Federal Court Cour fédérale

Date: 20180119

Docket: T-891-16
T-1197-16

Citation: 2018 FC 52

Ottawa, Ontario, January 19, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARCO CALANDRINI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Marco Calandrini, is a Civilian Member [CM] of the Royal Canadian Mounted Police [RCMP]. In these applications, pursuant to s 18 and s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, he seeks judicial review of a decision to initiate a conduct board hearing against him and a decision to extend the prescribed time for making that decision.

[2] Responsibilities for the promotion and maintenance of good conduct within the RCMP are set out in the Code of Conduct of the RCMP [Code of Conduct]: *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-28, Schedule (Code of Conduct of the Royal Canadian Mounted Police). Decisions regarding any allegation of a breach of the Code of Conduct against an RCMP Member are made by "conduct authorities" pursuant to the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO – Conduct*]. There are three levels of conduct authority with responsibilities which vary according to the severity of the conduct measures they may impose against a subject member: *CSO – Conduct*, ss 2–5.

[3] Decisions made by a conduct authority may be subject to review by a "review authority": *CSO – Conduct*, s 9. If a review authority determines that the conduct measures imposed by a conduct authority are clearly unreasonable or disproportionate, and if it is in the public interest to do so, the review authority may rescind the measures: *CSO – Conduct*, s 9(3). The review authority may then substitute other conduct measures as deemed to be appropriate or initiate a conduct board hearing into the alleged contravention of the Code of Conduct. The conduct board may impose conduct measures up to and including dismissal or a direction to resign: *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act* or the Act], s 45(4).

[4] Subsection 41(2) of the Act imposes a prescription period of one year during which the decision to initiate a conduct board hearing may be made. Under s 47.4(1) of the Act, the Commissioner of the RCMP [Commissioner] is authorized to extend that time when justified. That decision-making power may be delegated by the Commissioner to a member as set out in s 5(2) of the Act.

[5] In this matter, there was an investigation into three alleged violations of the Code of Conduct by the Applicant and conduct measures were imposed by a conduct authority. A review authority subsequently determined that the conduct measures were disproportionate to the nature and circumstances of the contraventions and that a conduct board hearing was required.

[6] In Court file T-891-16, the Applicant challenges the decision of the Commissioner's designate dated May 12, 2016 to grant an extension of time under s 47.4(1) of the Act. In file T-1197-16, the Applicant challenges the decision of the review authority dated May 30, 2016 to initiate a conduct hearing. As the two applications relate to decisions made in a continuous sequence of events they were heard one after the other and one Judgment and Reasons is being issued and will be placed on each file.

II. Background

[7] The Applicant was employed as a CM in the Explosives Training Unit [ETU] which forms part of the Police Sciences School [PSS] of the Canadian Police College [CPC] in Ottawa, Ontario.

[8] Mr. Calandrini was one of the subjects of an investigation into complaints of misconduct at the PSS relating to nudity in the workplace that had been initiated in April 2014. During the investigation, he was suspended with pay until December 17, 2014. This investigation was concluded by an Adjudication Board hearing on December 11, 2014 and the imposition of five days forfeiture of pay for disgraceful conduct on January 16, 2015. Written reasons for that decision were issued on April 13, 2015.

[9] On November 25, 2014, allegations of sexual assault and harassment were brought against Mr. Calandrini by a male co-worker. The allegations were that Mr. Calandrini had on three occasions between August 31, 2012, and October 29, 2013, touched the buttocks, inner thigh area and chest of the other employee while making sexually suggestive remarks. The co-worker objected to the physical contacts when they occurred. He did not report the incidents until he was told that Mr. Calandrini would be returning to the workplace. At that time, the complainant sought help from the RCMP Assistance Program and his union and made a report to the Acting Officer in Charge [A/OIC] of the PSS.

[10] On December 2, 2014, upon being informed of the fresh allegations, the A/OIC directed that a new Code of Conduct investigation be commenced by the RCMP Professional Responsibility Unit [PRU] pursuant to s 40(1) of the Act. The Applicant was temporarily reassigned to another unit pending the outcome of the investigation on December 24, 2014.

[11] In addition to the internal inquiry, the RCMP notified the Ottawa Police Service [OPS]. The OPS conducted an investigation but in February 2015 concluded that they would not proceed with criminal charges. The RCMP investigation then resumed and witness statements were obtained. On or about April 10, 2015, the RCMP investigation was completed and the PRU report was provided to the A/OIC. It was then determined that report should be considered by the Commanding Officer [CO] of the National Headquarters Division, Chief Superintendent [C/Supt] Marty Chesser as the alleged contraventions required a more senior conduct authority. As CO of the Division, C/Supt Chesser could impose a broader range of remedial, corrective or serious measures under the Code of Conduct.

[12] The RCMP was at that time implementing new procedures for the management of discipline inquiries. Under the former procedures, contraventions of the Code of Conduct were referred to adjudication boards. This had resulted in substantial backlogs as the boards dealt with both serious and less serious breaches of the Code. As a result of changes implemented in 2014, contraventions of the Code which could be dealt with at the unit, branch or divisional level were referred to the CO's at each level for conduct meetings with the subject member. The severity of the conduct measures that could be imposed, if the contravention was established, depended on the level of seniority of the CO.

[13] C/Supt Chesser informed Mr. Calandrini by memorandum in June 2015 that he had been designated by the Commissioner to act as the conduct authority with respect to the allegations. C/Supt Chesser stated in the same memorandum that he considered that if the allegations were established, a financial penalty in the range of 25 to 30 days of pay would be considered.

[14] C/Supt Chesser reviewed the investigation reports and met with the Applicant on September 10, 2015, to provide him with an opportunity to respond to the allegations. The investigation was concluded by October 5, 2015. In his Record of Decision, C/Supt Chesser found that all three allegations against Mr. Calandrini were substantiated. He imposed a reduction of five days' pay for each contravention for a total reduction of 15 days' pay as conduct measures under subsection 42(1) of the *RCMP Act*. Mr. Calandrini did not appeal the findings or imposition of conduct measures. It appears from the record that he did not dispute the factual basis of the allegations when interviewed by the OPS and the PRU.

[15] In the Record of Decision, C/Supt Chesser stated that he had taken the following into consideration in determining the appropriate conduct measures:

- that Mr. Calandrini accepted responsibility and was cooperative with the Ottawa Police Service;
- work record (above-average, work ethic);
- desire to resolve the matter quickly / at the earliest opportunity.

[16] The Applicant fulfilled the conduct measures by forfeiting the total of 15 days' pay over three consecutive pay periods in December 2015 and January 2016. It is not clear from the record whether the 5 days imposed by the adjudication board on December 11, 2014 for the other misconduct was also deducted at this time. On February 18, 2016 he was suspended again when complaints by members about the RCMP's handling of the initial investigation came to the attention of the Commissioner and Deputy Commissioner (D/Commr) Peter Henschel, the senior officer responsible for the CPC. As of the date of the hearing of these applications he remained suspended with pay. The matter had come to the attention of the Commissioner in February 2016 through an email from a RCMP Member. A CBC journalist was also asking to see a decision, presumably the written reasons of the adjudication board issued on April 13, 2015.

[17] Assistant Commissioner [A/Commr] Craig MacMillan was at that time the RCMP Professional Responsibility Officer [PRO]. In that role, he had responsibility for three branches of the RCMP concerned with matters relating to conduct, grievances, employment requirements and public complaints.

[18] On January 7, 2016, A/Commr MacMillan met with C/Supt Chesser and Superintendent [Supt] Joanne Robineau, the Employee Management Relations Officer for RCMP Headquarters. The purpose of the meeting was to get feedback on the new conduct management processes roughly a year after they had come into effect on November 28, 2014. This followed the enactment of Bill C-42, *An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts*, 1st Sess, 41st Parl, 2013, (assented to 19 June 2013) SC 2013, c 18. To that end, A/Commr MacMillan was meeting with all of the Divisional Commanders across the country. The object of these meetings was to collect information for a one-year review presentation about the new procedures scheduled for an RCMP Senior Management Meeting in late February.

[19] In preparation for the January 7, 2016 meeting, A/Commr MacMillan had been given a binder containing a brief summary of Mr. Calandrini's file, along with 15 – 20 others relating to conduct and harassment matters at National HQ. The binder had been prepared by the Workplace Relations Branch [WRB]. As stated in his affidavit and elaborated upon in cross-examination, A/Commr MacMillan had only a brief opportunity to do a cursory review of the binder before the meeting with C/Supt Chesser. He recalls only a general discussion with C/Supt Chesser regarding the content of the binder and how the processes had been working over the past year.

[20] Supt Robineau states in her affidavit that she recalls C/Supt Chesser discussing the range of sanctions that could be imposed on a CM at the CPC and what he thought was appropriate. She recalls that A/Commr MacMillan stated that the conduct decisions made by C/Supt Chesser were sound, including the present matter at the CPC. A/Commr MacMillan disagrees with that

statement and says that based on his review of the summaries, he did have concerns with three cases.

[21] On cross-examination, A/Commr MacMillan acknowledged that he provided C/Supt Chesser with some feedback regarding the process used in the conduct hearings and states that any comments regarding specific conduct decisions, if any, would have been preliminary in nature only and subject to further review.

[22] A/Commr MacMillan was designated by the Commissioner as a review authority for conduct measures imposed under the new regime pursuant to s 9 of the *CSO – Conduct*. In that capacity he was also a conduct authority in respect of the subject member for any decision that he decided to review. As review authority and on his own initiative, he could review a decision of a conduct authority to determine if a finding is clearly unreasonable or if a conduct measure that has been imposed is clearly disproportionate to the nature and circumstances of the contravention.

[23] If the review authority determines that a finding of the conduct authority is clearly unreasonable, or a conduct measure is clearly disproportionate, and, if it is in the public interest to do so, the review authority may rescind, vary or augment any conduct measure imposed by the conduct authority and initiate a hearing in accordance with subsection 41(1) of the Act: *CSO – Conduct*, ss 9(3).

