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Court File No.

FEDERAL COURT

B E T W E E N:

(Court Seal)

Evan **WIOME**

Applicant

and

Attorney General of Canada

Respondent

APPLICATION UNDER section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on pages 3 and 4.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date _____ Issued by _____
(Registry Officer)

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APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of the decision dated 4 March 2024 (the Decision) made by the Commander (Comd) 3rd Canadian Division (3rd Cdn Div), a Review Authority under the Code of Service Discipline, unreasonably rejecting the request of the Applicant to mitigate the sanction imposed by an Officer Conducting a Summary Hearing (OCSH) on 29 November 2023.

THE APPLICANT MAKES APPLICATION FOR:

1. An order in the nature of *certiorari* quashing the Decision, in which the Review Authority refused, unreasonably and without sufficient and intelligible reasons, to mitigate, through substitution or commutation, the sanction imposed by the OCSH on 29 November 2023;
2. An order in the nature of *mandamus* compelling the Review Authority to mitigate, through substitution or commutation, the sanction imposed by the OCSH on 29 November 2023, made unreasonably and without transparent and intelligible reasons;
3. Costs of this application; and
4. Such further and other relief as counsel may advise and the Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

General

5. The Applicant, Captain Evan Wiome is a commissioned officer of the Regular Force component of the Canadian Forces (“CF”). He joined the Regular Force in 2006 as an armoured officer.

6. On 11 November 2023, Captain Wiome was charged with four service infractions alleged to have occurred five months earlier, on or about 8 June 2023.

7. On 29 November 2023, Captain Wiome was tried by an Officer Conducting a Summary Hearing (“OCSH”) under the Code of Service Discipline.

8. Prior to the summary hearing, Captain Wiome held the rank of major, a rank to which he had been promoted on 14 April 2023. Upon finding (then) Major Wiome guilty of two service infractions, the OCSH imposed a sanction of “reduction in rank”. This is the most severe sanction available to any OCSH under the Military Justice at the Unit Level (“MJUL”). Major Wiome was reduced to the rank of captain.

9. The OCSH failed to provide intelligible reasons both for the finding of guilt and the sanction. Captain Wiome sought review only of the sanction.

10. The Review Authority failed to acknowledge the scope of the shortcomings of the OCSH reasons. By letter dated 4 March 2024, the Review Authority, like the OCSH before him, failed to offer reasonable and transparent justification why a lesser sanction would not have met the objectives and principles of sanctions.

Background

11. At the time of the summary hearing, Captain Wiome was the Officer Commanding (“OC”) Administration Company at the 3rd Cdn Div Training Centre (“3CDTC”), located at Canadian Forces Base (“CFB”) Wainwright. The incident that gave rise to the charges against Captain Wiome occurred at CFB Gagetown on or about 8 June 2023. At the material time, Captain Wiome held the rank of major and was the OC A Squadron at the Royal Canadian Armoured Corps School (“RCACS”). This was a training squadron in a training establishment.

12. The allegations were reported over four months later, after Captain Wiome had been posted to 3CDTC. The allegations were raised by select junior officers who had been trainees in Captain Wiome’s squadron at the RCACS. All of these junior officers were subsequently posted to units other than 3CDTC and the RCACS. The allegations were investigated by a non-commissioned member at 3CDTC.

13. Four charges were laid on 11 November 2023. All charges were laid under para 120.03(i) of the Queen’s Regulations and Orders for the Canadian Forces (“QR&O”). This provision is a “catch all” regarding conduct relating to behaviour that “... adversely affects the discipline, efficiency or morale of the Canadian Forces”.

14. Captain Wiome’s commanding officer (“CO”), Lieutenant-Colonel (“LCol”) Barker, referred the charges to a higher ranked officer, Colonel Reekie, the Chief of Staff (“COS”) for 3rd Cdn Div. Colonel Reekie was not the officer to whom LCol Barker is responsible for matters of discipline.

Summary Hearing

15. A summary hearing is an inquisitorial process, entirely under the control of the OCSH. An OCSH lacks any hallmarks of judicial independence and has negligible legal training. An accused cannot “plead guilty” before a summary hearing. An accused can admit to some or all of the particulars of one or more charges.

16. Major Wiome, as he then was, objected to the characterization of some of the allegations. Consequently, he chose to present evidence to clarify those issues.

17. On 29 November 2023, the OCSH found Major Wiome guilty of two of the charges that had been referred to him: charges number 1 and 2. The OCSH found Major Wiome not guilty of charge number 3. The OCSH chose not to proceed with charge number 4 due to insufficiency of evidence.

