make an admission of liability on behalf of the Crown, settle a liability claim, or make payments for a liability claim. It therefore had no power to award damages for any of the civil claims made by the applicant. The Final Grievance Authority recommended that the applicant seek redress from the Director Claims and Civil Litigation should he believe he has a valid claim against the Crown.

LEGISLATION

[53] The relevant provisions of the *National Defence Act*, R.S.C., 1985, c. N-5, the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), and the *Canadian Forces Adminstrative Orders* (CFAO) are attached in Appendix 1. The Court notes that although the relevant CFAO has since been updated, the version that was in force at the time that the urine test was ordered is the relevant version.

ISSUES

[54] The applicant raises the following issues in his application:

1. What is the nature and impact of the drug prohibition in the Canadian Forces?
2. Was there a breach of natural justice in the course of the administrative process?
    Was there an apprehension of bias raised by
    1. The Commanding Officer's involvement in multiple stages of the investigation, urine seizure and ultimate administrative action; and,
    2. The multitude of instances of malfeasance and improper purposes apparent throughout all stages of the matter?

    Was there a breach of the *audi alteram partem* rule created by
    1. The lack of written or oral disclosure prior to the seizure of the applicant's urine and during the administrative review phase;
    2. The failure to disclose the lost DVD of the key witness testimony in interviews conducted by military police during the investigation and

the failure to disclose the Adjutant's notes logging the investigation and administrative action;

3. Should the applicant's urine test be excluded?
4. Should the applicant's submissions be excluded?
5. What are the consequences of the above alleged breaches?

[55] The respondent submits that because this judicial review is a review of the decision of the Final Grievance Authority denying the applicant's grievance, the Court should consider only the two main issues raised by the applicant in his grievance: the absence of a written summary of the reasonable grounds for ordering the urine analysis; and, the absence of an opportunity to make submissions before the applicant was put on counselling and probation.

[56] The question before a Court on judicial review is whether the decision being reviewed was made in accordance with the law. The Court will not determine the factual issues that were determined by the Final Grievance Authority, but rather will consider whether the Final Grievance Authority rendered a decision that is consistent with the law.

[57] This is a case that has a long and complicated history. The applicant has represented himself throughout, and the Court is aware of the additional difficulties caused by that fact. Because of the convoluted nature of the case, the Court finds it helpful to summarize the key issues at stake. The applicant's aim is to have the decision placing him on counselling and probation overturned. The applicant raises in his grievances and before this Court, arguments regarding fairness and natural justice.

[58] The applicant submits that the Director Military Careers Administration should not have been able to rely upon the results of the applicant's urine test, because that test was procured in contravention of QR&O article 20.11 and the applicant's procedural fairness rights. The applicant submits that the Director Military Careers Administration should not have relied upon his letter of confession, because that letter, too, was elicited in contravention of the applicant's rights. Were that evidence to have been excluded, the applicant submits that he would not have been placed on counselling and probation.

[59] The Court frames the issues before it as follows:

1. Is the Canadian Forces' Drug Control Program contained in Chapter 20 of the QR&O within the jurisdiction of the Governor in Council pursuant to section 12(1) of the *National Defence Act*?

2. Was the Seizure of the Applicant's Urine done in Breach of Article 20.11?

    a. Was the urine order in breach of Article 20.11 because the applicant was denied his right to a fair hearing (i.e. not provided with a summary of the reasonable grounds and an opportunity to respond) prior to the seizure of his urine?

    b. Was the urine order in breach of article 20.11 because the Commanding Officer could not have had the required reasonable belief that the test would reveal the applicant's steroid use?

3. Does the conduct of the investigation raise a reasonable apprehension of bias or an actual bias at an institutional or individual level?

4. Was the applicant's letter of confession elicited in violation of his rights?

5. Was the applicant denied his right to a fair hearing by having the results of his urine test and his letter of confession considered as evidence towards the counselling and probation order?