[24] On January 8, 2016, the day after the meeting with D/Supt Chesser and Supt Robineau, A/Commr MacMillan requested a review of the measures imposed in three cases, including that of the Applicant, by a conduct advisor to determine if there were any concerns. In his email message, he stated that there was “no rush”. On cross-examination, he said that this was because he was conscious of the heavy burden on the staff in the WRB due to the recent changes. From January 18 to February 17, 2016, A/Commr MacMillan was on bereavement leave. While on leave, he remained in contact with his office.

[25] On February 10, 2016, A/Commr MacMillan became aware that the Commissioner had asked to meet with someone from the Professional Responsibility Sector regarding a conduct file for a CM at the CPC. It appears that this followed the receipt by the Commissioner of an email from an employee at the college. A/Commr MacMillan was advised that the Commissioner had been provided with the information he requested by a colleague. The same day, A/Commr MacMillan sent a follow-up email to the WRB regarding his request dated January 8, 2016, asking that the response be expedited in anticipation of his return to the office the following week.

[26] On February 17, 2016, A/Commr MacMillan attended a brief meeting with the Commissioner, and several others including C/Supt Chesser and D/Commr Henschel. A/Commr MacMillan says that at the outset of the meeting he advised the Commissioner that he had requested an initial review of the Applicant’s file and would subsequently determine whether a review was warranted. A/Commr MacMillan says he further explained that, given the nature of his role in the review process as the review authority, he should refrain from discussing the

details of the Applicant's file. According to A/Commr MacMillan, the meeting lasted no more than five minutes. His recollection of this meeting was supported by handwritten notes made the same day.

[27] A/Commr MacMillan states in his affidavit that at no time did he seek input from the Commissioner regarding the appropriateness of conducting a review under s 9 of the *CSO – Conduct* of the Applicant's conduct file and at no time did the Commissioner ever give him directions or instructions with respect to his determination of whether a review was warranted. He acknowledged on cross-examination that the Commissioner "had a view" about the Calandrini case.

[28] Between February 18 and 26, 2016, CBC News published a series of reports regarding improprieties at the CPC which identified the Applicant as one of the perpetrators. The articles contained quotes attributed to the Minister of Public Safety, the Commissioner and D/ Commr Henschel expressing concern about the situation.

[29] On February 19, 2016, A/Commr MacMillan was provided with a report prepared by Sgt David Falls of the National Conduct Management Section (NCMS) and a transit memorandum from C/Supt Mike O'Rielly of the WRB regarding the Applicant's conduct file. In his report, Sgt Falls identified discrepancies between the expected range of conduct measures set out in the RCMP Conduct Measures Guide with regard to allegations of sexual harassment and the conduct measures imposed on the Applicant. Absent significant mitigating factors to be found in the facts of the case, persistent sexual harassment would justify measures in the aggravated range of 20

days financial penalty to dismissal, he reported. The Record of Decision, Sgt Falls said, did not identify factors that would justify the imposition of mitigated conduct measures.

[30] In forwarding the report to A/Commr MacMillan, C/Supt O'Rielly noted that the public interest had not been explicitly addressed in the conduct measures decision and was a significant factor. In the absence of a proper justification for the imposition of mitigated conduct measures, they could be considered as clearly disproportionate in his view.

[31] There is no limitation period prescribed in the *RCMP Act* for the purposes of reviewing the decision of a conduct authority or the conduct measures that it imposes. However, section 41(2) of the *RCMP Act* prescribes that a conduct hearing shall not be initiated against a RCMP member for an alleged contravention of the Code of Conduct after the expiry of one year from the time that the alleged contravention and the identity of the subject member became known to the conduct authority.

[32] The measures that can be imposed where a review authority determines that a finding of a conduct authority is clearly unreasonable, or a conduct measure is clearly disproportionate, without initiating a hearing, are limited to those measures outlined in s 5(1) of the *CSO – (Conduct)* pursuant to s 9(3)(a) and (b) of the *CSO – (Conduct)*. These include demotions, transfers, suspensions without pay, forfeiture of annual leave and financial penalties but do not include dismissal. For a review authority to seek dismissal, the matter must be referred to a conduct board: *RCMP Act*, s 45(4).

[33] The parties agree that the date on which the alleged contraventions and the Applicant's identity became known to the conduct authority was November 25, 2014, being the date on which the A/OIC at the CPC became aware of the complaints rather than the date on which they were brought to C/Supt Chesser's attention. Thus the limitation period set out in s 41(2) of the *RCMP Act* expired on November 25, 2015. As noted above, subsection 47.4(1) of the *RCMP Act* provides that if the Commissioner is satisfied that the circumstances justify an extension, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limited prescribed by s 41(2) of the *RCMP Act.*

[34] On March 1, 2016, the Applicant was served with a Notice of Application by A/Commr MacMillan for an extension of time to initiate a conduct hearing. Chief Superintendent (C/Supt) Raj Gill was at that time designated as the delegated decision-maker for the Commissioner on applications for extensions under s 47.4(1) of the *RCMP Act.*

[35] Over the course of the next two months, A/Commr MacMillan and the Applicant, with the assistance of a Staff Relations Representative [SRR], submitted detailed written submissions to C/Supt Gill, regarding the merits of the application for an extension. For his part, A/Commr MacMillan listed fourteen factors that he argued justified the extension. These included, in his view; that there was a clear public interest in ensuring the RCMP deals properly with complaints of harassment in general and sexual harassment in particular; the contraventions amounted to serious misconduct and harassment; a time extension was required in order to preserve the public's trust; the decision to initiate the application was not influenced by media reports or bias;

the time-lapse was not significant or long and would not cause serious prejudice to the subject member's ability to respond; and there is no express limitation in s 47.4(1) of the *RCMP Act* that prevents the extension of time after the expiry of the limitation period.

[36] The Applicant, through the SRR, responded with arguments that the application was statute barred; motivated by negative media attention about the allegations of misconduct at the CPC; an extension would cause serious prejudice to his ability to respond to the allegations; there was no reasonable explanation for the delay; the review was an abuse of process and precluded by issue estoppel. The delay, he argued, was wholly attributable to administrative inefficiencies and the review authority's lack of diligence.

[37] In reply, A/Commr MacMillan noted that there were approximately 741 conduct cases during the period of November 28, 2014, to December 31, 2015, of which about 685 were handled through a conduct meeting. This represented a significant increase from the 287 annual nine year average for discipline cases under the previous process. These numbers were helpful, he submitted, in understanding the context in which the review process operates and why the *RCMP Act* provided for an extension of time.

[38] In a six-page decision letter issued on May 12, 2016, C/Supt Gill noted that the submissions addressed a number of issues relating to the merits of the review process and that his decision would be confined to the question of whether an extension of the time limitation was justified by the circumstances. He then outlined the history of the proceeding, the applicable

legislation, the documentary record, the submissions received and his mandate as delegated decision-maker.

[39] C/Supt Gill cited *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263, [1985] FCJ No 144 (FCA) [*Grewal*], for the proposition that the authority to grant an extension "must not be exercised arbitrarily or capriciously and the limitation period should only be extended when there are sound reasons for doing so."

[40] In his analysis, C/Supt Gill found that s 47.4(1) of the *RCMP Act* clearly demonstrated Parliament's intent that the Commissioner be authorized to grant an extension of the time limitation in 41(2) of the *RMCP Act* where the Commissioner is satisfied that the circumstances justify such an extension. In this regard, he continued at paragraph 22:

> […] While Parliament has indicated by placing time prescription periods on the ability of a conduct authority to impose a conduct measure or initiate a conduct hearing, in the interest of ensuring the conduct process move in a timely manner, Parliament has also, by virtue of subsection 47.4 (1), recognized that in some cases the one-year time limitations are not realizable, and in order to ensure the viability of the conduct process, has provided the Commissioner with the extension authority.

[41] C/Supt Gill found that the time extension had been requested with due procedural fairness and that there was an absence of a reasonable apprehension of bias. Both parties had been given a fair chance to be heard, to receive full disclosure of materials, and sufficient time to respond. He was persuaded by the arguments advanced by A/Commr MacMillan and summed up his conclusions in the last two paragraphs:

> 25. I determine that the delay in proceedings giving rise to the time extension request is not oppressive nor excessive, that there would be no serious prejudice caused to the Respondent by the granting of the time extension, and that the delay has not sufficiently denied the Respondent access to natural justice or his ability to have a fair due process.
>
> **CONCLUSION:**
>
> 26. The burden is on the Applicant to demonstrate that an extension to the limitation period in respect of the Allegations is justified in the circumstances. Given the totality of the circumstances, and for the reasons set out above, I am satisfied that an extension is warranted. Therefore, as previously stated, I grant the extension from November 25, 2015, until June 2, 2016, a period of twenty-one (21) days from the date of this decision.

[42] On May 30, 2016, Assistant Commissioner (A/Commr) MacMillan, rescinded the previous conduct measures that were imposed on October 5, 2015, and directed that a conduct hearing be initiated against the Applicant. The Notice of Decision informed the Applicant that the previous conduct measures of forfeiture of 15 days' pay was clearly disproportionate to the nature and circumstances of the contraventions and that it is in the public interest to rescind the measures and initiate a conduct hearing pursuant to s 41(1) of the *RCMP Act*. A Notice of Conduct Hearing issued on June 23, 2016, particularized the contraventions, named the conduct board and established a schedule for the procedures to follow.

III. Preliminary matter

[43] On December 1, 2016, the Court granted a motion, in part, pursuant to Rule 317 and Rule 318 of the *Federal Courts Rules*, SOR/98-106, for the production of additional documents contained within the Certified Tribunal Record (CTR) that had been withheld by the Respondent.

