Federal Court  Cour fédérale

Date: 20211203

Docket: T-464-21

Citation: 2021 FC 1347

Ottawa, Ontario, December 3, 2021

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

MARIE-JEANNE CAROLA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Marie-Jeanne Carola, is a Corporal with the Royal Canadian Mounted Police [RCMP]. She seeks judicial review of a Conduct Appeal Decision by an RCMP Conduct Adjudicator [Adjudicator] dated February 11, 2021 [Appeal Decision].

[2] The Adjudicator upheld an earlier decision by the Conduct Authority [Initial Decision-Marker] finding that the Applicant had contravened a provision of the RCMP's Code of Conduct [Initial Decision]. The Initial Decision-Maker imposed two conduct measures: a written reprimand and directions to complete two online courses. On appeal, the Adjudicator confirmed the conduct measures imposed by the Initial Decision-Maker.

[3] The Applicant alleges that the Initial-Decision Maker breached the principles of procedural fairness, and that the Adjudicator failed to address this breach in the Appeal Decision. The Applicant further alleges that the Adjudicator dismissed the appeal for additional reasons that were not raised on appeal. Finally, the Applicant submits that the Adjudicator's decision was clearly unreasonable.

[4] The Applicant seeks an order setting aside the Appeal Decision and directing that the Applicant's appeal of the Initial Decision be allowed. Alternatively, the Applicant seeks that the appeal be remitted for redetermination.

[5] The Respondent submits that the Appeal Decision upholding the conduct measures was reasonable and resulted from a fair process.

[6] The parties have agreed that costs should be fixed in the amount of $2,100.00, payable to the successful party.

[7] For the reasons that follow, this judicial review is allowed.

II. Background

[8] The Applicant has been a member of the RCMP for the past 20 years and is stationed with the RCMP's National Communications Services in Ottawa.

[9] In the early evening of July 5, 2018, while the Applicant was off-duty, she entered a grocery store, purchased groceries and left. While loading her groceries in the car, the Applicant was approached by an adult female [Complainant 1] who alleged that the Applicant had struck her ankle with the Applicant's shopping cart. The Applicant did not acknowledge Complainant 1 and proceeded to get into her vehicle.

[10] The Applicant alleged that as she sought to pull out of her parking space, Complainant 1's husband [Complainant 2] ran towards the vehicle, took photos of her vehicle with his phone, and accused her of being racist. Complainant 2 returned to his vehicle, and once the vehicle left its parking space, the Applicant took a photo of the licence plate. Complainant 1 confirmed that she saw the Applicant take a photo of their licence plate.

[11] The Applicant proceeded in her vehicle in the opposite direction from the Complainants, however Complainant 2 made a U-turn and then positioned the vehicle in front of the Applicant's vehicle, i.e. boxed her in, in order to prevent her from proceeding. Complainant 2 got out of his vehicle, approached the Applicant's vehicle and threatened to call the police. The Applicant remained in her vehicle.

[12] The Applicant alleged that Complainant 2 was blocking traffic, creating a disturbance, accusing her of racism and was aggressive and agitated. The Applicant alleged that she requested that Complainant 2 move his vehicle but he continued to yell at her. The Applicant alleges that there was an accumulation of vehicles causing a traffic jam. When Complainant 2 failed to move his vehicle in response to her first request, the Applicant alleged that she then identified herself as a police officer and again requested that he move his vehicle, following which he lowered his voice and returned to his vehicle.

[13] The Complainants alleged that the Applicant had driven too close to them, and that Complainant 2 had blocked her vehicle in order to tell her that he was going to call the police. Complainant 2 alleged that the Applicant identified herself as a police officer and then sought to intimidate and scare them with language to the effect of "I am the police; you'll see what I can do".

[14] The same evening, the Complainants called 911. Complainant 2 informed the Ottawa Police Services that he suspected the incident occurred because the Complainants are members of a visible minority and he felt it was wrong of the Applicant to have intimidated them.

[15] The Applicant did not report the incident or take further action. She alleges that she considered that she had sufficiently de-escalated the situation. Later that same evening, the Ottawa Police Services advised the RCMP of an incident where an RCMP officer presented her badge. No charges were laid by the Ottawa Police Services and no further investigation was conducted by them.

