

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170801

Docket: A-221-16

Citation: 2017 FCA 163

**CORAM: NADON J.A.
DAWSON J.A.
GAUTHIER J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

JAIME HERRERA-MORALES

Respondent

Heard at Vancouver, British Columbia, on May 15, 2017.

Judgment delivered at Ottawa, Ontario, on August 1, 2017.

REASONS FOR JUDGMENT BY:

GAUTHIER J.A.

CONCURRED IN BY:

**NADON J.A.
DAWSON J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The Attorney General of Canada (AGC) appeals a decision of Heneghan J. of the Federal Court (Federal Court) allowing Jaime Herrera-Morales' application for judicial review of a decision of a Probationary Review Officer (Officer), Deputy Commissioner D. Dubeau of the Royal Canadian Mounted Police (RCMP). The Officer dismissed Mr. Herrera-Morales' appeal of the Appropriate Officer (AO)'s decision to discharge him for unsuitability as defined in

subsection 45.18(1) of Part V of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (version in force between June 19, 2013 and November 27, 2014) (Act) and the Commissioner's Standing Orders (Probationary Member), 1997, Appendix AM-X-3-15 (Standing Orders).

[2] At issue is whether the conduct of Mr. Herrera-Morales should have been the subject of an oral hearing under Part IV of the Act (disciplinary action) instead of being reviewed under Part V of the Act (management right to dismiss on grounds of unsuitability).

[3] Mr. Herrera-Morales, a probationary member of the RCMP, was discharged; this appeal is thus important to him. However, as noted by his counsel at the hearing, this case is really the first and the last of its kind. Our decision will have little, if any, precedential value given that the Act (and the Code of Conduct) was completely overhauled after lengthy consultation in 2014. Part V of the Act that is under review in this appeal no longer exists. Under Part IV, the holding of a hearing is now discretionary and new sections have been added to deal with probationary members (sections 9.3 and 9.4).

[4] As this appeal turns on the interpretation of Part V, and more particularly former section 45.18 of the Act, the most relevant sections of the Act and the Standing Orders are reproduced in Annex 1 to these reasons.

[5] In my view, the Federal Court mischaracterized the main issue before it and thus applied the wrong standard of review.

[6] For the reasons that follow, I am of the view that this appeal should be allowed.

I. Background

[7] There is no need to describe in detail the factual matrix. The evidence and submissions reviewed by the administrative decision-makers were voluminous (more than 1000 pages).

[8] Suffice it to say that Mr. Herrera-Morales was recruited by the RCMP and was engaged as an RCMP Cadet on November 23, 2010. He completed his Cadet Training Program on May 16, 2011. Upon completion, he signed an engagement document (Appeal Book, Vol. 1 at 148) where he acknowledged that he understood that if he was found to be unsuitable for duties as a regular member of the RCMP during the first two years of service, he may be subject to discharge as a probationary member under Part V of the Act (see also subsections 45.19(8) and (11) of the Act). He immediately entered into the RCMP Field Coaching Program (the Program).

[9] A number of incidents arose during the Program starting in July 2011, which involved, among other things, the copying of responses on compulsory assignments in the Program such as the Module A and Module B assignments and the unattributed and inappropriate cutting and pasting of text from a website without attribution in his Community Profile Assignment. It was also alleged that Mr. Herrera-Morales lied or failed to readily disclose the whole truth to other members of the RCMP on several occasions.

[10] On September 9, 2011, in his four-month Program assessment report, he was rated as “unacceptable” under Core Values of the RCMP (i.e. honesty and integrity) and “needs

improvement” in respect of communication, ability to conduct investigations, conscientiousness and reliability.

[11] On October 13, 2011, Assistant Commissioner McRae, the Commanding Officer in charge of the Surrey Detachment where Mr. Herrera-Morales was assigned, suspended Mr. Herrera-Morales from the Program and placed him on administrative duties.

[12] On October 24, 2011, Assistant Commissioner McRae ordered what is referred to as a Code of Conduct investigation pursuant to Part IV of the Act in respect of three potential breaches of the *Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361, (Regulations). Namely, a breach of subsection 39(1) of the Regulations (conduct that could bring discredit onto the RCMP) by copying answers from the answer key in respect of Assignment Module B and a breach of paragraph 45(a) of the Regulations (lying in the performance of duties) by lying to a superior officer when asked about that incident. Mr. Herrera-Morales was also investigated for a possible breach of paragraph 45(a) with respect to whether he lied to his watch supervisor regarding an incident that is referred to in the documentation as the Notebook Incident.

[13] While on administrative duty and under investigation, Mr. Herrera-Morales repeatedly accessed the RCMP database (PRIME) on December 28, 29, and 30, 2011, for non-duty related purposes and allegedly discussed some general information obtained with a friend (PRIME Incidents).

[14] On February 7, 2012, Assistant Commissioner McRae reported to Inspector Sullivan, OIC Professional Standard of the “E” Division (that is British Columbia), that in his view, all three allegations investigated were supported and recommended that formal discipline proceedings be initiated under Part IV. He also explained why in this particular case, consideration should be given to an application of Part V of the Act. A copy of this report was sent to the AO, Assistant Commissioner Callens, who was also the Commanding Officer of the “E” Division of the RCMP.

[15] On February 8, 2012, upon being apprised of the PRIME Incidents, Assistant Commissioner McRae ordered another Code of Conduct investigation, this time to investigate the new incidents. Once again, the allegations to be investigated were potential breaches of subsection 39(1) of the Regulations. In the course of this second investigation, Mr. Herrera-Morales was again interviewed (videotaped) after being advised of his rights and given the opportunity to consult with a lawyer.

[16] On April 13, 2012, the AO, Assistant Commissioner Callens, suspended Mr. Herrera-Morales from his duties. There is no information as to how this decision was conveyed to Mr. Herrera-Morales or if he was advised that the said AO was considering whether to issue a Notice of Intent to Discharge under Part V of the Act.

[17] On May 3, 2012, Assistant Commissioner McRae initiated a formal disciplinary action under Part IV of the Act (section 43 of the Act) (Officer Reasons at paragraph 153). It is not clear if he did anything other than send a Notice to the Designated Officer in that respect. It also

unclear when and how Mr. Herrera-Morales became aware of this fact; the notice is not in the Appeal Book. However, it is not disputed that the process initiated was based on many of the incidents that were later included in the Notice of Intent to Discharge sent to Mr. Herrera-Morales pursuant to subsection 45.19(1) (Part V) of the Act (the Notice). There is no information in the record as to what formal sanction was envisaged or sought, given that contrary to Part V, a range of sanctions were available under Part IV of the Act. Although there is no evidence in the record as to how this happened and what exactly was said to Mr. Herrera-Morales, the disciplinary process was suspended and no panel was assigned to the matter (subsection 43(4) of the Act). It is worth mentioning that the Act provides for a short one-year time limitation period during which one can initiate formal disciplinary action under Part IV (see subsection 43(8) of the Act).

[18] Further to the recommendation of Assistant Commissioner McRae and the suspension from all duties ordered on April 13, 2012, the AO signed the Notice on December 20, 2012, which was served on Mr. Herrera-Morales on December 31, 2012. It is not disputed that Mr. Herrera-Morales was provided with all the evidence and material collected during the investigation and everything that could be relevant to the twelve incidents disclosed in the detailed 20-page Notice.