[44] The motion resulted in the delivery of additional documents to the Applicant. One document remained in dispute. This was a redacted email from Josianne Phenix, to Sgt Falls dated February 10, 2016, regarding information C/Supt Chesser had received from the Conduct Authority Representative (CAR), prior to making his decision about the conduct measures to impose. The Applicant sought the content as he believed that it contained references to precedents as well as the rationale for the conduct authority's determination that 15 days forfeiture of penalty was an appropriate penalty. The Respondent took the position that the redacted content was not relevant as it was not before the review authority, A/Commr MacMillan, when he made his decision and was, moreover, protected by solicitor client privilege.

[45] In my reasons for decision on the motion, I expressed doubt about the relevance of the email and concluded that the question of privilege would best be determined on the hearing of the judicial review application: *Calandrini v Canada (AG)*, 2016 FC 1331, 274 ACWS (3d) 867. Accordingly, I directed that an unredacted and unedited copy of the email be filed under seal for review by the Court prior to the hearing. This was done and the issue is addressed below.

IV. Relevant Legislation

[46] The following sections of the *RCMP Act* are relevant:

Notice to designated officer	**Avis — officier désigné**
41 (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct and the conduct authority is of the opinion that the conduct measures provided for	**41 (1)** Lorsqu'il apparaît à l'autorité disciplinaire d'un membre que celui-ci a contrevenu à l'une des dispositions du code de déontologie et que, eu égard à la gravité de la contravention et aux circonstances, les mesures

in the rules are insufficient, having regard to the gravity of the contravention and to the surrounding circumstances, the conduct authority shall initiate a hearing into the alleged contravention by notifying the officer designated by the Commissioner for the purpose of this section of the alleged contravention.

disciplinaires prévues dans les règles ne seraient pas suffisantes, elle convoque une audience pour enquêter sur la contravention qui aurait été commise en signalant celle-ci à l'officier désigné par le commissaire pour l'application du présent article.

Limitation or prescription period

(2) A hearing shall not be initiated by a conduct authority in respect of an alleged contravention of a provision of the Code of Conduct by a member after the expiry of one year from the time the contravention and the identity of that member as the one who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated.

Prescription

(2) L'autorité disciplinaire ne peut convoquer une audience, relativement à une contravention au code de déontologie qui aurait été commise par un membre, plus d'un an après que la contravention et l'identité du membre en cause ont été portées à la connaissance de l'autorité disciplinaire qui tient ou fait tenir l'enquête.

[…]

[…]

Representation

47.1 (1) Subject to any rules made under subsection (3) a member or a conduct authority may be represented or assisted by any person in any

> **(a)** presentation of a grievance under Part III;
>
> **(b)** proceeding before a board; or
>
> **(c)** appeal under subsection 45.11(1) or (3).

Représentation

47.1 (1) Sous réserve des règles établies conformément au paragraphe (3), toute personne peut représenter ou assister un membre ou une autorité disciplinaire :

> **a)** lors de la présentation d'un grief sous le régime de la partie III;
>
> **b)** lors des procédures tenues devant une commission;
>
> **c)** lors d'un appel interjeté en vertu des paragraphes 45.11(1) ou (3).

Privilege

(2) If a member or conduct authority is represented or assisted by another person, communications passing in confidence between them in relation to the grievance, proceeding or appeal are, for the purposes of this Act, privileged as if they were

Secret professionnel

(2) Lorsqu'un membre ou une autorité disciplinaire se fait représenter ou assister par une autre personne, les communications confidentielles qu'ils échangent relativement au grief, aux procédures ou à l'appel sont, pour l'application de la présente loi, protégées

communications passing in professional confidence between the member or the conduct authority and their legal counsel.

comme si elles étaient des communications confidentielles échangées entre le membre ou l'autorité disciplinaire et son conseiller juridique.

Rules

(3) The Commissioner may make rules prescribing

> **(a)** the persons or classes of person who may not represent or assist a member or conduct authority; and
>
> **(b)** the circumstances in which a person may not represent or assist a member or conduct authority.

Règles

(3) Le commissaire peut établir des règles pour prescrire :

> **a)** quelles sont les personnes ou catégories de personnes qui ne peuvent représenter ou assister un membre ou une autorité disciplinaire;
>
> **b)** quelles sont les circonstances dans lesquelles une personne ne peut représenter ou assister un membre ou une autorité disciplinaire.

[…]

[…]

Extensions of time limitations

47.4 (1) If the Commissioner is satisfied that the circumstances justify an extension, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limited by any of subsections 31(2), 41(2), 42(2) and 44(1), for the doing of any act described in that subsection and specify terms and conditions in connection with the extension.

Prorogation des délais

47.4 (1) Le commissaire, s'il est convaincu que les circonstances le justifient, peut, de sa propre initiative ou sur demande à cet effet, après en avoir dûment avisé les membres intéressés, proroger les délais prévus aux paragraphes 31(2), 41(2), 42(2) et 44(1) pour l'accomplissement d'un acte; il peut également spécifier les conditions applicables à cet égard.

Exception

(1.1) The notice shall not be given if, in the Commissioner's opinion, giving it might compromise or hinder any investigation of an offence under an Act of Parliament.

Exception

(1.1) Le commissaire n'avise pas les membres intéressés s'il estime que l'avis risque de compromettre la tenue d'une enquête relativement à une infraction à une loi fédérale ou d'y nuire.

Reference to time

(2) Where a time is extended under this section, any reference in this Act to the time shall be construed as a reference to the time as

Mention du délai

(2) Lorsqu'il y a prorogation d'un délai en vertu du présent article, toute mention du délai dans la présente loi s'interprète comme

so extended.

désignant le délai prorogé.

[47] The following section of the *CSO – Conduct* is relevant:

Serious conduct measures

5 (1) A conduct authority referred to in paragraph 2(1)(c) may impose, in addition to any remedial and corrective conduct measures, one or more of the following serious conduct measures against a subject member:

(a) a removal, restriction or modification of duties as specified by the conduct authority for a period of not more than three years;

(b) an ineligibility for promotion for a period of not more than three years;

(c) a deferment of pay increment for a period of not more than two years;

(d) a reduction to the next lower rate of pay for a period of not more than two years;

(e) a demotion for a period of not more than three years;

(f) a demotion for an indefinite period;

(g) a transfer to another work location;

(h) a suspension from duty without pay;

(i) a forfeiture of annual leave for a period of not more than 160 hours;

(j) a financial penalty deducted from the member's pay.

Mesures disciplinaires graves

5 (1) L'autorité disciplinaire visée à l'alinéa 2(1)c) peut imposer à un membre visé, en plus des mesures disciplinaires simples et correctives, une ou plusieurs des mesures disciplinaires graves suivantes :

a) le retrait, la limitation ou la modification de fonctions qu'elle précise, pour une période d'au plus trois ans;

b) l'inadmissibilité à toute promotion pour une période d'au plus trois ans;

c) le report de l'augmentation d'échelon de la solde pour une période d'au plus deux ans;

d) le retour à l'échelon de la solde inférieur précédent pour une période d'au plus deux ans;

e) la rétrogradation pour une période d'au plus trois ans;

f) la rétrogradation pour une période indéfinie;

g) la mutation à un autre lieu de travail;

h) la suspension sans solde;

i) une réduction de la banque de congés annuels d'au plus cent soixante heures;

j) une pénalité financière à déduire de la solde du membre.

[…]

Conduct boards and persons designated by Commissioner

(3) Conduct boards and persons who are designated as conduct authorities by the Commissioner under subsection 2(3) of the Act may impose any of the measures referred to in subsection 5(1) against a subject member.

[…]

Designation of review authority

9 (1) The Commissioner may designate a person to be a review authority in respect of decisions made by conduct authorities and as the conduct authority in respect of the subject member for any decision that the review authority decides to review.

Reason for review

(2) A review authority may, on their own initiative, review a decision to determine if a finding is clearly unreasonable or a conduct measure is clearly disproportionate to the nature and circumstances of the contravention.

Power of review authority

(3) If the review authority makes the determination that a finding is clearly unreasonable or a conduct measure is clearly disproportionate and if it is in the public interest to do so, the review authority may

> **(a)** rescind any finding made by the conduct authority that the subject member has not contravened the Code of Conduct, substitute for that finding a finding that the subject member has contravened the Code of Conduct and impose any one or more of the conduct measures referred to in subsection 5(1) that is proportionate to the nature and

[…]

Imposition de mesures par le comité de déontologie

(3) La personne désignée par le commissaire à titre d’autorité disciplinaire en vertu du paragraphe 2(3) de la Loi et le comité de déontologie peuvent imposer les mesures mentionnées au paragraphe 5(1).

[…]

Désignation d’une autorité de révision

9 (1) Le commissaire peut désigner une personne à titre d’autorité de révision à l’égard des décisions rendues par toute autorité disciplinaire. Lorsqu’elle révise une décision l’autorité de révision est désignée à titre d’autorité disciplinaire du membre visé.

Objet de la révision

(2) L’autorité de révision peut, de son propre chef, réviser une décision pour établir si une conclusion est manifestement déraisonnable ou si les mesures disciplinaires sont vraisemblablement disproportionnées avec la nature et les circonstances de la contravention.

Pouvoir de l’autorité de révision

(3) Lorsqu’elle établit qu’une conclusion est manifestement déraisonnable ou qu’une mesure disciplinaire est vraisemblablement disproportionnée et qu’il est dans l’intérêt public de le faire, elle peut :

> **a)** annuler la conclusion de l’autorité disciplinaire selon laquelle le membre visé n’a pas contrevenu au code de déontologie, y substituer une conclusion voulant qu’il ait contrevenu au code de déontologie et lui imposer une ou plusieurs des mesures disciplinaires mentionnées au paragraphe 5(1) qui sont

circumstances of the contravention;

proportionnées à la nature et aux circonstances de la contravention;

(b) rescind or amend any conduct measure imposed by the conduct authority, or substitute any one or more of the measures referred to in subsection 5(1) that is proportionate to the nature and circumstances of the contravention; or

b) annuler ou modifier toute mesure disciplinaire imposée par l'autorité disciplinaire, ou y substituer une ou plusieurs des mesures disciplinaires mentionnées au paragraphe 5(1) qui sont proportionnées à la nature et aux circonstances de la contravention;

(c) rescind any conduct measure imposed by the conduct authority and initiate a hearing in accordance with subsection 41(1) of the Act.

c) annuler toute mesure disciplinaire imposée par l'autorité disciplinaire et convoquer une audience conformément au paragraphe 41(1) de la Loi.