STANDARD OF REVIEW

[60] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[61] Questions of procedural fairness are reviewed on a standard of correctness: *Dunsmuir*, at paras. 55 and 90; *Khosa*, at paragraph 43. In this case, the Court must ensure that the applicant was afforded the proper degree of procedural fairness throughout the investigation and grievance process.

[62] Questions of law can be reviewed on a standard of reasonableness or correctness. Although questions of law are usually determined on a standard of correctness, where the legal question relates to the decision-maker's home statute or area of expertise, reasonableness may be the correct standard. The Federal Court of Appeal recently explained the distinction as follows in *Democracy Watch v. Campbell*, 2009 FCA 79, at paragraph 22:

> If an extricable question of law is an issue in a judicial review and that question is one which is "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise," then the appropriate standard will be correctness: see [page151] *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at paragraph 62; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraph 60. On the other hand, where the question of law arises in the course of a tribunal interpreting "its own statute or statutes closely connected to its function, with which it will have particular familiarity", then reasonableness may be the appropriate standard: see *Dunsmuir*, at paragraph 54.

[63] In this case questions of law related to whether the QR&O were authorized by law, and whether the procedure that they establish raises an actual or a reasonable apprehension of bias, do not fall within the Final Grievance Authority's area of expertise. Moreover, both questions are of central importance to the legal system as a whole, because they impugn the process by which members of the Canadian Forces may be criminally charged or disciplined for use of illicit substances. So, too, are questions regarding whether the Commanding Officer had the requisite reasonable grounds for ordering the urine test questions of law. These issues will therefore be reviewed on a standard of correctness.

[64] Questions of mixed fact and law are to be determined on a standard of reasonableness: *Cohen v. Canada (Attorney General)*, 2008 FC 676, at paragraphs 14-20. Questions of fact are also to be determined on a reasonableness standard.

[65] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at paragraph 47; *Khosa* at paragraph 59.

ANALYSIS

<u>Issue No. 1</u>: Is the Canadian Forces' Drug Control Program contained in Chapter 20 of the QR&O within the jurisdiction of the Governor in Council pursuant to section 12(1) of the *National Defence Act*?

[66] As stated by the Final Grievance Authority, the QR&O are enacted pursuant to section 12(1) of the *National Defence Act*. Section 12(1) empowers the Governor in Council to make regulations for, among other things, the discipline, administration, efficiency, and good governance of the

Canadian Forces. Article 20.03 of the QR&O establishes the purposes of the Canadian Forces' Drug Control Program. These purposes are all consistent with the goals for which the Governor in Council is empowered to make regulations.

[67] The Court therefore agrees with the Final Grievance Authority that the Canadian Forces' Drug Control Program established by Chapter 20 of the QR&O is enacted pursuant to the valid legal authority conferred by section 12(1) of the *National Defence Act*.

[68] In his written submissions, the applicant appeared to contest the constitutionality of the definition of "drug" in Chapter 20. The applicant did not pursue this argument before the Court, and the Court will not consider it here. The Court notes that Rule 57 of the *Federal Courts Rules*, SOR/98-106, requires, in general, that notice be given to provincial and federal attorneys general in cases where the constitutional validity of legislation will be challenged. The applicant acknowledged this, and stated at the hearing that he does not contest the constitutional validity of the legislation at issue in this application.

Issue No. 2: Was the Seizure of the Applicant's Urine Done in Breach of Article 20.11?

[69] The applicant has submitted that the order requiring him to provide a urine test was illegal. As stated above, although the applicant's written submissions appear to contest the constitutionality of QR&O article 20.11, the applicant clarified at the hearing that he is not making constitutional arguments. He submits, however, that the order requiring him to provide a urine sample for analysis was illegal for two reasons: (1) because the Commanding Officer did not inform the applicant of the

reasonable grounds underpinning the order, and (2) because the Commanding Officer could not have had the required reasonable belief that the test would reveal the applicant's steroid use.

[70] The applicant did not raise any of these issues before the Director Military Careers Administration. As a result, the Court finds that the applicant waived his rights to object: see *E.C.W.U., Local 916 v. Atomic Energy of Canada Ltd.*, [1986] 1 F.C. 103, 24 D.L.R. (4th) 675; *Jackson v. Canada (Minister of Citizenship & Immigration)*, 2002 FCT 89, at paragraphs 39-41, asserting that natural justice arguments must be raised at the earliest possible opportunity.