[19] Mr. Herrera-Morales was represented by legal counsel throughout the Part V discharge proceeding. He submitted a detailed response to the Notice on March 29, 2013 in which he raised several objections, including that his performance was unfairly evaluated, that he had not been provided with reasonable assistance, guidance and supervision (RAGS), particularly when taking

into account his English language proficiency, and that his record included notations corroborating the fact that he might well require help in that respect. He also argued that he was the victim of discrimination on the basis of language and that the commencement of concurrent discipline and performance proceedings under Part IV and V of the Act was unlawful and unfair.

II. The AO Decision

[20] Because the Officer agreed with the AO's rationale in most respects relevant to this appeal, it is worth summarizing the AO's most salient findings.

[21] On August 22, 2013, the AO issued a lengthy and detailed decision (40 pages) (AO Reasons) wherein he concluded that Mr. Herrera-Morales should be discharged pursuant to subsection 45.19(9) of the Act.

[22] The AO followed a seven-question analytical grid adopted by members of the RCMP Discharge and Demotion Board (under Part V) and by the external review committee (AO Reasons at para. 15). He dealt with the preliminary issues raised by Mr. Herrera-Morales with respect to the potential concurrent application of Parts IV and V of the Act to the same or similar factual basis at paragraphs 18-26 of his reasons. In the AO's view, Parts IV and V are meant to work symbiotically, not competitively. He gave some examples, such as section 41 of the Act, which lists the available informal disciplinary sanctions. These include performance measures such as "recommendation for special training" and "direction to work under close supervision". The AO also noted that the RCMP Code of Conduct "whose breach is the foundation for any action under Part IV includes provisions for the neglect or insufficient attention" to "any duty the

member is required to perform” (AO Reasons at para. 19). For the AO, it would be inconceivable that a member who neglected his or her duties could only be dealt with by using disciplinary or performance measures, but not both.

[23] The AO indicated that documentation available to all RCMP members, including Mr. Herrera-Morales, makes clear reference to the fact that conduct that attracts disciplinary measures could be dealt with under the performance management system and that it is an accepted practice that evidence gathered during a Code of Conduct investigation could be used in discharge proceedings under Part V.

[24] The AO held that in the present case, initiating a formal disciplinary action under Part IV and sending the Notice under Part V did not constitute an abuse of process. He concluded that in respect of the performance decision under Part V, all the various personnel involved, including Mr. Herrera-Morales and his counsel, had been given the opportunity to assist him in coming to a fair and reasonable decision in this matter.

[25] With respect to unsuitability, the AO found that on a balance of probabilities, there was insufficient evidence to convince him that Mr. Herrera-Morales failed to perform his duties in respect of the RCMP Core Values of honesty and integrity in the Module A Incident, the Missing Persons Incident and the Exhibits Incident. However, he held that on a balance of probabilities, Mr. Herrera-Morales had failed to perform his duties in relation to the Recovered Stolen Vehicle Incident, the Module B Incident, the Community Profile Incident, the Notebook Incident, and the PRIME Incidents (AO Reasons at paras. 107, 108 and 109). Having considered that he was to

judge Mr. Herrera-Morales' performance against that of "a reasonably able, skillful and efficient probationary member", the AO also found that Mr. Herrera-Morales repeatedly failed to perform his duties (particularly the Module B Incident and the PRIME Incidents) in a manner befitting his position.

[26] It is clear that the AO, having considered the response of Mr. Herrera-Morales, decided that his ultimate decision to recommend a discharge was based entirely on the performance incidents involving the RCMP Core Values of honesty and integrity because he was satisfied that in respect of those incidents the criteria set out in subsection 45.18(1) were met.

[27] The AO noted at paragraph 112 of his reasons that he only considered the RAGS with respect to honesty and integrity because unquestionably, more assistance could have been provided to address Mr. Herrera-Morales' other performance issues. Thus in that respect, he did agree with the representations made by Mr. Herrera-Morales.

[28] At paragraph 113 of his reasons, the AO summarized the RAGS provided to Mr. Herrera-Morales in respect of the RCMP Core Values of honesty and integrity before and after the incidents.

[29] It is in that particular context that the AO dealt with the allegation that English language proficiency played a role in Mr. Herrera-Morales' performance deficiency and whether further assistance in this area could have addressed the situation (AO Reasons at paras. 120-136). He clearly understood that "it would truly be a travesty and RCMP loss" if Mr. Herrera-Morales

were discharged on the basis of misunderstanding due to poor communication (AO reasons at paragraph 120).

[30] The AO concluded at paragraphs 135 and 136 that:

Based on the totality of the evidence presented to me, I find that English proficiency did not provide any circumstances that would explain or mitigate the performance failures with respect to the RCMP Core Values of honesty and integrity.... there is no need to address the third issue of whether language coaching or other therapy would have assisted him. Put another way, it is an irrelevant consideration that the RCMP did not provide Cst. Herrera-Morales with special assistance, guidance and supervision in the form of language training because I find that Cst. Herrera-Morales' performance failures were clearly due to a lack of honesty and integrity, not language skill.

[31] The AO found at paragraph 137, that on the totality of the evidence, he was satisfied that Mr. Herrera-Morales had "enjoyed **effective**, reasonable and sincere RAGS" [emphasis added].

[32] The AO considered that despite the provision of the relevant RAGS, Mr. Herrera-Morales continued to fail to meet the Core Values of honesty and integrity (AO Reasons at paras. 151-156).

[33] In the section entitled "Conclusion" found at paragraphs 157-163 of the AO's reasons, the AO noted that "[l]ying is an incredibly insidious behaviour for police officers, as it truly undermines the very fabric of our public function". He stated that integrity is at the very core of what makes a person suitable to be a member the RCMP.

[34] Finally, the AO mentioned that he was alert and alive to the seriousness of his decision considering both that the RCMP invests a lot of time, effort and money training its new members

and the dire consequences the decision will have on Mr. Herrera-Morales. Still, he held at paragraph 162 of the reasons that discharge was necessary in the circumstances.

III. The Officer's Decision

[35] Mr. Herrera-Morales appealed the AO decision on October 22, 2013 after obtaining an extension of time to do so.

[36] After reviewing the facts in detail, the decision of the AO and the arguments and supporting material before him, the Officer confirmed, in a decision dated January 15, 2015 (Officer's Reasons), the AO's decision to discharge Mr. Herrera-Morales. The Officer stated that he was satisfied with that decision (Officer's Reasons at para. 147). That said, he still thought it necessary to add some comments in respect of several issues raised by Mr. Herrera-Morales, some of which are relevant to the present appeal.

[37] At paragraphs 208 to 213, the Officer made several comments with respect to Mr. Herrera-Morales' argument that by focusing on incidents involving the RCMP Core Values of integrity and honesty, the AO unlawfully discharged him on the basis of discipline rather than performance. The Officer noted that as a senior leader of the RCMP, it is clear to him that:

performance in the policing context is not solely based on performing a particular task such as properly processing a stolen vehicle or logging an exhibit. It should not be so narrowly interpreted. Rather, it should be considered in the broader context of [the] core values of honesty and integrity. It is not simply a question of what was done but it is also as important to consider how it was done [emphasis added]

(Reasons at para. 209)

[38] In the Officer's view, the intent reflected in subsection 45.18(1) of the Act was to include the type of consideration referred to in *Jacmain v. Canada (Attorney General) et al.*, [1978] 2 S.C.R. 15 [*Jacmain*]. This illustrates the Officer's thinking that performance does not only include the quality and quantity of work, but also an employee's character, the ability to work in harmony with others and the general suitability for retention in the organisation.