[48] The following sections of the *Federal Courts Rules* are relevant:

Material from tribunal

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

Matériel en la possession de l'office fédéral

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

Request in notice of application

(2) An applicant may include a request under subsection (1) in its notice of application.

Demande inclue dans l'avis de demande

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

Material to be transmitted

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party

Documents à transmettre

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée

making the request; or

(**b**) where the material cannot be reproduced, the original material to the Registry.

conforme des documents en cause ;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Objection by tribunal

(**2**) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Opposition de l'office fédéral

(**2**) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

V. Issues in Application T-891-16

[49] Having considered the parties' submissions, the issues for the Court to consider on this application are:

A. What is the standard of review?

B. Is this application premature?

C. Was the decision to grant the extension of time statute-barred?

D. If not statute-barred, was the decision reasonable?

VI. Analysis

A. *What is the standard of review?*

[50] The question of whether an extension of time could be granted after the expiry of the limitation period is a question of law to be determined by the applicable legal principles. There is no dispute between the parties that when a tribunal is interpreting its home statute, the governing

standard of review is presumptively reasonableness: *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34, [2011] 3 SCR 654 [*ATA*]. In such cases, the correctness standard is to be applied in limited circumstances: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 60, [2008] 1 SCR 190 [*Dunsmuir*]; such as when a constitutional question or a question of general law of central importance to the legal system as a whole is at issue and the subject is outside the adjudicator's specialized area of expertise. These circumstances are not applicable in this instance and there is no reason to depart from the reasonableness standard.

[51] The Federal Court and Federal Court of Appeal have recognized that RCMP adjudicators have a specialized expertise in maintaining the integrity and the professionalism of the RCMP: *Schamborzki v Canada (AG)*, 2015 FC 1262 at para 30, [2015] FCJ No 1323 [*Schamborzki*]; *Smith v Canada (AG)*, 2009 FC 162 at paras 13–14, [2009] FCJ No 205 [*Smith*]; *Canada (AG) v Boogaard*, 2015 FCA 150 at paras 32–53, 474 NR 121 [*Boogaard*]. Their decisions in such matters are entitled to a considerable amount of deference: *Elhatton v Canada (AG)*, 2013 FC 71 at paras 29–30, [2013] FCJ No 58 [*Elhatton*]; *Canada (AG) v Gill*, 2007 FCA 305 at para 14, [2007] FCJ No 1241 [*Gill*].

[52] Where fairness requires that reasons for decision are provided, the total absence of reasons may constitute a breach of natural justice: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22, [2011] 3 SCR 708 [*Nfld Nurses*]. In such circumstances there is nothing to review. However, where there are reasons, as there are here, there is no such breach. Any challenge to the reasoning of the decision

should therefore be considered within the reasonableness analysis. The Court may supplement the reasons by reference to the record and deference should be accorded where the tribunal is alive to the question at issue and comes to a decision within the range of acceptable outcomes: *Dunsmuir*, above, at para 48; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 36–38 [*Edmonton*], [2016] 2 SCR 293; see also *Canada (Transport) v Canadian Union of Public Employees*, 2017 FCA 164 at para 32, 282 ACWS (3d) 455 [*Canadian Union*]; *2251723 Ontario v Rogers Media*, 2017 FCA 186 at para 26, 414 DLR (4th) 750 [*Rogers Media*].

B. *Is this application premature?*

[53] Under the *RCMP Act*, the Commissioner is responsible for investigating whether a member's conduct amounts to any possible contravention of the Code of Conduct. If a contravention is established, the Commissioner may impose conduct measures that are proportionate to the nature and circumstances of the contraventions. The Act, the Regulations and the Code of Conduct provide for an internal process to determine how contraventions are determined and conduct measures are imposed. The primary purpose of this internal administrative process is to maintain the confidence of Canadians in the RCMP: *Thériault v Canada (RCMP)*, 2006 FCA 61 at para 22, [2006] 4 FCR 69 [*Thériault*].

[54] Absent exceptional circumstances, the general rule with respect to judicial review of administrative decision making is that parties cannot proceed to the courts until the internal process has run its course. Those who are dissatisfied with a decision made in the administrative

process must pursue all effective remedies that are available within that process. Only when the process is finished, or affords no effective remedy, can they proceed to court.

[55] This principle of judicial non-interference with ongoing administrative procedures has been endorsed by the Supreme Court of Canada and the Federal Court of Appeal: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35–38, 51, [2012] 1 SCR 364; *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30–33, [2011] 2 FCR 332 [*Powell*]; see also *Coldwater Indian Band v Canada (Indian Affairs and Northern Development)*, 2014 FCA 277, [2014] FCJ No 1223.

[56] The principle of judicial non-interference also applies where an Applicant is challenging a tribunal's jurisdiction: *Greater Moncton International Airport Authority v PSAC*, 2008 FCA 68 at para 2, [2008] FCJ No 312. In this instance, the Applicant's challenge goes to the review authority's jurisdiction to appoint a conduct board.

[57] The Respondent argues that the application is premature as the internal administrative process has not been exhausted and the conduct board can determine whether the extension should have been granted, whether the review authority's decision was reasonable and if so, whether more serious conduct measures are warranted. If the Applicant is unsuccessful, he could appeal the conduct board's decision pursuant to s 45.11(1) of the *RCMP Act* and the *Commissioner's Standing Orders – Grievances and Appeals*, SOR/2014-289. Judicial review is only appropriate, the Respondent contends, after the internal administrative process has run its course.

[58] The Applicant submits that the decision to extend the prescribed period was final and binding, except for judicial review under the *Federal Courts Act.* There was no ongoing administrative process when the extension decision was made, as the time period had expired, and thus all internal remedies had been exhausted. Moreover, it was a decision by the Commissioner's delegate and any appeal of the conduct board's decision would go to the Commissioner who had determined, through his delegate, that an extension was warranted. An appeal of the decision to extend the time period, if upheld by the conduct board, would be meaningless in these circumstances. Thus, the Applicant argues, he has no effective remedy other than judicial review.

[59] As I will discuss below, I am satisfied that the application for an extension was not time-barred. Thus I agree with the Respondent that the decision to extend the time period was an interlocutory decision within the RCMP's disciplinary process. As it remained open to A/Commr MacMillan to seek an extension to initiate a hearing after the prescribed time had expired, there was an ongoing administrative process which would not be exhausted until every step open to the parties was completed.

[60] The delay in seeking the extension is not an exceptional circumstance that would require this Court to interfere with the RCMP's ongoing administrative process: *Powell*, above, at para 33. The remedy of judicial review will remain available to the Applicant to challenge the results at the conclusion of the process.

[61] It is premature to predict what the conduct board's ultimate decision will be on the procedures that were followed or the merits of the alleged contraventions; or that of the Commissioner on appeal. The disciplinary scheme should be allowed to run its course. The decision to grant an extension does not bind future decisions by the Commissioner. It is worth noting that the Commissioner who would consider any appeal is not the same Commissioner who was in office when these decisions were made. The conduct board may make findings favourable to the Applicant and those findings may be upheld by the Commissioner. If the Applicant succeeds in the result, the Applicant would have no need to be before this Court seeking redress.

C. *Was the decision to grant the extension statute-barred?*

[62] As noted, my conclusion that the administrative process had not been completed rests largely on the question of whether the extension of time pursuant to s 47.4(1) of the *RMCP Act* was statute barred. Section 47.4(1) of the *RCMP Act* is silent on whether an extension can be granted after the prescribed period. The resulting ambiguity has yet to be addressed by the courts. Neither party was able to provide me with any authorities directly on point and suggested that this would be the first case to interpret the section. It was subsequently brought to my attention that the section was considered by Madam Justice Mactavish in *Sauvé v Canada (Attorney General)*, 2017 FC 453 at paras 38–54, 281 ACWS (3d) 646 [*Sauvé*].

[63] In *Sauvé*, the Applicant had waited four years to seek an extension of time to appeal the outcome of a disciplinary proceeding against him. The refusal of an extension was held to be reasonable. While reference is made to the Applicant's contention that the disciplinary

proceedings were out of time, that argument had not been made by the Applicant when he sought an extension of time. Thus Justice Mactavish did not consider it necessary to deal with it.

[64] Some federal statutes, such as s 18.1(2) of the *Federal Courts Act*, expressly state that extensions of time can be granted "before or after" the expiry of the prescribed time. Other legislative instruments specify that an application can be brought "before" expiry (*Patent Rules*, SOR/96-423, s 26) or are silent as to when the extension can be granted (*Public Sector Equitable Compensation Act*, SC 2009, c 2, s 26). Another model is found in the *Trade-Marks Act*, RSC, 1985, c T-13, at s 47(2) which requires that certain conditions must be met if the request for an extension is made after expiry of the time period.

[65] The Applicant's position, vigorously advanced, is that express wording is necessary for s 47.4(1) of the Act to be applied after expiry or "retroactively". The subsection should not be interpreted so as to interfere with his right to protection from the risk of dismissal, he argues, relying on *Dorel Industries Inc v Canada (Border Services Agency)*, 2014 FC 175 at paras 25–27, 237 ACWS (3d) 939 and *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271 at 282, 66 DLR (3d) 449. The Commissioner had no authority to grant an extension of the limitation period once a year had passed from the date on which the events have become known to the conduct authority and the member identified. After that year, the Applicant argues, he acquired a vested right that he would no longer be subject to further disciplinary action in the form of a conduct hearing that could possibly lead to his dismissal. A review of his conduct could still proceed but solely within the more restricted range of sanctions falling short of dismissal.