18. The OCSH imposed the sanction of “reduction in rank”, reducing Major Wiome to the rank of captain.

19. As required at law, the OCSH reduced his reasons to writing for both his findings of guilt and the sanction he imposed. The OCSH purportedly sent these reasons to Captain Wiome on 29 November 2023. Due to intervening factors, Captain Wiome received these reasons on 6 December 2023.

20. The OCSH’s written reasons consisted of three pages of brief hand-written notes. Of these, one page was devoted to the reasons for the findings of guilt, one page was devoted to the reasons for the sanction, and one page, consisting of one paragraph, was devoted to the reasons for not proceeding with the fourth charge.

21. The three pages of brief hand-written notes, combined with a 3-page copy of the Charge Sheet, constituted the entirety of the record of the summary hearing presented to Captain Wiome at that time. No audio or video recordings were made. The written reasons offered by the OCSH did not indicate whether they were made contemporaneously with the hearing, or thereafter.

22. The page describing the findings of guilt offered no intelligible findings of fact. It merely listed witnesses who were heard and conclusory statements indicating that the OCSH found that Major Wiome (as he then was) committed two service infractions.

23. The OCSH also offered a conclusory statement that Major Wiome (as he then was) made an honest and reasonable mistake of fact regarding charge number 3. The notes indicated three witnesses upon whose testimony the OCSH purportedly relied.

24. The OCSH's "reasons" for his findings concluded with generalized statements about the importance of specific factors in military organizations but offered no relevant findings of fact.

25. The OCSH stated that he chose not to proceed with the fourth charge due to "... insufficient detail in the witness statements provided to the investigation ...".

26. In presenting his decision regarding sanction, the OCSH presented three specific statements of what he described as "mitigating factors". He wrote that he found Captain Wiome's "... actions to have been contrary to the QR&Os & to Trusted to Serve (specifically pages 30 & 31) ...", and concluded with the statements:

- (a) “This summary hearing imposes the following sanction: reduction in rank (Maj – Capt)”; and
- (b) “Conduct, actions & judgement inconsistent with a sr officer entrusted to lead HM forces in combat.”

27. There was no discussion, description, or elaboration of any objectives or principles of sanctions. There was no explanation why the most severe sanction available to any OCSH was necessary in this specific circumstance to maintain discipline, efficiency, and morale.

28. The OCSH demonstrated a lack of understanding of the distinction between aggravating, mitigating, and neutral factors, and described no aggravating factors.

29. There was no analysis.

30. Although the reasons for the findings of guilt were similarly deficient, Captain Wiome did not seek review of the findings of guilt.

31. As a result of the excessive sanction imposed on Captain Wiome, he became suicidal and had to be hospitalized from 30 November to 4 December 2023. He received the OCSH’s written reasons only after being discharged from the hospital.

Request For Review

32. Captain Wiome sought review of the sanction imposed by the OCSH.

33. A request for review must normally be brought within 14 days of the receipt of the reasons from the OCSH.

34. On 6 December 2023, Captain Wiome requested from the Review Authority, Comd 3rd Cdn Div, an extension of the normal 14-day limitation period. The summary hearing was held approximately two weeks before the year-end block leave period. Adherence to the limitation periods stipulated in the MJUL policy manual would have required all parties to the process – the Review Authority, the OCSH, and Captain Wiome – to submit representations and responses during this block leave period. Additionally, Captain Wiome’s mental health crisis impaired his ability to present a timelier request for review.

35. On 7 December 2023, the Review Authority granted Captain Wiome an extension until 31 January 2024 to submit his request for review.

36. Two weeks before this deadline, on 16 January 2024, Captain Wiome submitted a comprehensive request for review. His principal arguments were:

- (a) The OCSH failed to provide intelligible reasons justifying why reduction in rank was the minimal sanction necessary to maintain discipline, efficiency, and morale; and
- (b) His security of the person, guaranteed under s 7 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), was infringed in a manner inconsistent with principles of fundamental justice and this deprivation was not demonstrably justified in a free and democratic society.

37. Captain Wiome described the statutory objectives and principles of sanctions under the Code of Service Discipline. He described the fundamental principle of

proportionality and that "... a sanction should be the least severe sanction required to maintain the discipline, efficiency and morale of the Canadian Forces." He offered precedents describing factors and principles relating to circumstances in which reduction in rank was, and was not, imposed under the Code of Service Discipline.

38. Captain Wiome demonstrated that, when reduction in rank has been considered under the Code of Service Discipline, decision-makers consistently sought the evidence from an offender's chain of command, particularly their immediate superiors, regarding their trust and confidence in the offender. The precedents indicated that such evidence was a crucial factor in determining whether "reduction in rank" should be imposed.