[39] As indicated at paragraph 213 of his reasons, "suitability" considerations would include the RCMP Core Values, which are a fundamental cornerstone upon which the RCMP culture is built. The Officer noted that "[t]hese core values are evaluated during the recruitment process and they are assessed at Depot, during the Field Coaching Program and throughout [one's] career in the RCMP." He added that to discount such important values and not consider them in the discharge process under Part V was simply not acceptable.

[40] With respect to the ability to pursue proceedings concurrently under Part IV and Part V of the Act, the Officer noted that nothing that was presented to him convinced him that both processes cannot proceed simultaneously. He also noted that it was not surprising that Part IV would be engaged first when the allegations came to light given the one-year limitation period to initiate a formal disciplinary proceeding under Part IV (Officer's Reasons at para. 225).

[41] In the Officer's view, investigating an incident and sending a notice under subsection 43(1) of the Act could not have the effect of preventing the AO from exercising his jurisdiction under Part V of the Act.

[42] The Officer made it clear that he agreed with the AO that the facts and evidence obtained through a Code of Conduct investigation are entirely relevant to the performance discharge process initiated under Part V. These processes are simply not mutually exclusive. Once again, he referred to a Court decision to illustrate his thinking. The Officer quoted a passage from Marceau J.A.'s reasons in *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 at 9 [Penner], which explains that behavior amounting to misconduct (disciplinary issue) can also give rise to a *bona fide* dissatisfaction with suitability. And, thus, a management decision based on suitability should not be confused with a disciplinary sanction. While using the quote from *Penner* to illustrate his thinking, it is clear from paragraph 228 of his reasons that the Officer was alert to the fact that the statutory scheme before him was not the same as the one in play in *Penner*.

[43] Furthermore, in the Officer's view, the fact that the AO discarded some incidents listed in the Notice where proper RAGS (especially language) could have addressed the concern showed that the AO actually considered Mr. Herrera-Morales' submissions and thus respected the intent of the legislator and procedural fairness (there was an allegation that the AO did not have an open mind). In fact, the Officer noted that the AO's analysis in this respect made him more confident in confirming the AO's final decision to discharge.

[44] The Officer's conclusions with respect to "grounds of unsuitability" is found at paragraph 231 of his reasons, where amongst other things, the Officer noted that he was satisfied that the test to establish the ground of unsuitability was met in this case. In his view, Mr. Herrera-Morales was aware of the duties he was to perform as well as the expected standards (i.e. that

lying, cheating, plagiarizing and using police information systems for personal reasons was unacceptable). Despite this, he repeatedly failed to perform his duties in a manner fitted to the requirements of his position as a probationary member as demonstrated through the eight incidents noted in the decision. The Officer added:

I am satisfied that reasonable assistance, guidance and supervision were provided in order to address his shortcomings in relation to honesty and integrity. The evidence shows that Cst. Herrera was continuously closely supervised by his coaches during his [Program]; discussions took place with the Member following the incidents to address the importance of honesty and integrity and this was also documented.

[45] He concluded at paragraph 233 of the reasons that he shared the following views expressed in the AO's Reasons:

This is one of those cases where I find the discharge of the member is definitely necessary. This is not a case where Cst. Herrera-Morales made an isolated and understandable error in judgment. There are multiple and progressively serious incidents where Cst. Herrera-Morales demonstrated his repeated failure to follow the RCMP Core Values of honesty and integrity, even in the face of sincere guidance and advice on these most basic values. It is my view that the RCMP can teach a person about police ethics, but not about moral fabric. We do not employ a person and teach them to be honest. We employ an honest person and teach them to be a Mountie.

IV. The Federal Court Decision

[46] On application for judicial review, the Federal Court characterized the main issue before it as follows: Did the Officer breach procedural fairness by deciding that the applicant could be discharged under Part V of the Act? To answer this question, the Federal Court applied the standard of correctness (2016 FC 578, at para. 76).

[47] Although the Federal Court agreed that the Act does not prohibit concurrent proceedings under Part IV and Part V, it held that Part V could not be improperly used as a disguise for disciplinary sanctions (FC Reasons at para. 77). The Federal Court also found that the Officer erred in finding that unsuitability included breaches of the Code of Conduct, as it was of the view that the scope of subsection 45.18(1) was limited to performance and nothing more (FC Reasons at para. 88).

[48] After considering the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], particularly what it found to be Mr. Herrera-Morales' legitimate expectation that breaches of the Code of Conduct would be dealt with under Part IV of the Act, the Federal Court concluded that Mr. Herrera-Morales was entitled to an oral hearing as provided under that Part of the Act. Therefore, at paragraph 98, the Federal Court concluded that the Officer breached Mr. Herrera-Morales' procedural rights and the Officer's decision was set aside on that basis.

[49] Although the Federal Court offered brief comments on the other issues raised in respect of the merits of the decision *per se*, it is clear that these comments played no part in its ultimate decision to quash the Officer's decision.

[50] These comments are found at paragraphs 92-97 of the Federal Court's reasons. They can be summarised as follows.

[51] First, the Federal Court dealt with the alleged failure of the Officer to consider Mr. Herrera-Morales' difficulties with English and whether this amounted to discrimination. It focussed on the Officer's conclusion at paragraph 230 where he says that he was not persuaded by the argument that they played a major role in respect of issues before him. The Federal Court noted that a member may only be discharged for failing to perform his duties if the member received RAGS in an effort to improve his performance. The Federal Court concluded that the Officer had not sufficiently explained why the RAGS provided were adequate. Particularly, there was no indication that he considered whether the language difficulties (a concern raised by other members of the RCMP in respect of other performance issues) prevented Mr. Herrera-Morales from understanding the RAGS. This in the Federal Court's view was unreasonable. However, there was insufficient evidence to find discrimination.

[52] Second, turning to the assessment of the evidence by the Officer, the Federal Court found that the Officer consideration of the evidence was reasonable.

V. Issues

[53] The role of this Court in appeals of decisions dealing with applications for judicial review is to determine whether the reviewing Court chose the appropriate standard(s) of review applicable to the issues before it and properly applied them. This means that this Court steps into the shoes of the reviewing Court and its focus is on the administrative decision-maker's decision, not on the Federal Court decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 46-47 [*Agraira*].

[54] The determinative questions in this appeal are:

- i. Whether the Federal Court improperly characterized the main issue before it as one of procedural fairness as opposed to one of statutory interpretation of the Act which sets out the exact procedures to be followed when discharge for unsuitability is contemplated under Part V of the Act;
- ii. If the Federal Court did not mischaracterize the issue, whether the Federal Court correctly applied the standard of review to the issue of procedural fairness, including particularly in respect of whether Mr. Herrera-Morales had a legitimate expectation of an oral hearing pursuant to Part IV of the Act; and,
- iii. If the Federal Court did mischaracterize the issue, was the Minister's statutory interpretation of subsection 45.18(1) of the Act reasonable?

[55] The AGC argued that the Federal Court applied the wrong standard of review to determine what procedure was fair and appropriate in the circumstances. By doing so, the Federal Court gave no deference whatsoever to the Officer's construction of subsection 45.18(1) of the Act, a provision in his home statute. For the AGC, the Officer was entitled to the presumption that his construction is reviewable on the standard of reasonableness.

[56] The AGC further submitted that the Federal Court's conclusion that Mr. Herrera-Morales had a legitimate expectation that his case would be dealt with under Part IV was again premised

on the Federal Court's view that subsection 45.18(1) of the Act was inapplicable and as such, is also flawed.