[71] Between the time that the urine test was ordered, on October 8, 2004, and the time that the applicant informed the Director Military Careers Administration that he agreed that he ought to be placed on counselling and probation, on January 21, 2005, the applicant had nearly four months to consider his course of action. He received the disclosure package containing, among other things, the results of the urine test and his letter of confession. The applicant did not raise even a hint of an objection to the Director that the urine test results and the letter of confession were obtained illegally or unfairly. Moreover, the evidence is that the applicant questioned the "constitutionality" of the urine test on the day of the test, and chose to exercise his right not to incriminate himself. Accordingly, the Court finds that the applicant had knowledge on October 8th of these potential grounds for objection and cannot later claim a lack of knowledge so that he could not have waived his rights.

[72] As stated in *Jackson*, above, "it is trite law that alleged violations of natural justice must be raised at the earliest possible opportunity." The applicant failed to raise these issues before the Director, and the Court finds he thereby waived the opportunity to subsequently object.

[73] Nevertheless, the Court will review the applicant's submissions. It will consider each of the applicant's objections to the urine analysis order in turn.

Issue 2(a): Was the urine order in breach of Article 20.11 because the applicant was denied his right to a fair hearing by being denied proper disclosure prior to the seizure of his urine?

[74] Article 20.11 of the QR&O permits a commanding officer to order mandatory urine testing to detect the presence of an illicit drug in order to determine appropriate administrative or disciplinary action. A test conducted pursuant to article 20.11 can be used as evidence against an officer, including in disciplinary or criminal proceedings. The Court notes that this is in contrast to many other provisions of the Chapter, for which test results may not be used as evidence in disciplinary proceedings: see article 20.15.

[75] While the applicant was due procedural fairness at the investigation stage of the process, the requirements of QR&O article 20.11 provide a sufficient level of such. Article 20.11 requires that prior to the order for a urine test, the member be given a "written or oral" summary of the reasonable grounds underpinning the order, and an opportunity to respond to it, if desired. The Court notes that CFAO 19-21 requires a written summary, but that CFAO 19-21 is an administrative policy that is not legally binding. The Court finds that, having regard to the factors enumerated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39, [1999] 2 SCR 817, the oral summary and opportunity to respond guaranteed by article 20.11 meets

natural justice concerns. At the investigatory stage, the applicant's privacy rights were engaged, but the test did not constitute a decision that would affect any other rights.

[76] In this case, the Final Grievance Authority found that the applicant had received an oral summary of the grounds underlying the order for the urine test. In reaching this conclusion, the Final Grievance Authority relied on the evidence from the applicant's Adjutant in emails dated October 13 and 18, 2006, sent in response to inquiries from the Final Grievance Authority. In his email dated October 18, 2006, the Adjutant described the "sequence of events" and the "verbal summary" that he gave the applicant at their meeting on October 8, 2004:

> I explained to him that someone he knew very well had told the MPs [military police] that he was using steroids. I told him that his person had said he was shown a vial of steroids by him. I explained that this person had provided details of the steroid use that he stated were told to him by the member (McBain). I told him the three types of steroids that were indicated in the initial report to HMCS Star (Equipoise, Sustanon, and D-Bol). I then explained the process to him and the CF Drug Control Program (CFAO 19-21). I asked him if he wanted a copy and he said no and indicated that he was fairly familiar with it based on his training.

[77] The Final Grievance Authority also noted that the manner in which the applicant had been treated demonstrated no reason for which the Commanding Officer or Adjutant would have withheld their evidence from the applicant (emphasis added):

> Other than your contention, I find no evidence on your grievance file to show that your Adjutant or CO did not provide you with a summary of the grounds that your CO would use as the basis to order your provision of a urine sample on 8 October 2004. As well, I find no evidence why they would not have provided you with a summary of the grounds, nor do I see any advantage for the benefit of either the CO or Adjutant in withholding a summary of such grounds from you. Therefore, based on a balance of probabilities, I conclude that you were provided with a summary of information that would form

> the reasonable grounds of the order for you to provide a urine sample for urinalysis.