39. Captain Wiome described that both his current CO, and his CO at the material time of the infractions, were called as witnesses. Both were in a position to testify regarding whether they continued to have confidence in Captain Wiome's ability to command. The OCSH, who controlled the hearing process, did not ask either of these witnesses any questions regarding Captain Wiome's ability to command.

OCSH Response

40. Under the CF's MJUL policy, when a CF member seeks a review of a finding or sanction from a summary hearing, the OCSH normally has 7 days, from receipt of the request for review, to respond.

41. The OCSH replied to the Review Authority via email on 25 January 2024 with his response to the request for review. This response was provided to Captain Wiome on 26 January 2024.

42. The OCSH's response was an email of six paragraphs, enclosing 18 pages of notes containing a mix of type-written headings and questions and hand-written notes. The hand-written notes contained both questions and what appeared to be responses from select witnesses. The notes did not offer any analysis.

43. The OCSH's email response offered two paragraphs of purported factual conclusions. This was the first occasion the OCSH offered written findings of fact.

44. At this point, the OCSH first introduced the conclusion that, since Captain Wiome had lost the confidence of three of the complainants who had raised allegations against him, reduction in rank was "... the only acceptable minimum sanction ...".

45. Not all the complainants expressed a loss of confidence in Captain Wiome's ability to command. Lieutenant ("Lt") "M", whose spouse was present at the material time of the service infractions, did not share his colleagues' views.

46. None of Captain Wiome's current subordinates were called as witnesses regarding confidence in his ability to command.

47. The OCSH's response was silent on the OCSH's failure to seek the views of Captain Wiome's CO at the time of the infractions or his CO at the time of his summary hearing, even though both officers were called as witnesses.

48. The OCSH indicated that Captain Wiome did not demonstrate remorse. The OCSH asserted that precedents offered by Captain Wiome were not relevant because the accused in those matters "... plead guilty demonstrating remorse and maturity ..." and that those elements were not present in the summary hearing.

49. The OCSH indicated that Captain Wiome did not admit to the particulars of the charges, but that Captain Wiome did not dispute several of the allegations. The OCSH acknowledged that Captain Wiome disputed specific allegations relating to "allusions to sex tourism". The OCSH accepted Captain Wiome's explanation regarding those allegations.

50. The OCSH ignored or discounted evidence of apologies by Captain Wiome, including evidence from Lt "M", who testified that Captain Wiome had apologized to both him, and his spouse, and that he believed the apology to be genuine.

51. The OCSH expressly made note of the fact that Captain Wiome had demonstrated character and integrity in the handling of what the OCSH characterized as the "Hu" and "Boudreau" incidents. These were not factored into his analysis.

52. The OCSH justified the sanction based upon the conclusion that a breach of leadership could only be punished with "reduction in rank".

Captain Wiome's Reply

53. Under the CF's MJUL policy, the CF member requesting review then normally has 7 days to reply to the OCSH response. Captain Wiome submitted his reply to the OCSH's response on 2 February 2024.

54. In his reply, Captain Wiome elaborated on the fact that an accused cannot plead guilty in a summary hearing and that the OCSH disregarded evidence of contrition and remorse. He demonstrated that, even with a second opportunity to justify the proportionality of the sanction, the OCSH had failed to offer any analysis, and simply relied upon a conclusory assertion.

Review Authority Decision

55. Under the CFs MJUL policy, a Review Authority will provide his decision within 14 days of receipt of the CF member's reply to the OCSH response. For Captain Wiome, that would have established 16 February 2024 as the deadline for the decision.

56. On 16 February 2024, Captain Wiome was informed that the Review Authority had granted himself a 7-day extension in order to consider the review and to make a decision. The Review Authority eventually reduced his decision to writing on 4 March 2024. It was provided to Captain Wiome on the same day.

The OCSH Failed to Provide Intelligible and Transparent Reasons

57. The OCSH's written reasons consisted of conclusory statements, devoid of analysis. They lacked intelligibility and transparency.

58. In contrast, Captain Wiome's request for review provided a detailed explanation of the objectives and principles of sanctions and described how the OCSH failed to provide adequate explanation and analysis for his selection of "reduction in rank" as the minimum sanction necessary to maintain discipline, efficiency, and morale.

59. The OCSH relied principally on the views of select former subordinates, who were complainants regarding the service infractions, to justify the most severe sanction available in the MJUL process. He disregarded relevant evidence that did not support this outcome and failed to seek relevant and crucial evidence.

60. Even with the benefit of this robust explanation from Captain Wiome, and an opportunity to re-explain his reasons in the review process, the OCSH failed to offer intelligible reasons why a lesser sanction was insufficient to maintain discipline, efficiency, and morale of the CF.