[66] The Respondent's position is that an interpretation of s 47.4(1) that would allow for an extension after the expiry of the one-year period is a reasonable interpretation of the Act within the Commissioner's discretion. There is no "retroactivity" in the decision-maker's interpretation and no need for additional statutory language as an extension after expiry was contemplated by Parliament in enacting the *RCMP Act*. Retroactivity would arise if a new law creates a new form of misconduct and the Crown attempted to apply that law to actions that had wholly taken place in the past: *Canada (AG) v Almalki*, 2016 FCA 195 at paras 34–36, 402 DLR (4th) 352. That is not the case here. Expiry of the one-year limitation period at s 41(2) of the *RCMP Act* does not confer a vested right since s 47.4(1) of the *RCMP Act* specifically provides for an extension.

[67] Citing *R v KC Irving Ltd*, [1976] 2 SCR 366 at 368, 371, 65 DLR (3d) 564, the Respondent submits that limitation periods can be extended where the request is made after the prescribed period. Express terms in the legislation are not required. The Respondent also relies on *ATA*, above, at paras 65–66, wherein the Supreme Court of Canada concluded there was a reasonable basis for extending a 90-day limitation period after the expiry of that period:

> [65] The ATA argues that the principle of statutory interpretation, *expressio unius est exclusio alterius*, leads to the conclusion that an extension must be made before the expiry of 90 days: when the legislature intended to allow an extension to be made either before or after the expiry of a time period; it said so expressly. The now repealed s. 54(5) *PIPA* authorized a court to, "on application made either before or after the expiry of the period referred to in subsection (3) [i.e., 45 days], extend that period if the court considers it appropriate to do so". According to the ATA, absence of such language in s. 50(5) *PIPA* necessarily implies that the legislature did not intend for the Commissioner to be able to extend the period for completion of an inquiry "before or after" the 90-day period has expired (Factum, at para. 76).
>
> [66] This argument, while having some merit, is far from determinative. As Justice Berger pointed out, there are also many

> statutory provisions in Alberta that expressly restrict extensions to those granted before expiry of a time period (at para. 57, citing *Credit Union Act*, R.S.A. 2000, c. C-32, s. 13; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 23, *Garage Keepers' Lien Act*, R.S.A. 2000, c. G-2, s. 6(3); *Insurance Act*, R.S.A. 2000, c. I-3, s. 796; *Land Titles Act*, R.S.A. 2000, c. L-4, s. 140; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80(3); and *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-20, s. 257). I agree with Justice Berger that, "when . . . the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry" (para. 58). I am therefore unable to conclude that the *expressio unius* principle renders the adjudicator's interpretation unreasonable.
>
> [emphasis added]

[68] Having given the matter careful consideration, I am satisfied that the limitation period in s 41(2) of the *RCMP Act* can be extended by the Commissioner under s 47.4(1) of the *RCMP Act* after the expiry of the prescribed year.

[69] In *Thériault*, above, the Federal Court of Appeal dealt with the interpretation of a limitation period in another provision of the *RCMP Act* as it then read. The issue was when the limitation period began running. There was no provision for an extension. Section 47.4(1) of the *RCMP Act* as it reads now did not apply. The Court began its analysis, at para 22, by noting that it is not unusual for misconduct offences to be exempt from limitation periods in disciplinary proceedings in order to protect the public, promote the public's confidence in professional bodies and to maintain discipline and integrity. Where there is a limitation period, the Court noted at para 23, the purpose is to provide fairness and to enable offenders to put forward a full and complete defence. But this can also work to their disadvantage if an extension is not available to them. This was why the Commissioner was granted the authority to extend the time as the legislative history reveals.

[70] The scheme of the Act, the objective of the Act and the intention of Parliament are governing principles of statutory interpretation: *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537 [*Morgentaler*]; *Rizzo & Rizzo Shoes Ltd*, *Re*, [1998] 1 SCR 27, 154 DLR (4th) 193. The text of the statute must reflect the purpose of the scheme: *X, Re*, 2016 FC 1105 at para 118, 282 ACWS (3d) 876; *Schmidt v Canada (AG)*, 2016 FC 269 at paras 269, 282, 284, [2016] 3 FCJ 227. As recently noted by the Federal Court of Appeal in *Canada v Callidus Capital Corporation*, 2017 FCA 162 at para 14, 281 ACWS (3d) 209, "[…] the intention of Parliament is to be gleaned from the text, read in its context and in light of its purpose": see also *Canada Trustco Mortgage Co v R*, 2005 SCC 54 at para 10, [2005] 2 SCR 601.

[71] The former exclusionary rule about evidence of legislative history has long been relaxed: *Morgentaler*, above. Such evidence can be helpful in discerning why amendments were made to a statute but the Court must be mindful of its limited use: see *AYSA Amateur Youth Soccer Assn v Canada (Revenue Agency)*, 2007 SCC 42 at para 12, [2007] 3 SCR 217, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at 489 (It is clear that no single participant in the legislative process can purport to speak for the legislature as a whole).

[72] The Federal Court of Appeal has relied on amendments between the different readings of a bill, *Hansard* notes and parliamentary debates to aid in determining legislative intent: see *Canada (MCI) v Young (Litigation guardian of)*, 2016 FCA 183 at paras 10–11, 398 DLR (4th) 709; *Alexander College Corp v R*, 2016 FCA 269 at paras 40–41, 410 DLR (4th) 299. It has done so with great caution and has held that, in some cases, the material should be disregarded when the text is clear or unambiguous: *Friends of the Canadian Wheat Board v Canada (AG)*, 2012

FCA 183 at para 51, 352 DLR (4th) 163; *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para 8, [2011] 4 FCR 22.

[73] With that caution in mind, it is helpful to refer to the legislative history of s 47.4(1). When the RCMP's internal disciplinary hearing process was reviewed by Parliament in the mid-1980's, Bill C-65, *An Act to amend the Royal Canadian Mounted Police Act*, 1st Sess, 33rd Parl, 1985, cl 18 (first reading 27 June 1985), initially contained an express provision that an extension of time could not be granted after the expiration of the time prescribed for ten specified provisions of the Act relating to discipline and grievances:

47.4 (1) Where the Commissioner is satisfied that the circumstances justify an extension, he may, on his own motion or on application, and after giving due notice to any member affected thereby, extend the time limited by subsection 31(2), 44(1). 45.13(2), 45.14(4), 45.14(7), 45.19(4), 45.19(6), 45.23(6), 45.24(1) or 45.24(5) for the doing of any act therein described and specify terms and conditions in connection therewith.

(2) No time shall be extended under this section after the expiration of the time.

(3) Where a time is extended under this section, any reference in this Act to the time shall be construed as a reference to the time as so extended.

[emphasis added]

47.4 (1) Le Commissaire, s'il est convaincu que les circonstances le justifient, peut, de sa propre initiative ou sur demande à cet effet, après en avoir dûment avisé les membres intéressés, proroger les délais prévus aux paragraphes 31(2), 44(1), 45.13(2), 45.14(4), 45.14(7), 45.19(4), 45.19(6), 45.23(6), 45.24(1) ou 45.24(5) pour l'accomplissement d'un acte; il peut également spécifier les conditions applicables à cet égard.

(2) Un délai expiré ne peut être prorogé en vertu du présent article.

(3) Lorsqu'il y a prorogation d'un délai en vertu du présent article, toute mention du délai dans la présente loi s'interprète comme désignant le délai prorogé.

[je souligne]

[74] The restriction in the proposed s 47.4(2) was removed at the legislative committee stage in the House of Commons. As discussed in "Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65" (Issue No. 11, December 10, 1985), at p 11:148-149, this

was done in order to give the Commissioner discretion to grant extensions after the prescribed period had expired. It appears that the restriction was originally inserted in the bill to avoid requests by RCMP Members for extensions long after the prescribed period had expired - as in the *Sauvé* case. The restriction was removed primarily for their benefit. See for example the discussion at "Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-65" (Issue No. 7, November 27, 1985), at p 7:75-77.

[75] Subsection 41(2) was not included in the list of ten specified provisions in s 47.4(1) of Bill C-65 as it read at First Reading in 1985 or in the legislation enacted at Royal Assent. Section 41 of the *RCMP Act*, as it read at that time, dealt solely with informal disciplinary actions that could result only in the imposition of minor sanctions ranging from counselling to the forfeiture of no more than one work day or a reprimand. Formal disciplinary actions, including hearings before an adjudication board that could lead to dismissal and the related provisions for appeals and reviews by a Discharge and Demotion Board, were addressed in a complex scheme under sections 43 to 45.28 of the Act, as it then read.

[76] The Parliamentary intent in 1985 was to allow for extensions of time with respect to the more serious disciplinary proceedings under the Code of Conduct but not for those under the informal procedure. The Commissioner since then has interpreted section 47.4 to allow for retroactive extensions of time in the more serious cases. See for example the case summaries issued by the RCMP External Review Committee to the Commissioner of the RCMP: *Grievance Case Summary G-404* and *Grievance Case Summary G-419*.

[77] On June 20, 2012, Bill C-42, *An Act to amend the Royal Canadian Mounted Police Act and to make related and consequential amendments to other Acts*, 1st Sess, 41st Parl, 2013, (first reading 20 June 2012), SC 2013, c 18, was introduced. As noted by the Minister of Public Safety at the time, Bill C-42 was intended among other things, to "modernize discipline, grievance and human resource management processes for members of the RCMP. This would help prevent, address and correct performance issues in a way that is both fair and timely": *House of Commons Debates*, 41st Parl, 1st Sess, No 146, (17 September 2012) at 1200 (Hon Vic Toews), SC 2013, c 18.