[78] The Court finds that the Final Grievance Authority's finding that the applicant had received an oral summary of the evidence was reasonably open to it and this Court ought not intervene.

[79] Moreover, the Court finds that although the applicant was not made aware of the DVD recording of the military police interview with their key witness, or of other allegations made but not pursued, that does not diminish the value of the summary that he received. The applicant did not need to know the form of the evidence in order to know its contents. He received a summary of all of the key elements of the investigation, which meets the requirements of the rule requiring that he know the case against him. No decision-maker relied on the DVD or the other allegations in the military police report so they are not relevant.

[80] Finally, the Court notes that much of this argument is academic. Mr. McBain's letter of confession and apology dated October 8, 2004 stated:

> ... A confrontation with him (his former roommate) the night before, revealed most of the details of the investigation that led to the MP's conclusions …

[81] This demonstrates that Mr. McBain knew that his roommate had reported his steroid use to the military authorities. Accordingly, Mr. McBain admits in this letter, on the very day of the urine test, that he knew the reasonable grounds upon which the urine test was ordered.

Issue 2(b): Was the urine order in breach of article 20.11 because the Commanding Officer could not have had the required reasonable belief that the test would reveal the applicant's steroid use?

[82] Article 20.11 of the QR&O authorizes a commanding officer to order urine tests where he "has reasonable grounds to believe that [a member] has used a drug…within a time period during which that use could reasonably be detected by urine testing".

[83] The applicant has submitted that the Commanding Officer could not have had "reasonable grounds" for ordering the urine test because article 20.11 requires that the Commanding Officer reasonably believe that the test will reveal results. The applicant submits that had the Commanding Officer investigated the likelihood of steroids being detected by urine analysis, he would have found that there was little likelihood of steroids being found.

[84] The Court finds that, as stated by the Final Grievance Authority, the Commanding Officer was aware of the applicant's pattern of usage, and based upon that could determine the likely time during which the applicant had most recently used steroids. Given that the urine test did show steroids and given that the applicant's letter of confession admitted that the applicant knew that the urine test would show his steroid use, the Court cannot agree with this argument.

Issue No. 3: Does the conduct of the investigation raise a reasonable apprehension of bias or an actual bias at an institutional or individual level?

[85] Allegations of bias, as with other procedural rights, must be raised at the earliest opportunity: see cases cited above. In this case, the applicant was aware of the facts underlying his current allegations of breaches of procedural fairness for months prior to his hearing before the Director Military Careers Administration. By failing to raise the question then, the applicant waived

his right to assert it at a subsequent proceeding, including before this Court. In any event, were the Court to consider the question, it would find that there was no bias.

[86] The applicant submits that there is an institutional bias in the way in which the investigation process is envisaged by article 20.11. The applicant submits that the policy creates a process in which the commanding officer orders the investigation, determines whether reasonable grounds exist to make an order for testing, and receives submissions from the investigated member. The applicant submits that these multiple roles undermine the independence and impartiality of the decision-maker.

[87] The applicant further submits that the fact that a warrant issued by a different officer is required under normal circumstances before a search can be conducted of quarters or other storage property, the idea that the same officer who is conducting an investigation can order the provision of a urine sample is perverse. The applicant submits that a urine test is far more intrusive than a search of quarters. The applicant submits that because article 20.11 is silent as to whether it must be the same or another commanding officer who orders the urine test, the Court should infer that the article requires a different commanding officer to issue the order.

[88] The Court finds that although the Commanding Officer was kept informed of the investigation, the Final Grievance Authority reasonably found that he was not directing the investigation. To the contrary, the Final Grievance Authority found that the evidence demonstrated that the military police were conducting the investigation. Moreover, it was the Director Military Careers Administration, and not the applicant's Commanding Officer, who made the determination

regarding the consequences of the applicant's violation of the drug policy. In this case, the Court agrees with the Final Grievance Authority that the Commanding Officer did not exceed his statutory authority and did not act in a way that would impute an apprehension of bias into the proceeding.