[57] At the hearing of this appeal, Mr. Herrera-Morales maintained the position that the Federal Court had properly identified the issue before it as one of procedural fairness and legitimate expectation. He relied on the decision of the Supreme Court of Canada in *Baker*. He added that it is trite law that such an issue is to be reviewed on the correctness standard.

[58] Because of the nature of the interests at stake (dismissal based on what may constitute breaches of the Code of Conduct), Mr. Herrera-Morales claimed that he was entitled to the full procedural rights provided for under Part IV of the Act. In his view, while both Part IV and Part V proceedings could result in a discharge, Part IV, as it read at the relevant time, provided for a full hearing in all cases where formal discipline was initiated. In this case, several of the incidents included in the Notice and ultimately considered as the basis for discharge by the AO and the Officer were also alleged to be breaches of subsection 39(1) and paragraph 45(a) of the Regulations (Code of Conduct) that had been investigated under Part IV (section 40 of the Act).

[59] Moreover, although Mr. Herrera-Morales acknowledged before us that in some cases, concurrent proceedings can be undertaken under Part IV and Part V of the Act, he submitted that the RCMP cannot commence formal disciplinary proceedings under Part IV and then circumvent the requirements of that part of the Act by discharging the member under Part V on the same factual basis. On that interpretation, Mr. Herrera-Morales therefore had a legitimate expectation

that a disciplinary hearing would be held in respect of the alleged breaches of the Code of Conduct.

[60] Alternatively, Mr. Herrera-Morales contended that the Officer's interpretation of the Act is unreasonable given that the statutory scheme demonstrates Parliament's intention for Code of Conduct contraventions to be addressed under Part IV rather than Part V. Allowing the RCMP to discharge probationary members for disciplinary reasons under Part V would render the application of Part IV to probationary member meaningless. Since the grounds for discharging Mr. Herrera-Morales are all disciplinary in nature, the discharge should have been addressed under Part IV of the Act.

[61] I described the determinative issues in paragraph 54 above, on the basis of the written arguments of the parties (see particularly paragraph 45 of Mr. Herrera-Morales' memorandum of fact and law)

[62] In her own memorandum, the AGC also challenged the Federal Court's finding that the Officer's conclusion about the role of English proficiency and the RAGS was unreasonable. The AGC noted that the Federal Court was in fact reweighing the evidence and had failed to consider the Officer's reasons in their proper context as directed by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC62, [2011] 3 S.C.R.708. Mr. Herrera-Morales did not make any submissions on these issues. He also did not challenge the Federal Court's statement that the Officer did not err in his consideration of the evidence.

[63] Still, at the hearing before us, Mr. Herrera-Morales argued that the errors addressed in his memorandum that I described at paragraph 54 above could not be determinative because of the Federal Court's finding in *obiter* in respect of RAGS and his language difficulties. This new position effectively makes Mr. Herrera-Morales' argument that the statutory interpretation adopted by the Officer was unreasonable irrelevant. It shifts the focus of the debate before us.

[64] The AGC objected that this issue could not be raised for the first time at the hearing. I agree that, at the very least, this issue should have been raised as a preliminary issue at the commencement of the oral arguments, and that the failure to do so prejudiced the AGC.

[65] In any event, I am satisfied that the Federal Court misapplied the standard of reasonableness in respect of the RAGS and the language issue. It did not consider the Officer's reasons as a whole and in the context of the record before him, which included the AO's decision and the particular submissions made by Mr. Herrera-Morales (as opposed to those he appears to have raised before the Federal Court). Had the Federal Court done so, it could not have reached the bald conclusion on which Mr. Herrera-Morales now tries to rely. I will review this briefly in my analysis.

VI. Analysis

A. *Did the Federal Court mischaracterize the question before it as one of procedural fairness?*

[66] To determine the appropriate standard of review, the Court must properly characterize the issue before it. To do so in this case, one must take into account the following:

- i. The Act sets out a comprehensive set of rules for the procedures to be followed before one can make a decision under Part IV (disciplinary action) and Part V (management right to discharge on grounds of unsuitability). It details the participatory rights of the members of the RCMP including probationary members.
- ii. It is clear that in matters that fall within the ambit of subsection 45.18(1) of the Act (Part V), the legislator has fully considered whether probationary members should be entitled to have an oral hearing before a three-member Board. The Act expressly provides that such probationary members would not have the option of requiring such a hearing; only “full” members of the RCMP have the right to opt for an oral hearing (see paragraphs 45.19(4), (6), (7), (9)). This is not disputed.
- iii. Mr. Herrera-Morales does not contest the constitutional validity of any of the provisions of Part V.
- iv. It is trite law that such express choices made by the legislator in primary legislation bind any reviewing court. Absent a constitutional challenge when, as here, the intention of the legislator is unequivocal that a probationary member does not have the option of an oral hearing under Part V, there is no room to apply the common law doctrine of natural justice to import an obligation to hold such an oral hearing and to consider a failure to do so as a breach of procedural fairness (See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] S.C.J. No. 17, at paras. 21, 22 and 27; and *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, para. 117).

[67] Thus, to determine whether, as argued by Mr. Herrera-Morales, he was entitled to an oral hearing because the conduct under review involved breaches of the Code of Conduct that had been investigated under Part IV, the Federal Court had to determine whether the incidents relied upon in the Officer's decision could come within the ambit of subsection 45.18(1). If not, only Part IV applied and Mr. Herrera-Morales was entitled to the process set out in the relevant provisions of that part of the Act. This question involves construing Part V of the Act, particularly subsection 45.18(1). It is first and foremost a question of statutory interpretation followed by the application of this provision as construed to the facts of the case.

[68] Before us, and this is not the basis on which the Federal Court examined the issue of procedural fairness before it, Mr. Herrera-Morales argued that the issue is one of procedural fairness because when exercising discretion under subsection 45.18(1) of the Act the decision-maker had to consider that his decision would impact on Mr. Herrera-Morales' participatory rights – Mr. Herrera-Morales would lose the benefit of the full hearing provided for under Part IV. He argues that this preliminary decision (i.e. the exercise of the discretion to proceed or not under Part V), as opposed to the decision of whether the AO should recommend a discharge per se, is subject to the common law duty of procedural fairness. Therefore, the Federal Court was entitled to apply the standard of correctness and to consider the Baker factors. I cannot agree.

[69] Assuming without deciding that there is a preliminary decision distinct from the one under review, I believe that this argument is based on a false premise. The point raised by Mr. Herrera-Morales before us is not whether the AO should have heard Mr. Herrera-Morales before exercising his discretion to engage Part V by issuing the Notice; this could potentially be an issue

of procedural fairness but would not necessarily require an oral hearing. Rather it is that the AO should have considered the impact this had on how Mr. Herrera-Morales would be able to challenge the Notice (no oral hearing). When a court looks at the exercise of a discretion to engage a process like the one set out in sections 45.18 and following, to determine if the decision-maker failed to consider a particular fact, the court is actually reviewing the merits of that decision. Hence, like any other issue going to the merits of an administrative decision, the question of whether the decision-maker properly considered the impact of proceeding under Part V on a probationary member rather than under Part IV would be reviewable on the standard of reasonableness. In any event, this issue is not properly before us as it was not raised as such before the administrative decision-maker.