[78] This legislation, which received Royal Assent on June 19, 2013, did not substantively alter s 47.4 but it amended the section to reflect other more significant changes to the disciplinary regime under the Act. Most importantly in relation to the present issue, the language that had been proposed in Bill C-65, above, to prevent extensions after the expiry of the prescription period was not restored.

[79] In its revised and most current form, s 47.4 now refers to only four provisions of the Act, including the new s 41(2) which is at issue in these proceedings:

Extensions of time limitations

47.4 (1) If the Commissioner is satisfied that the circumstances justify an extension, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limited by any of subsections 31(2), 41(2), 42(2) and 44(1), for the doing of any act described in that subsection and specify terms and conditions in

Prorogation des délais

47.4 (1) Le commissaire, s'il est convaincu que les circonstances le justifient, peut, de sa propre initiative ou sur demande à cet effet, après en avoir dûment avisé les membres intéressés, proroger les délais prévus aux paragraphes 31(2), 41(2), 42(2) et 44(1) pour l'accomplissement d'un acte; il peut également spécifier les conditions applicables à cet égard.

connection with the extension.

Exception

(1.1) The notice shall not be given if, in the Commissioner's opinion, giving it might compromise or hinder any investigation of an offence under an Act of Parliament.

Exception

(1.1) Le commissaire n'avise pas les membres intéressés s'il estime que l'avis risque de compromettre la tenue d'une enquête relativement à une infraction à une loi fédérale ou d'y nuire.

Reference to time

(2) Where a time is extended under this section, any reference in this Act to the time shall be construed as a reference to the time as so extended.

Mention du délai

(2) Lorsqu'il y a prorogation d'un délai en vertu du présent article, toute mention du délai dans la présente loi s'interprète comme désignant le délai prorogé.

[80] Section 41 of the current *RCMP Act* now serves as the authority to initiate a hearing into allegations of contraventions of the RCMP Code of Conduct where the conduct authority considers that the measures provided by the rules are insufficient having regard to the gravity of the contravention and the surrounding circumstances. The new conduct board procedure can lead to the imposition of sanctions up to and including dismissal - as was the case with formal actions before the adjudication boards under the 1985 legislation. The prescription period of one year is maintained under s 41(2) of the Act but no express restriction is included in s 47.4 of the Act so as to bar post-expiry extensions of that time period.

[81] This leads me to the conclusion that Parliament did not intend to alter the status quo with regard to extensions of time when it enacted the new s 41(2) and included a reference to it within the slightly revised s 47.4. I am satisfied that this interpretation is consistent with the objectives and scheme of the Act, specifically with respect to the high standard of conduct expected of RCMP members and their responsibilities, set out at s 36.2 and s 37. While fairness to the subject

member is required, this does not mean that the disciplinary proceedings contemplated by the legislation and regulations should be frustrated by delays occasioned by the investigative and review process. The duty of procedural fairness can be met by ensuring, as was done here, that the subject member has a full opportunity to be heard on the question of whether an extension shall be granted.

[82] I am also satisfied that the Applicant acquired no vested rights because of the expiry of the prescribed period as it remained open to the Conduct Authority to seek an extension and for the Commissioner or the Commissioner's designate to grant it when justified by the circumstances. Nor does the doctrine of issue estoppel arise in the circumstances of this case given the absence of the three preconditions necessary to trigger its operation: *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44.

[83] Accordingly, I find that the decision to grant the extension by the Commissioner's delegate was not barred by the expiry of the prescribed time period.

D. *Was the decision to grant an extension of time reasonable?*

[84] My findings that this judicial review application is premature and that the *RCMP Act* provides for an extension of time after the expiry of the limitation period are sufficient to dispose of the first application. However, in the event that I am found to have erred on the first issue, I will set out my reasons for concluding that the decision was reasonable.

[85] The Applicant argues that the decision-maker did not identify or articulate any of the circumstances that justify an extension of the limitation period. The reasons are thus insufficient, he contends, to allow the reviewing Court to understand why the decision-maker made its decision and to permit the Court to determine whether the conclusion is within the range of reasonable outcomes. In the Applicant's view, there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived: *Ryan v Law Society (New Brunswick)*, 2003 SCC 20 at para 55, [2003] 1 SCR 247; *Nfld Nurses*, above, at paras 16, 19, 22.

[86] The Respondent submits that the reasons are adequate since they are based on the multiple documents that were before the decision-maker and provide intelligible and clear justification for the decision: *Nfld Nurses*, above, at para 16. The reasons do not have to be perfect or comprehensive and are to be reviewed in the context of the evidence, the parties' submissions and the process: *Nfld Nurses*, above, at para 18.

[87] I agree with the Respondent that the decision maker properly considered the extensive record before him including the documents recording the events and the procedural history. He had the benefit of extensive written submissions from both A/Commr MacMillan and the Applicant. He was persuaded that the circumstances justified the extension. This Court must give that decision considerable deference and pay respectful attention to the reasons offered or which could be offered in support of the decision: *Dunsmuir*, above, at paras 47–48. The Court must first seek to supplement the decision if necessary before it seeks to subvert it: *Nfld Nurses*, above, at para 12.

[88] Applying the reasonableness standard, the role of this Court is not to undertake a complete analysis of the merits of the decision but rather to determine if the reasons provided are intelligible and transparent and that it falls within a range of acceptable outcomes based on the evidence before the decision-maker. I am satisfied that it does.

[89] Circumstances that justify an extension of time, when the legislator chose not to specify any, must be given a broad interpretation and the decision-maker afforded wide discretion within the rule of law. Here, the decision-maker considered the factors set out in *Grewal*, above, regarding the exercise of the discretion. He was satisfied that there was a continuing intention to review the conduct measures imposed on the Applicant in the context of the new procedures recently implemented by the RCMP, that the Applicant would not be seriously prejudiced, that there was a reasonable explanation for the delay, that the application had merit and that other factors militated in favour of the extension. These factors are not conjunctive, *Grewal*, above, at paras 11–14, and an extension can be granted even if one of them is not satisfied: *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 33, 154 ACWS (3d) 1238.

[90] The allegations of sexual harassment in a workplace were serious and arose in the context of another investigation of the Applicant’s conduct and his return to that workplace. The workplace was part of the CPC providing services to Canada’s national police and other law enforcement agencies. The public interest called for a thorough examination of the events at the CPC. There was merit in reviewing the failure of the initial conduct decision to consider relevant aggravating factors.

[91] The delay in dealing with the review was not excessive considering the history of the matter and the length of time it took to complete the initial investigation, arrange the conduct meeting and reach a decision. The delay occurred in the context of major changes to the disciplinary procedures within the RCMP and a significant increase in the number of contraventions that would be dealt with by way of a conduct meeting in the same time frame; as was explained by A/Commr MacMillan in his submissions to C/Supt Gill. This was not simply a lack of due diligence or administrative inattention, as the Applicant contends. The entire organization was adapting to new procedures. This took a considerable time to implement. Thus, it was not surprising that the investigation was not concluded until October 5, 2015, and did not come to the review authority's attention until January 7, 2016.

[92] A/Commr MacMillan requested advice on the conduct measures imposed on the Applicant the day after he was briefed on the conduct meetings conducted at the National HQ in the preceding year. This request was made prior to the CBC news reports on misconduct at the CPC. A/Commr MacMillan initiated a review under s 9 of the *CSO – Conduct* once he returned from leave and had received a report on February 19, 2016. The amount of time that it then took to submit the request for an extension was not excessive in the circumstances.

[93] The Applicant contends that he is prejudiced simply by reason of the fact that he is now at risk of a finding by the conduct board that his conduct warrants dismissal or a direction to resign. That is, in my view, not the type of prejudice contemplated by the authorities relating to the exercise of the discretion to grant an extension of time. More on point is his argument that he

would be prejudiced by an extension because of the passage of time, the retirement of key witnesses and failing memories.

[94] I note that the investigative record including witness statements has been preserved and would be available to the conduct board should the Applicant request that it be considered. Otherwise, the hearing would be conducted *de novo*. The facts of the matter are not complex and there are several indications in the record that the Applicant did not dispute them when the initial investigation was conducted by the OPS and the PRU. It will remain open to him to challenge the allegations or to bring forward evidence in mitigation before the conduct board. The Commissioner's delegate was satisfied that no prejudice would result in these circumstances. That conclusion was reasonably open to him, in my view.

[95] The application in Court File T-891-16 is, therefore, dismissed.

VII. Issues in Court File T-1197-16

[96] Having considered the issues raised by the parties, in my view the Court must consider the following questions on this application:

A. What is the standard of review?

B. Is the redacted information in pages 105-106 of the CTR material to this application?

C. Did the Review Authority fetter his discretion?

D. Is the decision to initiate a Conduct Board hearing reasonable?

VIII. Analysis

A. *What is the standard of review?*

[97] As noted above, this Court and the Federal Court of Appeal have recognized that RCMP adjudicators have a specialized expertise in maintaining the integrity and the professionalism of the RCMP: *Schamborzki*, above, at para 30; *Smith*, above, at paras 13–14; *Boogaard*, above, at paras 32–53. Their decisions in such matters are entitled to a considerable amount of deference: *Elhatton*, above, at paras 29–30; *Gill*, above, at para 14.

[98] And as discussed above, where fairness requires that reasons for the decision are provided, their total absence may constitute a breach of natural justice if there is nothing to review: *Nfld Nurses*, above, at para 22. The Court may supplement the reasons by reference to the record and deference should be accorded where the tribunal is alive to the question at issue and comes to a decision within the range of acceptable outcomes: *Dunsmuir*, above, at para 48; *Edmonton,* above, at paras 36–38; *Canadian Union*, above, at para 32; *Rogers Media*, above, at para 26.

[99] This application raises the additional issues of fettering and solicitor-client privilege.