[89] Although the applicant did not allege any individual bias on the part of his Commanding Officer, the Court notes the very positive and supportive letter written by the applicant's Commanding Officer upon the applicant's transfer to Halifax, and the other comments made by the Commanding Officer that are in evidence and quoted above. The Commanding Officer consistently commended the applicant as a "fine officer" who had dealt with significant personal difficulty but was remorseful and deserving of a career in the Canadian Forces. This proves that the Commanding Officer was not biased against the applicant.

[90] The Court therefore finds that there is no actual or apprehended bias as a result of the statutory scheme created by article 20.11 of the QR&O and CFAO 19-21. A fully informed person having thought the matter through in a realistic and practical way would not have a reasonable apprehension of bias of a lack of independence nor is there a lack of independence in practice.

Issue No. 4: Was the applicant's letter of confession elicited in violation of his rights?

[91] At the hearing before this Court, the applicant did not make submissions regarding the letter of confession. Nevertheless, the Court will rely upon the applicant's written submissions to address this point.

[92] The applicant has submitted that the letter of confession was elicited by “undue influence”, in violation of his rights, and that the letter violates his right against self-incrimination. The right against self-incrimination is a constitutional right protected under section 10 of the Charter.

[93] With regard to the applicant’s submission that his confession letter was elicited by “undue influence”, the Court finds that the doctrine does not apply. The applicant has relied upon the decision of Prothonotary Hargrave in *Khaper v Canada*, [1999] FCJ no 1735, in which the Court defined “undue influence” as an equitable doctrine designed to set aside a transaction in which a party’s consent has been given only because the other party to the transaction deprived him of the “free use of his judgment.” The Court cannot see how the applicant in this case entered into a “transaction” as that word is generally understood by the equitable doctrine of undue influence; there is nothing for the Court to set aside.

[94] The Final Grievance Authority considered the applicant’s submissions in this regard as invoking the rule against self-incrimination, protected by section 10 of the Charter (and section 2(d) of the Bill of Rights), by suggesting that the applicant’s confession was involuntary. After first finding that no rule against self-incrimination applied because there was no criminal threat, the Final Grievance Authority found that “While I can certainly understand that you were mindful and upset on 8 October 2004 about your mother’s failing health, you do not, however, present any evidence to suggest that you were mentally incapable of making rational decisions that day based on your state of mind.”

[95] The rule against self-incrimination arises in the context of detention and involuntary statements by accused. The Court finds that the applicant was not detained at the time that he sent his confession letter. Indeed, while he was present and ostensibly subject to the influence of his Commanding Officers, the applicant refused to say anything. The confession letter was composed later that night, from the comfort of the applicant's home, and emailed to the relevant personnel. Although "detention" can extend to psychological influence, the applicant's behaviour in this case demonstrates that he was not intimidated by his superiors when he sent the letter: see *R. v. Grant,* [2009] 2 SCR 353.

[96] The Court finds that the Final Grievance Authority's conclusion that the applicant was of sound, if upset, mind at the time that he wrote the letter was reasonable, and will not interfere with it. The type of mental incapacity that is contemplated by the doctrines of duress, undue influence and involuntariness is of a much higher level than that suggested by the applicant's evidence before the Final Grievance Authority. To the extent that the applicant may have been influenced by other pressures, those submissions speak to the weight to be afforded the letter of confession.

Issue No. 5: Was the applicant denied his right to a fair hearing by having the results of his urine test and his letter of confession considered as evidence towards the counselling and probation order?

[97] The applicant submits that the administrative review that culminated in his being placed on counselling and probation was flawed because it was based upon the evidence that had been collected in violation of the applicant's rights. In particular the applicant submits that the Director's decision is flawed because at the time the applicant had not seen the military police report containing the allegations that had given rise to the initial investigation, and was not aware of the existence of the DVD or the military police notes of their investigation. As stated above, the

applicant did not raise any of the issues that he now raises before the Director Military Careers Administration.