[16] On July 9, 2018, the Director General of the National Communication Services, Sharon Tessier, was informed of the incident. The Director General is also the Applicant's supervisor and was the Initial-Decision Maker in the present matter. On August 8, 2018, the Initial Decision-Maker, Ms. Tessier, requested a Code of Conduct investigation, of which the Applicant was apprised. Following her receipt of the Code of Conduct letter, the Applicant attended the store and shopping center, identified herself as a police officer, and was ultimately provided with a copy of the surveillance video from the store on the day of the alleged incident.

[17] The parties involved in, or witness to, the incident, including the Applicant, the Complainants and the cashier, provided statements in the context of the conduct investigation. By the end of November 2018, the internal investigation by the professional responsibility unit of the RCMP was completed and the resulting report was provided to the Initial Decision-Maker and the Applicant. As a result of the investigation, the Initial Decision-Maker issued a Notice of Conduct Meeting, which scheduled the Conduct Meeting for April 3, 2019. The Notice of Conduct Meeting contained two allegations:

> **Allegation 1**: On July 5, 2018, at or near Ottawa, in the Province of Ontario, Cpl. Marie-Jeanne Carola did, while off-duty, at a local Farm Boy grocery store, become engaged in a confrontation with Salma Hafez and Omar Badreldin, members of the public, causing them to fear for their safety. It is therefore alleged that Cpl. Marie-Jeanne Carola has contravened Section 7.1 of the Code of Conduct. *"Members behave in a manner that is not likely to discredit the Force."*
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> **Allegation 2**: On July 5, 2018, at or near Ottawa, in the Province of Ontario, Cpl. Marie-Jeanne Carola did, while off-duty, at a local Farm Boy grocery store, produce her RCMP issued police badge to Omar Badreldin stating "I am the Police. You will see what I can do". It is therefore alleged that Cpl. Marie-Jeanne Carola has contravened Section 3.2 of the Code of Conduct.
> *"Members act with integrity, fairness and impartiality, and do not compromise or abuse their authority, power or position."*

[18] Following the receipt of the report on the investigation, the Applicant provided additional written submissions.

A. *The Conduct Meeting and the Initial Decision*

[19] During the Conduct Meeting on April 3, 2018, the Applicant made oral representations, in which she described the incident and provided her explanation of the events that took place. In her representations, the Applicant referred to the Incident Management Intervention Model [IMI Model], a model used by the RCMP officers to assess and manage risk in encounters with the public and evaluate police intervention options. As per the Initial Decision, the Applicant explained to the Initial Decision-Maker that, once she was boxed in and Complainant 2 was yelling, she felt that the situation was dangerous for herself and the public, such that it became a public safety issue. She showed her badge to direct him to move his vehicle, and considered that her use of her badge was consistent the IMI Model, namely that "police presence" was an intervention option.

[20] On the same day as the Conduct Meeting, the Applicant was informed verbally that, on a balance of probabilities, Allegation 1 (Code of Conduct, section 7.1 - Members behave in a manner that is not likely to discredit the Force) was not established, but that Allegation 2 (Code of Conduct, section 3.2 – abuse of authority) was established. The Applicant was also informed of the conduct measures to be imposed, and that she would received a written decision, entitled Record of Decision, in due course.

[21] Approximately three weeks after the Conduct Meeting, on April 25, 2018, the Initial Decision-Maker issued the Record of Decision. I will refer to the Initial Verbal Decision, being the oral communication on the day of the Conduct Meeting on April 3, 2018, and the Initial Written Decision, being the written decision issued on April 25, 2018, which together constitute the Initial Decision.

[22] In the Initial Written Decision, the Initial Decision-Marker determined that, with respect to Allegation 1, the Complainants had escalated the incident, and may have provoked the Applicant. The Initial Decision-Marker questioned the Applicant's decision not to acknowledge Complainant 1 when approached, but found that was not a contravention of the Code of Conduct. She further determined that she did not believe the Complainants feared for their safety based on their behaviour during the incident. The Initial Decision-Maker found that the allegation by the Complainants that the Applicant had drove aggressively towards the Complainants in the parking lot lacked credibility.

[23] With respect to Allegation 2, the Initial Decision-Maker found it to be established on a balance of probabilities. The Initial Decision-Maker determined that the Applicant was personally involved in an incident in a civilian capacity, and therefore producing her police badge and using her status as a police officer was inappropriate and consequently an abuse of authority. With respect to the IMI Model, the Initial Decision-Maker stated that the Applicant referred to it as a justification for her actions, but that the IMI Model could not be used in this fashion and the Applicant's reference to it was found to demonstrate a misunderstanding of the IMI Model and its purpose. The Initial Decision-Maker commented that the IMI Model relates to

an on-duty intervention or call for service, before stating “I further consulted with National Use of Force Subject Matter Resource who came to the same conclusion I did”.