[100] The fettering of discretion has traditionally been considered to be an automatic ground for setting aside administrative decisions: see for example, *Maple Lodge Farms Ltd v*

Government of Canada, [1982] 2 SCR 2 at 5–6, 137 DLR (3d) 558 [*Maple Lodge Farms*]; *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245 at paras 65–67, 246 ACWS (3d) 191 [*Forest Ethics*]; *Nfld Nurses*, above, at para 14. More recently there has been some uncertainty over where the concept fits within the correctness and reasonableness framework articulated by the Supreme Court of Canada in *Dunsmuir*, above.

[101] In *Stemijon Investments Ltd v Canada (AG)*, 2011 FCA 299 at paras 20–25, 341 DLR (4th) 710, the Federal Court of Appeal suggested that the distinction was immaterial as a decision that is the product of a fettered discretion must *per se* be unreasonable. This Court has routinely followed this approach: *Elson v Canada (AG)*, 2017 FC 459 at para 25, 279 ACWS (3d) 642; *Gordon v Canada (AG)*, 2016 FC 643 at para 27, 267 ACWS (3d) 738; *Ouedraogo v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 810 at para 12, 269 ACWS (3d) 339; *Pylatuik v Canada (AG)*, 2016 FC 1394 at paras 10–11, [2017] 3 CTC 40. In this matter, I am satisfied that the conclusion that I have reached is supportable under either standard.

[102] The issue of whether information subject to a valid claim of solicitor-client privilege is required to be produced is a question of law of central importance to the legal system as a whole and, therefore, subject to the correctness standard: *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 20, [2016] 2 SCR 555.

B. *Is the redacted information in pages 105-106 of the CTR material to this application?*

[103] As noted above, I read the redacted information on pages 105-106 of the CTR in clear text prior to the hearing and advised the parties that I would reserve my decision on whether the document was relevant and if so, privileged, until I had heard all their arguments on the other issues before me. In my decision on the motion for production issued on December 1, 2016, I expressed doubt about the relevance of the document largely for the reasons advanced by the Respondent. For the reasons below, I remain of that view.

[104] The Applicant's argument that the document is relevant since it was before A/Commr MacMillan "in one form or another" when he made his decision is not persuasive. While Sgt Falls, the recipient of the email, may have relied on the content in drafting his recommendation, it was his report that was before A/Commr MacMillan, as well as the transit memorandum of C/Supt O'Rielly, and not the Phenix email. There is no evidence in the record that A/Commr MacMillan was apprised of the content of the Phenix email. Indeed his evidence is to the contrary. On cross-examination he stated that he had made it clear that he did not want to see conduct authority legal advice in the review packages provided to him. Accordingly, the content of the email was redacted by someone unknown before it was included.

[105] At best, the email formed part of the documentation that Sgt Falls collected prior to completing his report. It adds nothing to the information that is already before the Court through the other materials in the record. Those materials show clearly that C/Supt Chesser received advice from the conduct advisors prior to making his determination of what measures would be

appropriate. A/Commr MacMillan knew that from his conversation with Chesser on January 7, 2016. While that may be a factor in considering whether the decision to initiate a conduct hearing was reasonable, ultimately it was a decision for MacMillan to make and not dependent on the legal advice provided to Chesser.

[106] As a general principle, materials that were not before the decision-maker are not relevant on judicial review: *Access to Information Agency Inc v Canada (Transport)*, 2007 FCA 224 at para 7, 17–21, 162 ACWS (3d) 570; see also *Canada (Public Sector Integrity Commissioner) v Canada (AG)*, 2014 FCA 270 at para 4, [2014] FCJ No 1167; *Ochapowace First Nation v Canada (AG)*, 2007 FC 920 at para 19, [2007] FCJ No 1195; aff'd 2009 FCA 124, 177 ACWS (3d) 699.

[107] There are exceptions to this principle. Materials that were not before the decision-maker may be considered relevant if there is an allegation that the decision-maker breached procedural fairness, committed jurisdictional error or where there is an allegation of a reasonable apprehension of bias: *Bernard v Canada (MNR)*, 2015 FCA 263 at paras 14–28, 261 ACWS (3d) 441. None of these exceptions apply, in my view, in these circumstances.

[108] While this conclusion is sufficient to dispose of this issue, I am also satisfied that the redacted content of the email is privileged. In this instance, the information alluded to in the opening lines of Ms. Phenix's email was provided by a lawyer at the Conduct Authority Representative Directorate [CARD] in professional confidence to C/Supt Chesser as the Conduct Authority.

[109] The Respondent had initially argued that the communication was covered by the statutory privilege set out in subsection 47.1(1) of the *RCMP Act*. That position was abandoned at the hearing. The statutory privilege applies only in the context of a grievance under Part III of the Act, a proceeding before a board or an appeal under subsection 45.11(1) or (3). The procedure before C/Supt Chesser, for which he received advice from CARD, falls within none of those categories but rather within a Part IV conduct investigation.

[110] But that is not the end of the matter. Having now read the email, I am satisfied that it contains legal advice that would be protected by common law solicitor-client privilege under the three-part test set out in *Solosky v The Queen*, [1980] 1 SCR 821 at 837, 105 DLR (3d) 745: the content concerns a communication between a lawyer and a client; the communication involved the giving of legal advice; and it was intended to be kept confidential by the client.

[111] The Applicant submits that if the common law privilege applies, an express waiver of the privilege by the client is indicated by the words in clear text which appear at the outset of the email: "As you may know, the communication between conduct authorities and Conduct Authority representatives (CAR) are privileged. I sought and obtained the authorization from the CO [Commanding Officer] to share the information received from the CAR (Denys Morel) in this matter."

[112] Section 29 of the *CSO – Conduct* defines a "Conduct Authority Representative" [CAR] as a "person who is authorized by the Director of the Conduct Authority Representative Directorate to provide representation or assistance to a Conduct Authority." Representation is

defined as the “act of representing a subject member or Conduct Authority, including providing legal advice, litigation or advocacy for the purpose of these Standing Orders” while assistance is defined as “legal guidance and information provided to a subject member […] or to the Conduct Authority in respect to the subject member.” [emphasis added].

[113] Express waiver of a privilege will occur when the holder knows of the existence of the privilege and voluntarily evinces an intention to waive it: *R v Youvarajah*, 2011 ONCA 654, at para 146, [2011] OJ No 4610. The unredacted content of the Ms. Phenix email indicates, the Applicant argues, that C/Supt Chesser voluntarily waived the privilege by authorizing the sharing of that communication with a third party.

[114] The Respondent submits that since the sharing of the communication was internal to the RCMP conduct authorities and advisors, the “common interest” or “joint interest” exception to waiver would apply to the communications. As such, the communication would remain privileged to the outside world even though it was disclosed within that group. For the exception to apply, C/Supt Chesser, the nominal holder of the privilege, and the persons to whom the communication was disclosed would have to share a common goal: see David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at p 239.

[115] It is arguable that all of those within the RCMP who were concerned with the investigation into the Applicant’s alleged behaviour shared a common interest in ensuring that the conduct measures were appropriate. At the very least, while C/Supt Chesser and A/Commr

MacMillan played different roles in this process, they, and those who advised them, both shared this common interest.

[116] The Respondent submits that the holder of any privilege arising from the legal advice provided by staff lawyers within the RCMP is ultimately the Crown as represented by the Executive Branch of the Government of Canada, based on cases such as *Stevens v Canada (Prime Minister)*, [1997] 2 FC 759 at para 27, 144 DLR (4th) 553, and *Canada (AG) v Central Cartage Co,* (1987) 10 FTR 225 at para 105, 4 ACWS (3d) 359. The Applicant submits that these decisions are distinguishable because they involve legal advice provided by lawyers employed by the Department of Justice. I am not persuaded that makes a significant difference having regard to the role performed by the CAR advisors.

[117] It is arguable that the holder of the privilege is the Commissioner of the RCMP considering that office's responsibilities under s 5(1) of the Act "for the control and management of the Force and all matters connected with the Force." The conduct procedures carried out in this case all flowed from that statutory authority and its expression in the Code of Conduct and the Commissioner's Standing Orders. In any event, C/Supt Chesser could not have waived the privilege since he was not the holder of the privilege; it was either the Commissioner's or belonged to the Crown in right of Canada.

[118] For that reason, I find that there was no waiver of the privilege attached to the communication of the advice to the Conduct Authority in the Phenix email.

C. *Did the Review Authority fetter his discretion?*

[119] The Applicant submits that the decision of A/Commr MacMillan to rescind the conduct measures previously imposed and initiate a conduct hearing should be set aside as unreasonable on the basis that his discretion under section 9 of the *CSO – Conduct* was unduly influenced by the Commissioner.

[120] On February 18, 2016, a news report quoted the Minister of Public Safety as saying the following:

> I have laid out my expectation and I fully expect the Commissioner to deliver and I will be following this very, very closely […] I expressed to the Commissioner very clearly my outrage at this situation. He knows very clearly what I expect. I expect a complete transparent and comprehensive investigation. I expect strong discipline that suits the misbehaviours that has taken place.

[121] D/Commr Henschel was quoted in the CBC News Report of February 18, 2016, that upon learning of the new allegations he had immediately ordered the Applicant and the former head of the ETU suspended again and launched two new investigations. Henschel was at that time responsible for the CPC. He was quoted as saying:

> When this came to our attention, we were appalled at what the allegations were. I found it hard to believe that in this day and age that this kind of behaviour would take place in our organization or anywhere else. It is completely unacceptable behaviour. It is abhorrent. The kind of behaviour that was alleged is completely in opposition to our core values.

[122] The circumstantial evidence, including the media reports indicating the Minister's and the Commissioner's displeasure with events at the CPC, demonstrate, the Applicant argues, that the Review Authority's exercise of discretion was fettered. The evidence is underscored by the timing of the decision to conduct a review and to apply for an extension to initiate a conduct hearing.