[98] The applicant was given a fair hearing before the Director. He received disclosure of all of the evidence that was relied upon by the Director, and he made his own written submissions. In his submissions, he objected only to the evidence in which it was alleged that he had threatened Mr. Lindner and his father. He otherwise put forward no objections, and, as quoted above, agreed with the counselling probation recommendation.

[99] The Court finds that the Director Military Careers Administration did not rely upon the military report; indeed, there would have been no reason for the Director Military Careers Administration to look at the military report when it had before it the applicant's own confession, his positive urine test results, and his letter responding to the disclosure package in which he states that he agrees with the suggestion of placing him on counselling and probation.

[100] The Court has found above that the applicant's procedural fairness rights were not violated. Moreover, the Court has found that by not raising his objections before the Director Military Careers Administration, the applicant waived his right to later object at the grievance level.

CONCLUSION

[101] For all of these reasons, the Court will dismiss the application.

LEGAL COSTS

[102] The applicant submitted at the outset of the hearing that no legal costs ought be awarded against him because he is a Ph.D student with limited financial resources, and that this Federal Court application was about “closure” for himself. The respondent nevertheless sought legal costs because this case has imposed a significant cost burden on the respondent. It is obvious that this matter has cost the Canadian Forces tens of thousands of dollars in resources.

[103] The hearing before the Court demonstrated that the applicant’s rights to natural justice and fairness were not breached, and in fact he was treated with support and compassion by the Canadian Forces. Unfortunately, the applicant has been mentally distraught throughout this period and later voluntarily left the Canadian Forces because of his “disgust and dismay with the failure military to intervene” when he threatened suicide.

[104] When a party commences an application for judicial review in the Federal Court, the applicant is legally responsible for the legal costs incurred by the respondent if the application does not succeed. The ordinary legal costs for such a voluminous case including counsel fee and disbursements are in the order of $20,000 to $30,000. In the circumstances of this case, the Court will exercise its discretion and order a reduced amount for legal costs which are payable by the applicant to the respondent in the fixed lump sum of $5,000.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review of the Final Grievance Authority decision dated August 30, 2010 is dismissed with reduced legal costs in the amount of $5,000 payable by the applicant to the respondent.

"Michael A. Kelen"
Judge

APPENDIX 1: LEGISLATION

Section 12(1) of the *National Defence Act*, R.S., 1985, C. N-5, authorizes the Governor in Council to make regulations for the administration of the Canadian Forces:

12. (1) The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.	**12.** (1) Le gouverneur en conseil peut prendre des règlements concernant l'organisation, l'instruction, la discipline, l'efficacité et la bonne administration des Forces canadiennes et, d'une façon générale, en vue de l'application de la présente loi.

Section 18 of the *National Defence Act* authorizes the Chief of Defence Staff to issue instructions for carrying out the regulations:

18. (1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.	**18.** (1) Le gouverneur en conseil peut élever au poste de chef d'état-major de la défense un officier dont il fixe le grade. Sous l'autorité du ministre et sous réserve des règlements, cet officier assure la direction et la gestion des Forces canadiennes.
(2) Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff.	(2) Sauf ordre contraire du gouverneur en conseil, tous les ordres et directives adressés aux Forces canadiennes pour donner effet aux décisions et instructions du gouvernement fédéral ou du ministre émanent, directement ou indirectement, du chef d'état-major de la défense.

Article 20.01 of the Queen's Regulations and Orders for the Canadian Forces (QR&O) defines what constitutes a "drug":

"drug" means :	«drogue» Selon le cas :
(a) a controlled substance as defined in the Controlled Drugs and Substances Act (Statutes of Canada, 1996, Chapter 19); or	a) une substance désignée tel que le définit la Loi réglementant certaines drogues et autres substances (Lois du Canada (1996), chapitre 19);
(b) any other substance, except for alcohol, the use of which can impair normal psychological or physical functioning and the use of which has been prohibited by the Chief of the Defence Staff;	b) toute autre substance, à l'exclusion de l'alcool, dont l'usage peut affaiblir les facultés physiques ou mentales et dont l'usage a été interdit par le chef d'état-major de la défense.