The Review Authority Failed to Identify the OCSH's Errors

61. The Review Authority purported to summarize the evidence provided at the summary hearing. The Review Authority could not rely on the OCSH's initial reasons, as those reasons were devoid of factual summary. The Review Authority relied principally upon the response offered by the OCSH, dated 25 January 2024.

62. The Review Authority cited the MJUL policy manual for the basis of an assertion that he must exercise restraint in reviewing the decision of an OCSH.

63. The Review Authority then cited *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, asserting that he would review the OCSH's decision on the basis of "reasonableness".

64. Instead of reviewing whether the OCSH's decision was reasonable, and whether the OCSH provided reasons that were sufficiently transparent and intelligible

to justify using the most severe sanction available to the OCSH, the Review Authority presented his own analysis and his own justification for the sanction imposed.

65. In so doing, the Review Authority conducted a *de novo* determination.

66. The Review Authority failed to review the actual decision made by the OCSH in order to determine whether it was reasonable. The Review Authority failed to review the reasons offered by the OCSH.

67. In his *de novo* review, the Review Authority focused solely on what he viewed as aggravating factors and omitted relevant mitigating or neutral factors, which had been raised in the summary hearing and the review process. The Review Authority also downplayed the new information of Captain Wiome's suicidal ideation.

68. The Review Authority commenced his explanation with the statement: "... In addition, the record as a whole, including but not limited to the evidence before the OCSH (which was attached to his response at ref C) and other applicable orders and policy are relevant in the review of severity of sanctions."

69. The "record" to which the Review Authority appeared to refer is uncertain. By his statement, it appeared that the "record as a whole" upon which he relied included evidence other than evidence that was before the OCSH.

70. The Review Authority indicated that the OCSH attached "evidence" to the OCSH's response dated 25 January 2024 – presumably referring to the 18 pages of notes that the OCSH disclosed to Captain Wiome for the first time in the review process.

71. It remains unclear what additional evidence the Review Authority may have considered, in addition to the notes that the OCSH provided.

72. In his *de novo* review, the Review Authority observed, contrary to the OCSH's assertion of an absence of remorse, that Captain Wiome "... acknowledged repeatedly that what [he] did was wrong ...".

73. In his conclusion, the Review Authority asserted that the impact of the sanction was directly proportional to Captain Wiome's actions. However, the Review Authority offered no analysis of how it was proportional.

74. The lack of analysis and intelligibility of reasons in the justifications of both the OCSH and the Review Authority can be contrasted with the detailed representations offered by Captain Wiome in his request for review on 16 January 2024 and his reply, dated 2 February 2024, to the OCSH's re-explanation.

The Review Authority's Decision Was Unreasonable

75. The Review Authority failed to conduct a proper review of the OCSH's reasons. Instead, the Review Authority conducted a *de novo* review. In so doing, the Review Authority was unreasonable in two distinct, yet related, ways.

76. First, the Decision, including both the reasoning process and the outcome of the Decision, was not a justified, transparent, or intelligible review of the OCSH's decision. The Decision was made without true regard to the actual evidence and decision-making that was before the Review Authority.

77. Second, although the Review Authority is not empowered to conduct a *de novo* review, his *de novo* review did not offer a transparent or intelligible justification for the sanction imposed. The Decision, including both the reasoning process and the outcome of the Decision, was arbitrary and made without true regard to the actual and relevant evidence that was before the Review Authority.

78. The Decision, including both the reasoning process and the outcome of the Decision, failed to remedy the shortcomings of the OCSH's flawed determinations, including the OCSH's failure to consider compelling evidence and legal principles.

79. The Applicant pleads and relies on:

- (a) Section 18.1 of the *Federal Courts Act*;
- (b) the *National Defence Act*, RSC 1985, c N-5, Division 5;
- (c) The *Queen's Regulations and Orders for the Canadian Forces*, notably, but not limited to, Chapters 120 to 124.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (a) The affidavit of Captain Evan Wiome to be sworn in support of this Application and the exhibits thereto;
- (b) The Certified Tribunal Record from the review under Chapter 124 of the QR&O; and
- (c) Such further and other material as counsel may advise and this Honourable Court may permit.

THIS APPLICANT REQUESTS pursuant to Rule 317 of the *Federal Courts Rules* that the Respondent send a certified copy of the following material that may not in the possession of the applicant but is in the possession of the respondent to the Applicant and to the Registry:

1. The full record of all material which was before the Review Authority, or formed part of its files at the time of the Decision, including all documents, memoranda, reports, emails, notes, and other communications considered, prepared and/or collected in the preparation of the Decision;
2. Without limiting the generality of the foregoing, any documents relevant to the adjudication of the applicant's request.

March 28, 2024



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