[70] Thus, as mentioned, the question before the Federal Court was whether the Officer made a reviewable error in interpreting subsection 45.18(1). Since this provision is within his enabling legislation, the Officer's interpretation is presumptively entitled to deference. But the Federal Court gave no deference whatsoever to the decision-maker's interpretation of the Act. Instead, it proceeded with its own view of what subsection 45.18(1) encompassed, and what "grounds of unsuitability" meant.

[71] There is no valid ground on which to rebut the presumption that the interpretation of this section by the specialized administrative decision-maker should be reviewed on the standard of reasonableness. In fact, Mr. Herrera-Morales does not dispute that if the question to be determined is one of statutory interpretation, the presumption has not been rebutted. Rather, what

Mr. Herrera-Morales argues is that there was only one possible interpretation – his. The Officer’s conclusion was thus unreasonable.

[72] I therefore conclude that the Federal Court did not apply the proper standard of review to determine whether the AO was entitled to proceed as he did following the process set out in Part V of the Act.

B. *Was the Officer’s statutory interpretation of the Act unreasonable?*

[73] As mentioned, to determine this question, I must proceed to apply the appropriate standard focusing on the Officer’s decision.

[74] At the relevant time, subsection 45.18(1) of the Act read as follows:

45.18 (1) Any officer may be recommended for discharge or demotion and any other member may be discharged or demoted on the ground, in this Part referred to as the “ground of unsuitability”, that the officer or member has repeatedly failed to perform the officer’s or member’s duties under this Act in a manner fitted to the requirements of the officer’s or member’s position, notwithstanding that the officer or member has been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties.

[Emphasis added]

45.18 (1) Le renvoi ou la rétrogradation d’un officier peut être recommandé, ou tout autre membre peut être renvoyé ou rétrogradé, pour le motif, appelé dans la présente partie « motif d’inaptitude », qu’il a omis, à plusieurs reprises, d’exercer de façon satisfaisante les fonctions que lui impose la présente loi, en dépit de l’aide, des conseils et de la surveillance qui lui ont été prodigués pour l’aider à s’amender.

[Soulignement ajouté]

[75] This provision must be interpreted purposively, that is, considering the meaning of the words in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[76] In my view, this is the approach adopted by the Officer and the AO.

[77] Ordinarily, the word “unsuitability” means that a person is unfit for the duties of his or her position. However, the legislator added some specific criteria to this general meaning. “Grounds of unsuitability” are limited to cases involving “repeated” failure to perform one’s duties in a manner fitted to one’s position. It also requires that the decision-maker consider whether reasonable RAGS were provided in an attempt to improve the member’s performance. These conditions do not appear in any of the provisions of Part IV of the Act.

[78] The express reference in subsection 45.18(1) to the manner in which one performs his or her duties supports the Officer’s findings that the AO must consider not only the quality and quantity of work done, but also how it was done.

[79] Determining whether the Core Values of honesty and integrity are an integral part of the manner in which a member of the RCMP is required to perform his or her duty as a probationary member is at the core of the expertise of the specialized decision-maker. The Officer considered and explained why such values must necessarily be included as part of the performance evaluation of a probationary member (or any member of the RCMP). It is clear from his reasons, and the evidentiary record supports this finding, that when the performance of cadets,

probationary members and members of the RCMP are evaluated, the analysis invariably includes these core values.

[80] Indeed, in this particular case, in my view, even a layperson would readily agree that such basic values must be included in the evaluation of how a member of the RCMP performs police duty.

[81] The next step is to consider whether when one reads the Act as a whole and considers the scheme of the Act, including particularly Part IV, one must conclude that the legislator intended to nevertheless exclude such core values from the process set out in Part V dealing with grounds of unsuitability because they are also at the core of the Code of Conduct and thus might be implicated in disciplinary actions (formal or informal sanctions) if breaches of the Code occurred.

[82] As mentioned earlier (see paragraph 22 above), the AO noted that Parts IV and V are meant to work symbiotically, not competitively. For the Officer and the AO, the interpretation proposed by Mr. Herrera-Morales would render Part V meaningless and therefore such interpretation was unacceptable. As mentioned by the AO, the RCMP Code of Conduct even provides that neglect or insufficient attention to any duty the member is required to perform could constitute a breach of the said Code.

[83] *A contrario*, Mr. Herrera-Morales argues that the interpretation adopted by the AO and the Officer would render Part IV meaningless in this case. This makes little sense as Part IV covers much more than a discharge on grounds of unsuitability as defined under Part V.

[84] When considering these parts of the Act to construe subsection 45.18, the decision-maker must not only consider the specific circumstances before him, but the full scope of the statutory provisions to determine the intention of the legislator. Many of the arguments advanced by Mr. Herrera-Morales to support a different interpretation of subsection 45.18(1) are fact-specific and driven by statements made by the decision-maker in the application of the statutory provision to the facts of the case. These arguments are therefore of limited assistance.

[85] Further, Mr. Herrera-Morales' position that previous Code of Conduct violations cannot form the basis of a Part V proceeding would lead to an absurd result in which an RCMP member would be insulated from Part V proceedings initiated based on his repeated conduct despite RAGS. For example, if an RCMP member committed three Code of Conduct violations, it may be that no single violation justified a discharge. However, together those violations justify discharge for lack of suitability under subsection 45.18(1). An officer conducting a Part V proceeding must be allowed to consider the aggregate effect of those violations especially if RAGS were provided. If not, a member whose conduct would otherwise justify discharge would escape those consequences solely on a procedural basis.

[86] Having carefully considered all the arguments put forth by Mr. Herrera-Morales in his memorandum and at the hearing, I cannot conclude that the Officer's interpretation of subsection

45.18(1) is unreasonable. The end result of the interpretation adopted is that a probationary member is treated the same way as all other members of the RCMP unless, because of repeated failures to perform in a manner fitted to his duties during the first two years on the force, and having benefited from RAGS, there are grounds to consider that he may not be “suitable” for a position as member of the RCMP. In my view, such an interpretation is within the range of interpretations that is defensible on proper application of principles of statutory construction. I do not agree that there is only one possible way to construe subsection 45.18(1).

[87] This is especially so when one considers that a probationary member who is alleged to meet the grounds of unsuitability, as defined in the subsection 45.18, is afforded considerable participatory rights as is evident from the overall process that was followed in this matter.

[88] Before concluding, I wish to add a few comments on other points. First, as mentioned, the question of whether the decision to exercise one’s jurisdiction in a particular matter is reasonable is distinct from the question of what conduct subsection 45.18(1) is intended to address. Thus, the interpretation adopted by the Officer does not mean that in all cases, it would be reasonable for the AO to exercise his discretion to send a Notice of Intent when contraventions to the Code of Conduct are involved and proceedings under Part IV are in play. This was well understood by the Officer who, like the AO, made it clear that he considered that it was necessary in this particular case to exercise the powers under Part V.

[89] Second, there can be no legitimate expectation based on Mr. Herrera-Morales’ own interpretation of the Act when the statutory interpretation adopted by the decision-maker is

reasonable. Moreover, Mr. Herrera-Morales never argued before the Officer (or the AO) that even though the AO could validly proceed under Part V, he should exercise his discretion not to do so because clear representations were made to him that no such proceedings would be instituted in this case. There is no evidentiary basis on which one could conclude that clear representations were made by the RCMP to Mr. Herrera-Morales that he would not be subjected to Part V. If anything, he was clearly advised that he would be subject to such process when he signed his engagement (see paragraph 8 above). Hence, the administrative decision-maker did not deal with this argument and the issue should not have been considered by the Federal Court.

C. *English proficiency and the RAGS*

[90] Consideration of this issue must start from the premise that, as this finding was not challenged, the decision-maker properly considered the evidence before him. This means that my analysis of the reasonableness of the decision in respect of the RAGS and the actual role of the language difficulties must be based on the factual findings made.

[91] It is clear from a fair reading of the reasons of the Officer and the reasons AO (which the Officer endorsed) that the decision-maker was alert to the fact that if language difficulties played a role in respect of the repeated failures to perform under consideration, it would be inappropriate to discharge Mr. Herrera-Morales under Part V (see for example paragraphs 26-31 and 43-45 above). It was found as a fact that language difficulties did not play such a role. In reaching this conclusion the AO accepted, among other things, Mr. Hall's emphatic view that Mr. Herrera-Morales understood that what he did was wrong. Mr. Hall met with Mr. Herrera-Morales as part as the RAGS described in paragraph 113 of the AO's decision. In respect of

another meeting on September 1, 2012 (also part of the RAGS described at paragraph 113), the AO noted that Cst. Schuck reported that Mr. Herrera- Morales stated that he understood the discussion they had about honesty and integrity. There is a full section of the AO's decision entitled "What role if any did...English proficiency play ...and could further assistance in this area have addressed the situation". He concludes at paragraph 137, that effective RAGS had been provided. This can only mean RAGS that were understood.

[92] On a proper application of the standard of reasonableness, one cannot conclude that the Officer failed to consider whether Mr. Herrera-Morales understood the RAGS provided in respect of honesty and integrity and their importance. Furthermore, the Officer gave sufficient reasons for his conclusion. This is particularly so when one considers the Officer's ultimate conclusion that it is impossible for the RCMP to teach the level of honesty and integrity required to a person who does not have does values to start with.

VII. Conclusion

[93] In light of the foregoing, I propose to allow this appeal, to set aside the decision of the Federal Court and to dismiss the application for judicial review. The AGC also asks for his costs both here and in the Federal Court. However, I am of the view that each party should bear their costs.

"Johanne Gauthier"

J.A.

"I agree
M. Nadon J.A."

"I agree
Eleanor R. Dawson J.A."

ANNEX 1

Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, in force at the relevant time.

...	...
PART IV	PARTIE IV
Discipline	Discipline
Standards	Principes
...	...
Code of Conduct	Code de déontologie
Marginal note: Code of Conduct	Note marginale : Code de déontologie
38 The Governor in Council may make regulations, to be known as the Code of Conduct, governing the conduct of members.	38 Le gouverneur en conseil peut prendre des règlements, appelés code de déontologie, pour régir la conduite des membres.
R.S., 1985, c. R-10, s. 38; R.S., 1985, c. 8 (2nd Supp.), s. 16.	L.R. (1985), ch. R-10, art. 38; L.R. (1985), ch. 8 (2e suppl.), art. 16.
Marginal note: Contravention of Code of Conduct	Note marginale : Contravention au code de déontologie
39 (1) Every member alleged to have contravened the Code of Conduct may be dealt with under this Act either in or outside Canada,	39 (1) Tout membre à qui l'on impute une contravention au code de déontologie peut être jugé selon la présente loi au Canada ou à l'extérieur du Canada :
(a) whether or not the alleged contravention took place in or outside Canada; and	a) que la contravention alléguée ait été ou non commise au Canada;
(b) whether or not the member has been charged with an offence constituted by, included in or otherwise related to the alleged contravention or has been tried, acquitted, discharged, convicted or sentenced by a court in respect of such an offence.	b) que le membre ait été ou non accusé d'une infraction constituée par la contravention alléguée, en faisant partie ou s'y rattachant, ou qu'il ait ou non été jugé, acquitté, libéré, reconnu coupable ou condamné par un tribunal relativement à une telle infraction.
Marginal note: No interference with jurisdiction of courts	Note marginale : Compétence des tribunaux
(2) Nothing in this Act affects the jurisdiction of any court to try a member for any offence triable by that	(2) La présente loi n'a pas pour effet d'empêcher les tribunaux de juger un membre pour les infractions relevant

court.

R.S., 1985, c. R-10, s. 39;

R.S., 1985, c. 8 (2nd Supp.), s. 16.

Investigation

Marginal note: Investigation

40 (1) Where it appears to an officer or to a member in command of a detachment that a member under the command of the officer or member has contravened the Code of Conduct, the officer or member shall make or cause to be made such investigation as the officer or member considers necessary to enable the officer or member to determine whether that member has contravened or is contravening the Code of Conduct.

...

Informal Disciplinary Action

Marginal note: Informal disciplinary action

41 (1) Subject to this section, the following informal disciplinary action may be taken in respect of a contravention of the Code of Conduct, namely,

- (a) counselling;
- (b) recommendation for special training;
- (c) recommendation for professional counselling;
- (d) recommendation for transfer;
- (e) direction to work under close supervision;
- (f) subject to such conditions as the Commissioner may, by rule, prescribe, forfeiture of regular time off for any period not exceeding one work day; and
- (g) reprimand.

de leur compétence.

L.R. (1985), ch. R-10, art. 39;

L.R. (1985), ch. 8 (2e suppl.), art. 16.

Enquête

Note marginale : Enquête

40 (1) Lorsqu'il apparaît à un officier ou à un membre commandant un détachement qu'un membre sous ses ordres a contrevenu au code de déontologie, il tient ou fait tenir l'enquête qu'il estime nécessaire pour lui permettre d'établir s'il y a réellement contravention.

...

Mesures disciplinaires simples

Note marginale : Mesures disciplinaires simples

41 (1) Sous réserve des autres dispositions du présent article, peuvent être imposées, pour une contravention au code de déontologie, les mesures disciplinaires simples suivantes :

- a) conseiller le contrevenant;
- b) recommander de lui faire suivre une formation spéciale;
- c) recommander de le faire bénéficier des conseils d'un spécialiste;
- d) recommander sa mutation;
- e) le soumettre à une stricte surveillance pendant son travail;
- f) le priver de son congé hebdomadaire pour une période ne dépassant pas un jour de travail, sous réserve des conditions que peut prescrire le commissaire par règle;
- g) lui donner un avertissement.

...

Formal Disciplinary Action

Marginal note: Initiation

43 (1) Subject to subsections (7) and (8), where it appears to an appropriate officer that a member has contravened the Code of Conduct and the appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.

Marginal note: Adjudication board

(2) On being notified pursuant to subsection (1), the designated officer shall appoint three officers as members of an adjudication board to conduct the hearing and shall notify the appropriate officer of the appointments.

Marginal note: Qualifications

(3) At least one of the officers appointed as a member of an adjudication board shall be a graduate of a school of law recognized by the law society of any province.

Marginal note: Notice of hearing

(4) Forthwith after being notified pursuant to subsection (2), the appropriate officer shall serve the member alleged to have contravened the Code of Conduct with a notice in writing of the hearing, together with

...

Mesures disciplinaires graves

Note marginale : Convocation

43 (1) Sous réserve des paragraphes (7) et (8), lorsqu'il apparaît à un officier compétent qu'un membre a contrevenu au code de déontologie et qu'en égard à la gravité de la contravention et aux circonstances, les mesures disciplinaires simples visées à l'article 41 ne seraient pas suffisantes si la contravention était établie, il convoque une audience pour enquêter sur la contravention présumée et fait part de sa décision à l'officier désigné par le commissaire pour l'application du présent article.