Article 20.03 of the QR&O sets out the purpose of the Canadian Forces' Drug Control Program:

The purpose of the Canadian Forces Drug Control Program is the maintenance of:	Le programme des Forces canadiennes sur le contrôle des drogues a pour objet de maintenir :
(a) the operational readiness of the Canadian Forces;	a) l'état de préparation opérationnel des Forces canadiennes;
(b) the safety of members of the Canadian Forces and the public;	b) la sécurité des militaires des Forces canadiennes et du public;
(c) the health of members of the Canadian Forces and the public;	c) la santé des militaires des Forces canadiennes et du public;
(d) the security of defence establishments, materiel and other public or private property;	d) la sécurité des établissements de défense, des matériels et des biens publics ou privés;
(e) the security of information classified in the national interest or otherwise protected by law;	e) la sécurité des renseignements classifiés pour

(f) discipline within the Canadian Forces; (g) the reliability of members of the Canadian Forces; and (h) cohesion and morale within the Canadian Forces	des raisons d'intérêt national ou de ceux protégés de toute autre manière par la loi; f) la discipline au sein des Forces canadiennes; g) la fiabilité des militaires des Forces canadiennes; h) la cohésion et le bon moral au sein des Forces canadiennes.

Article 20.04 of the QR&O prohibits the use of a drug:

No officer or non-commissioned member shall use any drug unless: (a) the member is authorized to use the drug by a qualified medical or dental practitioner for the purposes of medical treatment or dental care; (b) the drug is contained in a non-prescription medication used by the member in accordance with the instructions accompanying the medication; or (c) the member is required to use the drug in the course of military duties.	Il est interdit à un officier ou à un militaire du rang de faire usage de toute drogue, sauf dans les cas suivants : a) un médecin ou dentiste qualifié a autorisé le militaire à faire usage d'une drogue à des fins de traitements médicaux ou de soins dentaires; b) la drogue fait partie intégrante d'un médicament disponible sans ordonnance dont le militaire fait usage en conformité avec les instructions du médicament; c) le militaire est tenu de faire usage d'une drogue dans l'accomplissement de ses tâches militaires.

Article 20.07 of the QR&O provides for the conditions for the issuance of an order for mandatory urine testing:

(1) An order for mandatory urine testing made pursuant to any of articles 20.08 (Deterrent Testing) to 20.13 (Blind Testing) shall be issued in writing.	(1) Tout ordre donné en vertu de toute disposition des articles 20.08 (Dissuasion par l'analyse d'urine) à 20.13 (Analyse d'urine sur une base anonyme) en vue d'une analyse

(2) The order shall contain, as a minimum,
(a) information sufficient to clearly identify the officers or non-commissioned members who are subject to the order;
(b) the article under which the testing is ordered;
(c) the time period within which the urine samples are to be obtained; and
(d) where only one person is authorized to obtain urine samples, the name or designation of that person and, where more than one person is authorized to obtain samples, the name or designation of the person who is to supervise the obtaining of the samples.
(3) Any officer or non-commissioned member subject to testing pursuant to an order shall be shown a copy of the order on request.

obligatoire est émis par écrit.
(2) L'ordre doit contenir, à tout le moins, les renseignements suivants :
a) une description suffisamment détaillée permettant d'identifier les officiers ou les militaires du rang assujettis à l'ordre;
b) l'article en vertu duquel l'analyse d'urine est ordonnée;
c) la période pendant laquelle les échantillons d'urine doivent être fournis;
d) si une seule personne est autorisée à recevoir des échantillons d'urine, le nom ou le poste de cette personne et, si plus d'une personne est autorisée à les recevoir, le nom ou le poste de la personne qui doit superviser la collecte des échantillons.
(3) Tout officier ou militaire du rang a, sur demande, le droit de consulter une copie de l'ordre lui enjoignant de remettre un échantillon d'urine.