[123] Prior to the intervention of the Commissioner, the Applicant submits, A/Commr MacMillan had expressed himself to be content with the previously imposed conduct measures at his meeting with C/Supt Chesser and Supt Robineau on January 7, 2016. The Commissioner's inquiry regarding the Applicant's discipline matter on February 10, 2016; the meeting at the Commissioner's office on February 17, 2016; and the subsequent publication of CBC reports regarding the allegations of misconduct at the RCMP Canadian Police College all point to the conclusion that A/Commr MacMillan's actions were driven by the views of the Commissioner.

[124] The Respondent's position is that the evidence reveals nothing inappropriate about A/Commr MacMillan's actions. Rather, it indicates that A/Commr MacMillan exercised his discretion independently and made efforts to ensure that his decision was not unfairly influenced by others.

[125] There is no doubt that the Commissioner "had a view" as A/Commr MacMillan phrased it during cross-examination on his affidavit. However, the test to be applied by the Court in considering this issue is not whether A/Commr MacMillan received any comments from the

Commissioner but whether, when he did so, he considered himself bound by those views and unable to consider other factors.

[126] The exercise of discretion by a decision-maker is said to have been fettered if the decision is made in accordance with the views of another without the exercise of independent judgment: *Maple Lodge Farms*, above, at paras 6–7; *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 at para 97, [2016] 8 WWR 298; *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 62, [1999] 4 CNLR 1.

[127] To find that discretion has been fettered, the facts before the Court must give rise to a reasonable apprehension that the decision-maker treated another individual's views as binding or conclusive, without the need to consider any other factors or to conduct an independent analysis.

[128] A/Commr MacMillan's notes made contemporaneously after the February 17, 2016, meeting, support his recall that he had immediately informed the Commissioner that they should not discuss the merits of the review due to his role as the Review Authority. In addition, the evidence shows that A/Commr MacMillan initiated the administrative steps to start the review on January 8, 2016, before the series of meetings in early February. This was several weeks before the matter came to the Commissioner's attention in February when he received an email from a Member of the Force and before the press began clamouring for responses from the Minister and the Commissioner.

[129] As for the comments attributed to D/Commr Henschel, my reading of the news report and the other material in the CTR satisfies me that he was not referring to the review which A/Commr MacMillan was to undertake but rather to complaints received from other members of the ETU that the original investigations into misconduct at the College by the Applicant and the second member had not been thorough enough. In other words, he was ordering investigations into those investigations. A/Commr MacMillan did not report to Deputy Commissioner Henschel and received no instructions from him pertaining to this matter.

[130] I am not persuaded that the comment attributed to A/Commr MacMillan at the January 7, 2016 meeting, that the measures imposed were "sound" is significant in the context of what occurred, if in fact he made it. A/Commr MacMillan had been provided with a briefing book containing summaries of a number of conduct meetings that had occurred under C/Supt Chesser's purview at National HQ. It was not the complete Record of Decision of this specific matter. Moreover, A/Commr MacMillan took steps the following day to obtain advice on the appropriateness of the conduct measures imposed on the Applicant as well as in two other cases.

[131] As review authority, A/Commr MacMillan properly received detailed advice from the WRB outlining the factors that he should consider prior to deciding whether or not to conduct a review. His decision under s 9 of the *CSO – Conduct* was based on the recommendations of the WRB which were authored on February 18, 2016, and provided to A/Commr MacMillan on February 19, 2016. The report was detailed and identified several issues with the process and the conduct measures previously imposed.

[132] On the record before me, I am satisfied that the evidence does not establish that A/Commr MacMillan's decision was fettered. Rather it demonstrates that the decision was the result of an independent analysis. For that reason, this ground of challenge must also fail.

D. *Is the decision to initiate a conduct board hearing reasonable?*

[133] The Applicant submits that insufficient reasons were provided by A/Commr MacMillan to allow the Court to apply the reasonableness standard. In this instance, the Applicant argues, A/Commr MacMillan's Notice of Decision dated May 30, 2016, states bald conclusions without providing any form of rationale or justification for his conclusion that the previously imposed conduct measures were clearly disproportionate to the nature and circumstances of the alleged contraventions and that it was in the public interest to rescind those measures and initiate a conduct hearing.

[134] The Respondent submits that the reasons are adequate since they are based on the several reports before the decision-maker and provide intelligible and clear reasons: *Nfld Nurses*, above, at para 16. The reasons do not have to be perfect or comprehensive. They are to be reviewed in the context of the evidence, the parties' submissions and the process: *Nfld Nurses*, above, at para 18.

[135] In my view, the reasons, while brief, are sufficient to permit this Court to understand why the tribunal made its decision and to determine whether the decision falls within the range of acceptable outcomes. In cases such as this where the decision-maker adopts the recommendations set out in a report and provides only brief reasons, the reasons set out in the

report may be considered to be those of the decision-maker: *Saber & Sone Group v Canada (MNR)*, 2014 FC 1119 at para 23, 468 FTR 286, citing *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 37–38, [2006] 3 FCR 392; *Nfld Nurses*, above, at paras 15-16; see also *Dunsmuir*, above, at para 48; *Edmonton,* above, at paras 36–38; *Canadian Union*, above, at para 32; *Rogers Media*, above, at para 26.

[136] The Applicant further submits that the decision to rescind the conduct measures and initiate a conduct hearing is unreasonable since the conduct measures previously imposed are not "clearly disproportionate."

[137] Prior to making his decision, the Applicant notes, C/Supt Chesser consulted with the NCMS section. They recommended that the conduct measures which should be imposed upon the Applicant start in the normal range (11 to 20 days) or at the bottom of the aggravated range (20 days to dismissal). In addition, C/Supt Chesser consulted with a CAR who in turn recommended a range of conduct measures that would apply in the circumstances. C/Supt Chesser imposed conduct measures that were within the reasonable range of measures that were recommended by the CAR, the Applicant argues. A/Commr MacMillan's decision is inconsistent with the recommendations of the NCMS and the CAR to C/Supt Chesser as the conduct authority and is, therefore, unreasonable, the Applicant contends.

[138] The Respondent submits that the decision to rescind the conduct measures and initiate a conduct hearing is reasonable. There were identifiable issues surrounding the conduct measures imposed by the conduct authority. Among the factors that should have been considered were the

seriousness of the misconduct, the lack of compassion and respect shown for a fellow RCMP Member, the Applicant's prior misconduct, the intentional nature of his actions, persistence over an extended period of time and the impact on the complainant. Considering these matters, the decision falls within the range of acceptable outcomes.

[139] The WRB report prepared by Sgt Falls questioned the appropriateness of the conduct measures imposed by the conduct authority, discusses how the recommendations given to the conduct authority were misapplied and what the appropriate conduct measures would have been according to the Conduct Measure Guide. Since the three allegations were considered to be sexual harassment and were persistent in nature, it was reasonable to conclude that an aggravated range of sanctions could have been applied to each allegation.

[140] Section 9(2) of the *CSO – Conduct* instructs the review authority to determine if "a finding is clearly unreasonable, or a conduct measure is clearly disproportionate to the nature and circumstances of the contravention" [emphasis added]. The task of the review authority is to conduct an independent analysis. In doing so, the review authority may look at the evidence that was before the conduct authority, but this is not determinative. The review authority may seek assistance and advice from conduct advisors within the WRB.

[141] In this instance, the WRB raised issues with the conduct measures that were previously imposed. They pointed to the lack of consideration of aggravating factors, such as the seriousness of sexual harassment and the Applicant's previous discipline for misconduct in the office. The lack of a proper justification in the Record of Decision for considering that the

conduct was mitigated indicated that the measures were "clearly disproportionate" in the view of C/Supt O'Rielly. This forms part of the rationale for the review authority's decision.

[142] While not expressly stated in the Record of Decision, it can be inferred from several references in the record that C/Supt Chesser regarded the conduct as "horseplay", perhaps on the basis of oral representations made to him during the conduct meeting with the Applicant. In the complaint forwarded by the A/OIC of the CPC, reference is made to the Applicant saying he was only joking when the complainant objected to physical contacts and sexually belittling comments. The conduct was regarded on review as harassment in the workplace rather than horseplay in keeping with the policy adopted by the RCMP in the *Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints)*, SOR/2014-290. It was reasonable for the review authority to conclude that the measures imposed were clearly disproportionate as the conduct authority had, based on the Record of Decision, failed to turn his mind to this aspect of the matter.

[143] This was in essence a procedural decision as the matter remains to be determined by the conduct board and any appeals that may result. And as noted above, there may be further applications for judicial review at the conclusion of the internal process.

[144] Having considered these reports, the Record of Decision by C/Supt Chesser and the other materials outlined in the Notice of Decision, and having conducted his own analysis, the review authority reached a transparent and justified decision which fell within the range of acceptable and defendable outcomes. I see no reason to interfere with that decision.

IX. Costs

[145] On the question of costs, the parties have proposed that if the Respondent is successful on both applications the amounts that should be awarded are $3,600 for T-891-16 and $5,000 for T-1197-16 – both all inclusive. I accept that proposal.

JUDGMENT IN T-891-16 and T-1197-16

THIS COURT'S JUDGMENT is that:

1. the application in Court File T-891-16 and the application in Court File T-1197-16 are dismissed;

2. a copy of this Judgment and Reasons shall be placed on both Court Files;

3. in File T-891-16, costs are awarded the Respondent in the amount of $3,600 inclusive of disbursements; and

4. in File T-1197-16, costs are awarded the Respondent in the amount of $5,000 inclusive of disbursements.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-891-16 T-1197-16
STYLE OF CAUSE:	MARCO CALANDRINI V THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 30, 2017
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	JANUARY 19, 2018

APPEARANCES:

Louise Morel Ryan Kennedy	FOR THE APPLICANT
Abigail Martinez	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Forget Smith Morel Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT