Federal Court of Appeal  Cour d'appel fédérale

Date: 20171004

Docket: A-351-16

Citation: 2017 FCA 204

CORAM: **WEBB J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

CONSTABLE ROBERT McBAIN

Respondent

Heard at Edmonton, Alberta, on October 4, 2017.
Judgment delivered from the Bench at Edmonton, Alberta, on October 4, 2017.

REASONS FOR JUDGMENT OF THE COURT BY: BOIVIN J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on October 4, 2017).

BOIVIN J.A.

[1] The Crown appeals from a judgment of Mr. Justice Manson of the Federal Court (the Judge) rendered on July 19, 2016 (indexed as 2016 FC 829 (the Decision)). The Judge granted the respondent's application for judicial review of a decision made by the Royal Canadian Mounted Police (RCMP) Commissioner (the Commissioner). The Commissioner had been seized of an administrative appeal by the respondent from a decision of the RCMP Adjudication

Board (the Board), wherein the Board found the respondent had conducted himself in a disgraceful manner and ordered him to resign from the RCMP within fourteen days or be dismissed. The Commissioner found that the Board had breached the respondent's right to procedural fairness, but confirmed its finding and sanction on the basis that the outcome was legally inevitable. In this appeal, this Court must determine whether the Judge erred in granting the respondent's application on the basis of a procedural fairness breach and remitting the matter back to a differently constituted Board for redetermination.

[2] On an appeal from an application for judicial review, the task of our Court is to determine whether the judge identified the proper standard of review and applied it correctly. This Court must thus "step into the shoes" of the judge and focus on the administrative decision at issue (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47).

[3] The Judge in his reasons underwent a complete review of the facts and procedural history (paras. 2-37). As such, only a brief summary will be provided here.

[4] The respondent was the subject of a disciplinary proceeding before the Board (now, the Conduct Board) for allegedly having sexual intercourse during a contemporaneous professional interaction with a citizen. During the hearing, the Board heard considerable amounts of inadmissible evidence relating to whether the sexual intercourse was consensual and to the respondent's unforthcoming conduct following the incident. The Board relied heavily on this

evidence in its reasons. It ultimately refused the parties' joint proposal on sanction (a reprimand and forfeiture of ten days' pay), and ordered the respondent to resign.

[5] The respondent appealed the Board's decision to the Commissioner on the basis that the proceeding was procedurally unfair. The Commissioner referred the appeal to the RCMP External Review Committee (the Committee) for a recommendation, as required by subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 (the Act). The Committee found there were serious breaches of the respondent's right to procedural fairness and recommended that the Commissioner allow the respondent's appeal. It recommended ordering a new hearing or, in the alternative, accepting the parties' joint recommendation on sanction.

[6] The Commissioner agreed that the respondent's right to procedural fairness was breached, but he decided to render the decision that should have been rendered and thus found that a new hearing would inevitably have resulted in the same outcome and he made the order himself.

[7] Seized of the respondent's judicial review application, the Judge found that the Commissioner's decision failed to cure the procedural fairness issues that had occurred at the initial stage (para. 51), and therefore ordered that a new hearing be held before a differently constituted Board.

[8] The question of whether an administrative decision-maker complied with the duty of procedural fairness is reviewed for correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79).

[9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).

[10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).

[11] In this case, there was also a statutory requirement on the Commissioner to justify his reasons for departing from the recommendation made by the Committee (the Act, subsection 45.16(6)).

[12] We do not agree with the Commissioner that the outcome in this case was legally inevitable (*Mobil Oil*). The Board had departed from a joint submission on sanction, and it relied heavily on inadmissible evidence in reaching its decision. It is far from certain that the Board

would have reached the same result had the procedural fairness breaches not occurred. The Crown acknowledged that *Mobil Oil* does not apply in this case.

[13] Nor do we agree that the proceedings before the Commissioner cured the procedural fairness breaches. *Taiga Works* adopts the five factors outlined by De Smith, Woolf & Jowell in *Judicial Review of Administrative Action, 5th ed.* (London: Sweet & Maxwell, 1995) at 489-90, to determine whether an appellate proceeding has cured earlier procedural defects. These are: (i) the gravity of the error committed at first instance; (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing; (iii) the seriousness of the consequences for the individual; (iv) the width of the powers of the appellate body; and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.

[14] In this case, the errors at first instance were serious, and it is likely that those errors permeated the proceedings before the Commissioner when he considered inadmissible evidence. It was not disputed that the consequences for the respondent were serious and that the Commissioner remained bound by the same duty of procedural fairness toward the respondent. In this case, the Commissioner, relying on *Mobil Oil*, did not proceed *de novo* and reached his decision on the basis of the record before him, and this record was tainted by earlier breaches of procedural fairness.

[15] Therefore, we are all of the view that the Commissioner's refusal to order a new hearing was a legal error. The Judge arrived at the same conclusion and we agree with his reasons for so

finding. In his review of the Commissioner's decision, he identified the proper standard of review and he applied it correctly. He committed no error that would warrant the intervention of this Court.

[16] For these reasons, the appeal will be dismissed, with costs.

"Richard Boivin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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