Article 20.11 of the QR&O gives a commanding officer authority to order testing for cause:

(1) Where a commanding officer has reasonable grounds to believe that an officer or non-commissioned member has used a drug contrary to article 20.04 (Prohibition) within a time period during which that use could reasonably be detected by urine testing, the commanding officer may order the member to provide a sample of urine.
(2) Before a commanding officer decides whether reasonable grounds exist to

(1) Un commandant peut ordonner à un officier ou à un militaire du rang de fournir un échantillon d'urine s'il croit, pour des motifs raisonnables, que le militaire a fait usage d'une drogue en contravention avec l'article 20.04 (Interdiction) au cours de la période durant laquelle un tel usage aurait pu être raisonnablement dépisté au moyen d'une analyse d'urine.
(2) Avant qu'un commandant décide s'il y a des motifs

order that the member provide a urine sample, the commanding officer shall cause the member to be:
(a) provided with a written or oral summary of the information that forms the grounds upon which the decision would be based; and
(b) given a reasonable opportunity to provide additional information and submissions to the commanding officer concerning whether the member should be ordered to provide a urine sample.
(3) There is no obligation on the member under paragraph (2) to provide additional information and make submissions should the member not wish to do so.
(4) Nothing in paragraph (2) requires the release of information that could properly have been exempted or excluded from release had the member requested that information pursuant to the *Privacy Act* or *Access to Information Act.*
(5) The results of a urine test obtained under any other article in this section do not constitute reasonable grounds to order testing pursuant to this article.

raisonnables d'ordonner à un militaire de fournir un échantillon d'urine, il doit satisfaire aux conditions suivantes :
a) remettre au militaire un résumé écrit ou verbal des renseignements constituant les motifs pour lesquels la décision serait fondée;
b) donner une occasion raisonnable au militaire de lui fournir tout renseignement additionnel et de lui présenter des observations sur la question de savoir s'il devrait ordonner au militaire de fournir un échantillon d'urine.
(3) L'alinéa (2) n'oblige pas un militaire à fournir au commandant des renseignements additionnels ou à lui présenter ses observations.
(4) L'alinéa (2) n'a pas pour effet d'obliger la communication de renseignements qui auraient pu être valablement exemptés ou exclus si le militaire avait fait une demande de renseignements en vertu de la *Loi sur la protection des renseignements personnels* ou de la *Loi sur l'accès à l'information*.
(5) Les résultats d'analyse d'urine obtenus aux termes de tout autre article de la présente section ne peuvent servir de motifs raisonnables pour justifier en vertu du présent article l'émission d'un ordre en vue d'une analyse d'urine.

Article 20.14 of the QR&O requires individuals to provide samples upon an order:

(1) No officer or non-commissioned member shall, without reasonable excuse, fail or refuse to provide a urine sample when required to do so in accordance with this chapter. (2) Failure or refusal to provide a urine sample in accordance with this chapter may result in disciplinary or administrative action, or both.	(1) Il est interdit à un officier ou à un militaire du rang de faire défaut ou de refuser de fournir, sans excuse raisonnable, un échantillon d'urine lorsqu'il en reçoit l'ordre en conformité avec le présent chapitre. (2) Le défaut ou le refus de fournir un échantillon d'urine en conformité avec le présent chapitre peut entraîner des mesures disciplinaires et administratives.

Canadian Forces Administrative Order 19-21 (CFAO 19-21), Annex B provides the administrative procedures for mandatory urine testing. With regard to QR&O article 20.11, CFAO 19-21 provides that before issuing an order under article 20.11, a Commanding Officer must provide a written summary of the information forming the basis of the order:

> 23. … Before deciding whether reasonable grounds exist to order a member to provide a urine sample under QR&O 20.11, a CO must:
>
> a. have the member concerned provided with a copy of the proposed order shown in Appendix 3 and a written summary of the information that forms the grounds upon which the decision would be based ….

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1634-10
STYLE OF CAUSE:	*Mr. Jordan J. McBain v. The Attorney General of Canada*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 7, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	June 22, 2011

APPEARANCES:

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