Note marginale : Constitution d'un comité d'arbitrage

(2) Dès qu'il est avisé de cette décision, l'officier désigné nomme trois officiers à titre de membres d'un comité d'arbitrage pour tenir l'audience et en avise l'officier compétent.

Note marginale : Conditions d'admissibilité

(3) Au moins un des trois officiers du comité d'arbitrage est un diplômé d'une école de droit reconnue par le barreau d'une province.

Note marginale : Avis d'audience

(4) Dès qu'il est ainsi avisé, l'officier compétent signifie au membre soupçonné d'avoir contrevenu au code de déontologie un avis écrit de l'audience accompagné des documents suivants :

(a) a copy of any written or documentary evidence that is intended to be produced at the hearing;

(b) a copy of any statement obtained from any person who is intended to be called as a witness at the hearing; and

(c) a list of exhibits that are intended to be entered at the hearing.

Marginal note: Contents of notice

(5) A notice of hearing served on a member pursuant to subsection (4) may allege more than one contravention of the Code of Conduct and shall contain

(a) a separate statement of each alleged contravention;

(b) a statement of the particulars of the act or omission constituting each alleged contravention;

(c) the names of the members of the adjudication board; and

(d) a statement of the right of the member to object to the appointment of any member of the adjudication board as provided in section 44.

Marginal note: Statement of particulars

(6) Every statement of particulars contained in a notice of hearing in accordance with paragraph (5)(b) shall contain sufficient details, including, where practicable, the place and date of each contravention alleged in the notice, to enable the member who is served with the notice to determine each such contravention so that the member may prepare a defence and direct it to the occasion and events indicated in the notice.

Marginal note: Restriction

(7) No hearing may be initiated by an

a) une copie de la preuve écrite ou documentaire qui sera produite à l'audience;

b) une copie des déclarations obtenues des personnes qui seront citées comme témoins à l'audience;

c) une liste des pièces qui seront produites à l'audience.

Note marginale : Contenu de l'avis

(5) L'avis d'audience signifié à un membre en vertu du paragraphe (4) peut alléguer plus d'une contravention au code de déontologie et doit contenir les éléments suivants :

a) un énoncé distinct de chaque contravention alléguée;

b) un énoncé détaillé de l'acte ou de l'omission constituant chaque contravention alléguée;

c) le nom des membres du comité d'arbitrage;

d) l'énoncé du droit d'opposition du membre à la nomination de tout membre du comité d'arbitrage comme le prévoit l'article 44.

Note marginale : Énoncé détaillé

(6) L'énoncé détaillé visé à l'alinéa (5)b) doit être suffisamment précis et mentionner, si possible, le lieu et la date où se serait produite chaque contravention alléguée dans l'avis d'audience, afin que le membre qui en reçoit signification puisse connaître la nature des contraventions alléguées et préparer sa défense en conséquence.

Note marginale : Restriction

(7) L'officier compétent ne peut

appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member if the informal disciplinary action referred to in paragraph 41(1)(g) has been taken against the member in respect of that contravention.

Marginal note: Limitation period

(8) No hearing may be initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member after the expiration of one year from the time the contravention and the identity of that member became known to the appropriate officer.

...

Marginal note: Sanctions

45.12 ...

(3) Where an adjudication board decides that an allegation of contravention of the Code of Conduct by a member is established, the board shall impose any one or more of the following sanctions on the member, namely,

(a) recommendation for dismissal from the Force, if the member is an officer, or dismissal from the Force, if the member is not an officer;

(b) direction to resign from the Force and, in default of resigning within fourteen days after being directed to do so, recommendation for dismissal from the Force, if the member is an officer, or dismissal from the Force, if the member is not an officer;

(c) recommendation for demotion, if the member is an officer, or demotion, if the member is not an officer; or

convoquer une audience en vertu du présent article relativement à une contravention au code de déontologie censément commise par un membre à qui la mesure disciplinaire simple visée à l'alinéa 41(1)g) a déjà été imposée à l'égard de cette contravention.

Note marginale : Prescription

(8) L'officier compétent ne peut convoquer une audience en vertu du présent article relativement à une contravention au code de déontologie censément commise par un membre plus d'une année après que la contravention et l'identité de ce membre ont été portées à sa connaissance.

...

Note marginale : Peines

45.12 ...

(3) Si le comité d'arbitrage décide qu'un membre a contrevenu au code de déontologie, il lui impose une ou plusieurs des peines suivantes :

a) recommander que le membre soit congédié de la Gendarmerie, s'il est officier, ou, s'il ne l'est pas, le congédier de la Gendarmerie;

b) ordonner au membre de démissionner de la Gendarmerie, et si ce dernier ne s'exécute pas dans les quatorze jours suivants, prendre à son égard la mesure visée à l'alinéa a);

c) recommander la rétrogradation du membre, s'il est officier, ou, s'il ne l'est pas, le rétrograder;

(d) forfeiture of pay for a period not exceeding ten work days.

Marginal note: Informal disciplinary action

(4) In addition to or in substitution for imposing a sanction under subsection (3), an adjudication board may take any one or more of the informal disciplinary actions referred to in paragraphs 41(1)(a) to (g).

...

PART V

Discharge and Demotion

Ground for Discharge or Demotion

Marginal note: Ground for discharge or demotion

45.18 (1) Any officer may be recommended for discharge or demotion and any other member may be discharged or demoted on the ground, in this Part referred to as the “ground of unsuitability”, that the officer or member has repeatedly failed to perform the officer’s or member’s duties under this Act in a manner fitted to the requirements of the officer’s or member’s position, notwithstanding that the officer or member has been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties.

...

R.S., 1985, c. 8 (2nd Supp.), s. 16.

Marginal note: Notice of intention

45.19 (1) Before any officer is recommended for discharge or demotion under this Part or any other member is discharged or demoted under this Part, the appropriate officer

d) imposer la confiscation de la solde pour une période maximale de dix jours de travail.

Note marginale : Mesure disciplinaire simple

(4) Le comité d’arbitrage peut, en outre ou à la place des peines visées au paragraphe (3), imposer une ou plusieurs des mesures disciplinaires simples visées aux alinéas 41(1)a) à g).

...

PARTIE V

Renvoi et rétrogradation

Motifs de renvoi ou de rétrogradation

Note marginale : Motifs de renvoi ou de rétrogradation

45.18 (1) Le renvoi ou la rétrogradation d’un officier peut être recommandé, ou tout autre membre peut être renvoyé ou rétrogradé, pour le motif, appelé dans la présente partie « motif d’inaptitude », qu’il a omis, à plusieurs reprises, d’exercer de façon satisfaisante les fonctions que lui impose la présente loi, en dépit de l’aide, des conseils et de la surveillance qui lui ont été prodigués pour l’aider à s’amender.

...

L.R. (1985), ch. 8 (2e suppl.), art. 16.

Note marginale : Avis d’intention

45.19 (1) Un officier ne peut faire l’objet d’une recommandation de renvoi ou de rétrogradation et un autre membre ne peut être renvoyé ni rétrogradé, en vertu de la présente

shall serve the officer or other member with a notice in writing of the intention to recommend the discharge or demotion of the officer or to discharge or demote the other member, as the case may be.

Marginal note: Contents of notice

(2) A notice of intention served on an officer or other member under subsection (1) shall include

(a) particulars of the acts or omissions constituting the ground of unsuitability on which it is intended to base the recommendation for discharge or demotion or the discharge or demotion, as the case may be;

(b) where the officer or other member is not a probationary member, a statement of the right of the officer or other member to request, within fourteen days after the day the notice is served, a review of the officer's or member's case by a discharge and demotion board; and

(c) where the officer or other member is a probationary member, a statement of the right of the officer or other member to make, within fourteen days after the day the notice is served, written representations to the appropriate officer.

Marginal note: Opportunity to examine material

(3) An officer or other member who is served with a notice under subsection (1) shall be given a full and ample opportunity to examine the material relied on in support of the recommendation for discharge or demotion or the discharge or demotion, as the case may be.

Marginal note: Request for review

(4) An officer or other member, except

partie, avant que l'officier compétent ne lui ait signifié, par écrit, un avis d'intention à cet effet.

Note marginale : Contenu de l'avis

(2) L'avis d'intention visé au paragraphe (1) contient les éléments suivants :

a) un exposé détaillé des actes ou des omissions constituant le motif d'inaptitude devant servir de fondement à la sanction projetée;

b) si l'officier ou l'autre membre n'est pas un membre stagiaire, la mention de son droit de demander, dans les quatorze jours suivant la signification de l'avis, la révision de sa cause par une commission de licenciement et de rétrogradation;

c) si l'officier ou l'autre membre est un stagiaire, la mention de son droit de faire, dans les quatorze jours suivant la signification de l'avis, des observations écrites à l'officier compétent.

Note marginale : Possibilité d'examen de la documentation

(3) L'officier ou l'autre membre à qui est signifié l'avis visé au paragraphe (1) doit avoir toute latitude pour examiner la documentation ou les pièces présentées à l'appui de la sanction projetée.

Note marginale : Demande de révision

(4) L'officier ou l'autre membre, autre

a probationary member, who is served with a notice under subsection (1) may, within fourteen days after the day the notice is served, send to the appropriate officer a request in writing for a review of the officer's or member's case by a discharge and demotion board.

Marginal note: Request to be forwarded to designated officer

(5) An appropriate officer shall forthwith after receiving a request under subsection (4) forward the request to the officer designated by the Commissioner for the purposes of this section.

Marginal note: Written representations

(6) A probationary member who is served with a notice under subsection (1) may, within fourteen days after the notice is served, make written representations to the appropriate officer.

Marginal note: Notice of decision

(7) Where an officer or other member, except a probationary member, who is served with a notice under subsection (1) does not request a review of the officer's or member's case by a discharge and demotion board within the time limited for doing so, the appropriate officer shall serve the officer or other member with a notice in writing of the decision to recommend discharge or demotion of the officer or to discharge or demote the member, as the case may be.

Marginal note: Idem

(8) Where a probationary member who is served with a notice under subsection (1) does not make written representations to the appropriate

qu'un membre stagiaire, à qui est signifié l'avis visé au paragraphe (1) peut, dans les quatorze jours suivant la signification de cet avis, demander par écrit à l'officier compétent la révision de sa cause par une commission de licenciement et de rétrogradation.

Note marginale : Transmission de la demande à l'officier désigné

(5) Dès qu'il reçoit la demande visée au paragraphe (4), l'officier compétent la transmet à l'officier désigné par le commissaire pour l'application du présent article.

Note marginale : Représentations écrites

(6) Le membre stagiaire à qui est signifié l'avis visé au paragraphe (1) peut, dans les quatorze jours suivant la signification de cet avis, faire des observations écrites à l'officier compétent.

Note marginale : Avis de la décision

(7) Lorsque l'officier ou l'autre membre, à l'exception d'un membre stagiaire, à qui est signifié l'avis visé au paragraphe (1) ne demande pas la révision de sa cause par une commission de licenciement et de rétrogradation dans le délai prévu, l'officier compétent lui signifie un avis écrit de la décision recommandant ou imposant la sanction visée à ce paragraphe.

Note marginale : Idem

(8) Lorsque le membre stagiaire à qui est signifié l'avis visé au paragraphe (1) ne fait pas d'observations écrites à l'officier compétent dans le délai

officer within the time limited for doing so, the appropriate officer shall serve the probationary member with a notice in writing of the decision to recommend discharge of the probationary member or to discharge the probationary member, as the case may be.

Marginal note: Consideration of written representations

(9) An appropriate officer shall forthwith after receiving written representations pursuant to subsection (6) consider the representations and either

(a) direct that the probationary member be retained in the Force; or

(b) serve the probationary member with a notice in writing of the decision to recommend discharge of the probationary member or to discharge the probationary member, as the case may be.

Marginal note: Effective date

(10) A member, other than an officer, who is served with a notice under subsection (7), (8) or (9) is discharged on such day as is specified in the notice or is demoted on such day and to such rank or level as is specified in the notice, as the case may be.

Definition of probationary member

(11) In this section, probationary member means a member with less than two years of service in the Force.

R.S., 1985, c. 8 (2nd Supp.), s. 16;
1993, c. 34, s. 111(F).

...

prévu, l'officier compétent lui signifie un avis écrit de la décision recommandant ou imposant la sanction prévue à ce paragraphe.

Note marginale : Étude des observations écrites

(9) Dès qu'il reçoit les observations écrites prévues au paragraphe (6), l'officier compétent étudie celles-ci et, selon le cas :

a) ordonne que le membre stagiaire continue à faire partie de la Gendarmerie;

b) signifie par écrit au membre stagiaire la décision de recommander son renvoi, s'il est officier, ou, s'il ne l'est pas, de le renvoyer.

Note marginale : Date d'entrée en vigueur

(10) Un membre qui n'est pas officier et à qui est signifié un avis en vertu des paragraphes (7), (8) ou (9) est, selon le cas, soit renvoyé à la date prévue à l'avis, soit rétrogradé au grade ou à l'échelon indiqué à l'avis à la date qui y est prévue.

Définition de membre stagiaire

(11) Au présent article, membre stagiaire s'entend d'un membre qui compte moins de deux ans de service au sein de la Gendarmerie.

L.R. (1985), ch. 8 (2e suppl.), art. 16;
1993, ch. 34, art. 111(F).

...

Royal Canadian Mounted Police Act

Commissioner's Standing Orders (Probationary Member)

...

Stay of Discharge

4. (1) Subject to subsection (2), a probationary member may appeal to the Probationary Review Officer, on any ground, the decision referred to in subsections 45.19(7), (8) and (9) of the Act.

...

5. (1) The Probationary Review Officer shall decide an appeal made pursuant to Section 4, on the basis of:

- (a) the material referred to in subsection 45.19(3) of the Act,
- (b) the decision being appealed, and
- (c) the statement of appeal.

...

...

Sursis à l'exécution de la décision

4. (1) Sous réserve du paragraphe (2), le membre stagiaire peut interjeter l'appel, quel que soit le motif, devant l'agent d'évaluation des stagiaires, de la décision visée aux paragraphes 45.19(7), (8) et (9) de la Loi.

...

5. (1) L'agent d'évaluation des stagiaires étudie l'affaire portée en appel en vertu de l'article 4 en se fondant sur les documents suivants :

- a) la documentation visée au paragraphe 45.19(3) de la Loi;
- b) la décision dont il est interjeté appel;
- c) Le mémoire d'appel.

...

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF MADAM JUSTICE HENEGHAN DATED MAY 20, 2016 (AMENDED MAY 24, 2016, NO. T-234-15)

DOCKET: A-221-16

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA v. JAIME HERRERA-MORALES

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 15, 2017

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NADON J.A.
DAWSON J.A.

DATED: AUGUST 1, 2017

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