B. *Consultation with the “Subject Matter Resource”*

[24] Prior to the release of the Initial Written Decision, neither the Applicant nor her NHQ Member Workplace Advisor [Applicant’s Advisor] had been aware that a consultation had been held with a “National Use of Force Subject Matter Resource” [Subject Matter Resource].

[25] Following the receipt of the Initial Written Decision, the Applicant’s Advisor made enquiries and determined the identity of the Subject Matter Resource to be Sgt. Raymond. On May 9, 2019, the Applicant’s Advisor wrote an email to the Initial Decision-Maker concerning the statement in the Initial Written Decision that “I further consulted with [Sgt. Raymond] who came to the same conclusion I did”. In the email, the Applicant’s advisor expressed concern that the consultation took place, and that the Applicant did not have an opportunity to speak to Sgt. Raymond about what facts were presented to him that formed the basis of his opinion. The Applicant’s Advisor considered that a procedural fairness issue had arisen, and informed the Initial Decision-Maker that he was advised by Sgt. Raymond’s superiors that Sgt. Raymond “was not provided [with] all of the facts to give any kind of advice or opinion”. The Applicant’s Advisor further informed the Initial Decision-Maker that he was aware that she had not spoken directly to Sgt. Raymond, rather a Conduct Advisor assisting the Initial Decision-Maker on the matter, Sgt. Adm, was the one who had spoken with Sgt. Raymond. The Applicant’s Advisor requested disclosure of the communications that had been had with Sgt. Raymond concerning the Applicant’s alleged Code of Conduct contravention.

[26] On May 14, 2019, the Applicant submitted a Statement of Appeal form, in which she advised that she was appealing the Initial Decision on the basis that the Initial Decision-Maker breached procedural fairness, and requested all relevant material on the communications with Sgt. Raymond.

[27] On May 17, 2019, in response to the procedural fairness issue raised in the Applicant's Advisor's email and in the Statement of Appeal, the Conduct Advisor to the Initial Decision-Maker, Sgt. Adm, sent an email to the National Headquarters Conduct Advisor with "clarifying points" concerning his consultation with the Subject Matter Resource, Sgt. Raymond. In the email, Sgt. Adm confirmed that after the Initial Verbal Decision, he contacted Sgt. Raymond "and discussed in general terms the incident and the application of the [IMI Model] in the circumstances brought up by the [Applicant]". Sgt. Adm stated that the consultation was "done in fairness to the [Applicant], as the [Initial Decision-Maker] is a [public servant] and did not have formal use of force training". Sgt. Adm's email further states that the Initial Decision-Maker had already arrived at her decision and the consultation "served as an extra step of consideration to cover all bases in order to show that her decision was fair to the [Applicant]". Sgt. Adm explained that "seeking input from someone with more knowledge was to confirm her decision was sound and fair to the [Applicant] before she was served with the [Initial Written Decision]".

[28] The Applicant plead that other than the above May 17, 2019 email received during the appeal process, the Applicant had never received any documentation related to the consultation with Sgt. Raymond or his qualifications. On December 31, 2019, the Applicant filed written

submissions on the merits of the appeal in which she reiterated her ground that there was a breach of procedural fairness, and further submitted an additional breach of procedural fairness and allegations that the Initial Decision was unreasonable because it was based on irrelevant considerations and on a misapprehension of the evidence, for a total of four grounds of appeal.

[29] In the Applicant's appeal submissions, in her submissions in this judicial review, and at the hearing before this Court, the Applicant has plead that her Advisor contacted Sgt. Raymond and upon being provided with a more fulsome summary of the facts, Sgt. Raymond modified his original position and agreed that the Applicant's actions were consistent with the IMI Model. That is not apparent from the record before me. While the email dated May 9, 2019 from the Applicant's Advisor to the Initial Decision-Maker stated that that he was advised that Sgt. Raymond was not provided with all of the facts and that he would be contacting Sgt. Raymond, there is no evidence on file that he actually did so and that Sgt. Raymond communicated to him that he had modified his position.

III. The Appeal Decision

[30] The Adjudicator identified that in order for the Applicant to be successful in her appeal, she had to establish that the Initial Decision a) contravened the principles of procedural fairness, b) was based on an error of law, or c) was clearly unreasonable (subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR 2014-289).

[31] After setting out the background facts, the procedural history, and a legal overview, the Adjudicator addressed each of the four grounds of appeal raised by the Applicant. In addition,

the Adjudicator provided his views on the question of abuse of authority under a separate heading entitled “Additional Point”, before concluding that the Applicant had not convinced him that the Initial Decision had contravened the principles of procedural fairness, was based on an error of law, or was clearly unreasonable.

[32] With respect to procedural fairness, the Adjudicator identified *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 [*Baker*] as establishing the framework for reviewing issues of procedural fairness and *Smith v Canada (Attorney General)*, 2019 FC 770 [*Smith*] as applying the factors identified in *Baker* in the context of the RCMP conduct process. The Adjudicator recognized that in *Smith*, it was determined that a higher degree of procedural fairness is owed due to section 45.16(9) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, [*RCMP Act*] which provides that an appeal decision is final and binding. The Adjudicator determined that an RCMP member who is subject to the conduct process has three broad rights: the right to notice, the right to be heard, and the right to an impartial decision maker. The Adjudicator concluded that those rights were respected on the basis that the Applicant had notice of the Conduct Meeting, that she provided written and oral submissions, and that the Initial Decision-Maker “appeared to have been impartial”.

[33] The Adjudicator noted the Applicant’s submission that a breach of procedural fairness occurred because a consultation was held with Sgt. Raymond concerning aspects of the IMI Model and the Applicant’s actions during the incident. The Applicant had submitted that, among other things, (a) at no time during the conduct proceedings was it disclosed to her that this consultation would take place or that it had taken place, (b) Sgt. Raymond’s credentials were not

established, (c) Sgt. Raymond's opinion or the information that it was based on was not documented, (d) she was deprived of the opportunity to object to the consultation and submit a rebuttal, (e) Sgt. Raymond was not aware of all the facts and once provided with further information then deemed the Applicant's actions to be in accordance with the IMI Model, and (f) the Initial Decision-Maker relied on the consultation in her decision to impose conduct measures, therefore it cannot be said that the consultation was in support of the Applicant.

[34] The Adjudicator confirmed that the consultation with Sgt. Raymond took place after the Conduct Meeting and the Initial Verbal Decision had been rendered. The Adjudicator stated that he concurred with the position of the Initial Decision-Maker, who was also the respondent for the purposes of the appeal, that "the consultation was made after the Conduct Meeting for no improper purpose and had no effect on the [Initial Decision-Maker's] decision on the allegations and the eventual conduct measures imposed in the [Initial Written Decision]." The Adjudicator concluded that because the "decision and the conduct measures did not vary in any way between the Conduct Meeting's date and the service of" the Initial Written Decision, then no breach of procedural fairness resulted from the consultation with Sgt. Raymond.

[35] Turning to the issue of an error in law, the Adjudicator found that while the Applicant had alleged a number of errors in fact which contributed to the decision being unreasonable, he found that no error of law had occurred.

[36] On the issue of whether the Initial Decision was clearly unreasonable, the Adjudicator recognized that Conduct Authorities, such as the Initial Decision-Maker, enjoy considerable

discretion in exercising their responsibilities and they are entitled to deference when they make conduct decisions. The Applicant provided several grounds upon which she alleged the Initial Decision was clearly unreasonable, and the Adjudicator addressed each of them separately.

[37] As to the question of abuse of authority, the Applicant had alleged that there was an absence of evidence that she uttered the words “I am the Police. You will see what I can do.”. The Applicant submitted that the Initial Decision-Maker had found that the Complainants had provoked the altercation and had lacked credibility. The Adjudicator found that even if the words were not uttered, the Applicant had identified herself for the sole purpose of de-escalating the situation – and therefore she used her authority as a police officer to gain control of the situation.

[38] Contrary to the Applicant’s submissions, the Adjudicator found that the Initial Decision-Maker did not misunderstand or misapprehend the evidence. The Adjudicator found that the Applicant’s intentions as to whether she had contemplated arresting Complainant 2 or whether the Complainant 2 would have been found guilty of causing a disturbance to be “of secondary importance and would not change the [Initial Decision-Maker’s] decision”.

[39] The Adjudicator also found that the Applicant’s submission that the Initial Decision-Maker failed to provide sufficient reasons for her finding of abuse of authority to be without merit.

[40] In a final point, the Adjudicator found that although the actions of the Applicant were minimally invasive, they were not in good faith because she chose to resolve a personal issue by

using her position as a police officer. In essence, the Adjudicator found that by identifying herself as a police officer, she abused her authority. Consequently, on February 11, 2019, the Adjudicator dismissed the appeal and confirmed the Initial Decision along with the imposed conduct measures.

IV. The Handwritten Notes of the Consultation with the Sgt. Raymond

[41] Shortly following the hearing of this judicial review, the Court issued oral directions concerning a one-page document in a copy of the Certified Tribunal Record contained in the Applicant's Record that had not been legible in the copy of the Certified Tribunal Record filed with the Court:

> In both their written and oral submissions, the parties have addressed the consultation that took place between the Conduct Advisor, Sargent Adm, and the "National Use of Subject Matter Resource", Sargent Raymond. While the parties have referred to documents in the record, including Steve Madden's email dated May 9, 2019 and Helen Meinzinger's email dated May 17, 2019, it does not appear that the parties have referred to the notes taken on April 8, 2019 concerning Sargent Adm's consultation with Sargent Raymond ("Consultation Notes"). A legible copy of the Consultation Notes is contained in the Certified Tribunal Record (CTR) at p. 237 of the Applicant's Record. It is referred to as "Notes discussion use of force" in the table of contents of the CTR at p. 98 of the Applicant's Record. Note that the copy of the Consultation Notes contained in the copy of the Certified Tribunal Record ID 7 filed with the Court on April 12, 2021, is not legible. The Court considers that the Consultation Notes may be relevant, consequently, should the parties wish to make submissions, up to a limit of five (5) pages, on the Consultation Notes, they shall have until 4:30 PM on Wednesday, November 17, 2019, to do so.

[42] In response to the oral directions of the Court, both parties made further submissions. It is common ground between the parties that the page of notes are handwritten notes taken on April

8, 2019 by Sgt. Adm concerning his consultation with Sgt. Raymond, the national use of force "subject matter resource". The contents of the handwritten notes will be addressed in the context of my analysis further below.

V. Issues

[43] The Applicant has identified the issues as follows:

> (a) What is the appropriate standard of review to apply to the findings at issue in the Appeal Decision?
>
> (b) Did the Adjudicator err in failing to find that the Applicant's inability to consult with the Subject Matter Resource resulted in a breach of procedural fairness?
>
> (c) Did the Adjudicator breach the Applicant's right to procedural fairness by raising new issues without giving her the opportunity to make submissions?
>
> (d) Was the Adjudicator's application of the legal test for abuse of authority reasonable?

[44] The Respondent has identified the sole issue as being whether the Appeal Decision was reasonable. Nevertheless, the Respondent does acknowledge and address the two issues of procedural fairness raised by the Applicant.

[45] I reformulate the issues as follows:

> (a) Did the Initial Decision-Maker comply with the duty of procedural fairness?
>
> (b) If so, was the breach of procedural fairness cured during the appeal process before the Adjudicator?
>
> (c) If not, what is the appropriate remedy?

(d) Did the Adjudicator fail to comply with the duty of procedural fairness by raising two new issues?

(e) Was the Appeal Decision on the merits and on the conduct measures reasonable?

[46] As explained below, considering my findings on the first three issues, (a) through (c), it is unnecessary for me to consider issues (d) and (e).

VI. Analysis

A. *Procedural Fairness*

[47] A court assessing whether a decision-maker complied with the duty of procedural fairness "is required to ask whether the procedure was fair having regard to all the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment is done on the basis of correctness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *CPR* at 54-56). The ultimate question is whether an applicant knew the case to meet and had a full and fair chance to respond (*CPR* at para 56).

[48] While the RCMP adjudicators have specialized expertise in maintaining the integrity and professionalism of the RCMP and consequently their decisions in such matters are entitled to deference (*Calandrini v Canada (Attorney General)*, 2018 FC 52 at para 51), no deference is to be afforded on issues involving breaches of procedural fairness (*McBain v Canada (Attorney General)*, 2016 FC 829 at para 40).

[49] The Adjudicator referenced the factors identified in *Baker* and noted this Court's finding in *Smith* that a higher degree of procedural fairness is owed in the context of RCMP conduct process matters (Appeal Decision, para 21). The Applicant submits that, as in *Smith,* she is owed a high degree of procedural fairness. I agree.

B. *Did the Initial Decision-Maker comply with the duty of procedural fairness?*

[50] The Applicant submits that the Initial Decision-Maker's reliance on the Subject Matter Resource, Sgt. Raymond, breached her right to be heard, also know as the principle of *audi alteram partem*. The Applicant argues that the consultation with Sgt. Raymond led to a breach of procedural fairness. The thrust of the Applicant's argument is that the Initial Decision-Maker was not permitted to engage in *ex-parte* fact finding, meet with third parties in relation to the matter in question, or conduct private interviews to supplement the evidence adduced at the hearing on a question of fact that was controvertible. The Applicant submits that she ought to have been provided with the opportunity to respond to the evidence provided by Sgt. Raymond.

[51] The Respondent pleads that the decision and the conduct measures imposed did not change between the Initial Verbal Decision and the Initial Written Decision, and that Sgt. Raymond did not take over the decision-making role. It was highlighted at the hearing of this matter that the Adjudicator had found that the consultation "had no effect" on the Initial Decision. In response, the Applicant pleads that if procedural fairness had been respected not only *could* there have been an effect on the Initial Decision, there *would* have likely been an effect.

[52] The Applicant pled that once Sgt. Raymond had been provided with a more fulsome summary of the facts, he modified his original position and agreed with the Applicant on the issue of the use of the IMI Model. At the hearing, the Respondent argued that the material in the record does not show that Sgt. Raymond changed his mind. I agree with the Respondent. At best, the material in the record spoke to a concern that Sgt. Raymond had not been provided with the full facts and that the Applicant's Advisor intended to contact Sgt. Raymond personally. At the hearing the Applicant plead that subsequent to the email from her Advisor to the Initial Decision-Maker on May 9, 2019, and prior to the appeal submissions dated December 31, 2019, Sgt. Raymond communicated that he had changed his view, hence why this point is contained in the appeal submissions and raised before the Adjudicator and ultimately before this Court. Based on the record before me, I am not prepared to find that Sgt. Raymond did in fact change his view on the whether the Applicant's actions were consistent with the IMI Model. Nevertheless, whether or not Sgt. Raymond actually changed his view is not determinative of this matter.

[53] In *Iwa v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282) [*Consolidated-Bathurst*], the Supreme Court of Canada found that discussions on factual issues, to the extent that persons who have not heard all the evidence are involved, will generally constitute a breach of the principles of natural justice, namely the right to be heard / *audi alteram partem* rule (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)* 2020 FCA 196 at para 62, discussing *Consolidated-Bathurst*). The Supreme Court drew a distinction between discussions on factual matters and discussions on legal or policy issues, with the former being problematic on the basis that factual discussions allow persons other than the parties to make representations on factual issues when they have not heard the evidence

(*Consolidated-Bathurst* at para 86). The Supreme Court reasoned that generally such factual discussions constitute a breach of the *audi alteram partem* rule (*Consolidated-Bathurst* at para 86).

[54] The Respondent pleads that in the matter at hand, the consultation with Sgt. Raymond "concerned matters of policy and interpretation, but did not go beyond influence to coercion and did not deal with findings of fact." The Applicant disagrees and submits that the facts were discussed during the consultation. It is common ground between the parties that it was the Initial Decision-Maker's Conduct Advisor, Sgt. Adm. that had the consultation with Sgt. Raymond on April 8, 2019, and that consultation is reflected in his handwritten notes of that date. Other than this handwritten note, the consultation was undocumented.

[55] I find that the handwritten notes of the consultation do refer to factual and contextual elements of the incident. The handwritten note includes the following notations: "Carola – spoke to Steve Raymond from Use of Force"; "IMIM - Officer presence when personally involved while off duty"; "Authority of [the Applicant] to put herself on duty"; "Grounds for arrest?", "arrest when someone is expressing their concern w your behavior (sic)?"; "public disturbance. NOT peace officer disturbance while involved in the matter"; "not reported to O.P.S."; "duty to report once you Id as a Police Officer"; "Sec 175 + mischief"; and "case law to look up".

[56] It is common ground between the parties that the O.D.S referred to Off Duty Sick. The Respondent submits that if the Applicant was off duty sick, this means she could not have been fit to work or put herself on duty. The Applicant submits that this note was inaccurate regarding

the Applicant's duty status, as she was not O.D.S at the time of the incident. The references to the public versus the police officer disturbance, along with "Sec 175 + mischief" and "case law to look up", relate to the notion that a police officer cannot be disturbed but rather it is the public that must be disturbed. Relying on the handwritten note and the additional submissions of both parties, these notations speak to the factual circumstances of the Applicant and whether she was disturbed as a party to the incident, a witness, an officer, and whether the public was disturbed. The Respondent admits that there was some discussion about the Applicant's statements concerning Complainant 2 creating a public disturbance. The Applicant submits that multiple factual circumstances specific to the Applicant's situation were discussed in the meeting with the result that certain issues were then adopted in the Initial Written Decision by the Initial Decision-Maker. Indeed, the Initial Written Decision addresses the disturbance of a police officer versus the disturbance of the public, notes section 175 of the *Criminal Code*, RSC 1985, c C-46, and relies on case law concerning yelling in a public place being insufficient to establish a disturbance within s. 175 of the *Criminal Code*.

[57] As detailed in paragraph 27 of this judgment, following the issuance of the Initial Written Decision and the complaints of procedural fairness lodged by the Applicant and her Advisor, Sgt. Adm sent an email to the National Headquarters Conduct Advisor in which he set out a number of "clarifying points". In this email Sgt. Adm states that he "discussed in general terms the incident and the application of the IMIM in the circumstances brought up by the [Applicant]" with Sgt. Raymond. Sgt. Adm further stated that in "seeking input" from Sgt. Raymond, the Initial Decision-Maker was acting out of fairness to the Applicant because the Initial Decision-Maker does not have formal use of force training. Sgt. Adm explained that "seeking input from

someone with more knowledge was to confirm her decision was sound and fair to the [Applicant] before she was served with the [Initial Written Decision]". The Respondent submits that this consultation was merely a "good conscience follow-up" by the Initial Decision-Maker "to dispel any doubts in her mind that the [IMI Model] was not a valid defence to the allegations despite the argument raised by the Applicant at the conduct meeting." On the contrary, the Applicant submits that the consultation between Sgt. Adm and Sgt. Raymond involved a discussion of the Applicant's factual circumstances and a detailed consideration of whether the Applicant's actions were justifiable, both under the IMI Model and with respect to potential grounds for arrest, other duties that may have owed, and whether she should have reported to the Ottawa Police Services.

[58] I find the Respondent's position, that the consultation did not deal with findings of fact, to be contrary to the record before me. Both Sgt. Adm's consultation notes and his email containing "clarifying points" evidence a discussion that delved into the facts of the incident in question and addressed whether the Applicant's actions, based on the facts provided to Sgt. Raymond, were consistent with the IMI Model and other duties she may have had. Save for Sgt. Adm's handwritten notes, the consultation was undocumented. At the time of the consultation, by the Respondent's own admission, Sgt. Raymond had not heard all the evidence before the Initial Decision-Maker. For the most part, the Applicant was left to guess the extent to which Sgt. Raymond made representations on factual issues to Sgt. Adm, which ultimately resulted in (a) the statement in the Written Initial Decision that Sgt. Raymond had "agreed with" the Initial Decision-Maker, and (b) certain points arising from the discussion being adopted into the written

reasons by the Initial Decision-Marker. Relying on *Consolidated-Bathurst*, I find the consultation breached the principles of natural justice.

[59] In addition, administrative decision-makers "are generally precluded from ex parte fact-finding or meeting privately with a party or third persons in relation to the matter in question" (Donald J.M. Brown et al., *Judicial Review of Administrative Action in Canada*, Thomson Reuters, 2021, section 12:2, page 12-7). Such meetings are problematic because, among other things, one or more parties may not be a fair opportunity to respond to information that has been provided (*Judicial Review of Administrative Action in Canada*, page 12-6). The question of whether the Applicant's actions were justified under the IMI Model, given the evidence presented, was central to the Initial Decision. Given that the consultation concerned that very issue, and others, the Applicant ought to have been given notice and an opportunity to respond. I find that once the consultation had taken place, the failure to afford the Applicant an opportunity to respond to the contribution made by Sgt. Raymond was a breach of procedural fairness. Specifically, it was in contravention of the rule of *audi alteram partem* (the right to be heard).

[60] The Respondent relies on Sgt. Adm's email containing the "clarifying points" on the consultation for proposition that the consultation was intended to be, and was, for the Applicant's benefit. Sgt. Adm was the Conduct Advisor (also described as a scribe) assisting the Initial Decision-Maker during the conduct process. Sgt. Adm penned this email after the Applicant had been made aware of the consultation, had raised the issue of procedural fairness, and had appealed on that ground. I am not prepared to attribute any weight to Sgt. Adm's statements that the consultation was for the Applicant's benefit. Sgt. Adm's email is an attempt to respond to the

procedural fairness argument advanced by the Applicant in her Advisor's email to the Initial Decision-Maker and in her Statement of Appeal. It is, in my view, improper. In *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 [*Canada (Human Rights Commission)*], a party sought judicial review on, among other things, procedural fairness grounds after having received a decision from a tribunal that referred to over 10,000 pages being in the record when in fact the parties had only submitted approximately 2,000 pages. When responding to a disclosure request following the filing of the application for judicial review, the Director of Registry Operations at the tribunal included a cover letter stating that certain documents were not taken into consideration by the chairperson when rendering her ruling. Justice MacTavish cautioned adjudicators against seeking to shore-up their decisions with after-the-fact materials:

> [187] Reviewing courts have repeatedly cautioned adjudicators against trying to shore-up their decisions through after-the-fact affidavit evidence filed in response to applications for judicial review of their decisions: see, for example, Sapru v. Canada (Minister of Citizenship and Immigration), 2011 FCA 35, 413 N.R. 70 at para. 51, and Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness), 2008 FCA 255, [2009] 2 F.C.R. 576 at para. 45.
>
> [188] What happened in this case is even more problematic than what occurred in Sapru and Sellathurai. When a decision-maker files an affidavit in an ex post facto attempt to improve on his or her decision, the statements in issue are made under oath and it is at least open to the aggrieved party to challenge statements contained in the affidavit through cross-examination.
>
> [189] In this case, the statement as to what materials the Tribunal did and did not consider in deciding the motion to dismiss came not from the Tribunal member herself, but rather from a public servant within the Tribunal Registry. There is no explanation as to how the Registry official knew what the Tribunal member had or had not considered in arriving at her decision. Nor is there any explanation as to why contradictory statements appear in the decision itself. Moreover, the statement in question is contained in

> a letter rather than in an affidavit. Consequently, the applicants have no way to challenge the Registry officer's assertions.
>
> [190] At the end of the day what we are left with is the Tribunal's own statement that it had "vetted" 10,000 pages of material in relation to the motion to dismiss, when the record on the motion before it was only some 2,000 pages in length. There is, moreover, no suggestion by any of the parties that the authorities filed in relation to the motion came anywhere close to accounting for the 8,000 page difference.
>
> [191] Taking the Tribunal's statements in its decision at face value, I can only conclude that the Tribunal considered thousands of pages of material not properly before it on the motion to dismiss, without advising the parties accordingly, and without affording them any opportunity to make representations in this regard. This is a clear breach of procedural fairness: Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise), 1975 CanLII 194 (SCC), [1977] 1 S.C.R. 456 at 463.

[61] As was the case in *Canada (Human Rights Commission)* above, there was no way for the Applicant to challenge what was asserted by Sgt. Adm in his email on the impact, or the alleged lack thereof, of the consultation on the Initial Written Decision. This was not an affidavit upon which Sgt. Adm could be cross-examined, nor is there an affidavit from the Initial Decision-Maker in the record. Rather, all the Applicant is left with is Sgt. Adm's self serving email sent after-the-fact and his handwritten notes from the consultation with Sgt. Raymond.

[62] Furthermore, I am not persuaded by the Respondent's argument that there was no breach of procedural fairness because the consultation had no impact on the decision recorded in the Initial Written Decision. In his email containing the "clarifying points", Sgt. Adm quoted the paragraph from the Initial Written Decision concerning the IMI Model which finished with "I further consulted with National Use of Force Subject Matter Resource who came to the same conclusion I did" but assured the reader that he "did not request or include in the [Initial Written

Decision] Sgt Raymond's personal opinion on any actions taken by the [Applicant]." I disagree. As noted above, while the ultimate sanction (conduct measures) did not change, the reasoning by the Initial Decision-Maker was at the very least supplemented by the results of the consultation with Sgt. Raymond. This is reflected clearly in the language of the Initial Written Decision when combined with the Sgt. Adm's consultation notes. Moreover, what is the point of noting that Sgt. Raymond supposedly agreed with the Initial Decision-Maker if it was meaningless? Overall, the record shows that the consultation with Sgt. Raymond had an impact, and the Applicant is left to wonder whether the Initial Written Decision would be different if Sgt. Raymond had been provided with a full version of the facts or if he had disagreed with Sgt. Adm.

[63] The Applicant does not need to show actual prejudice from the Initial Decision-Marker's consideration of the results of the consultation with Sgt. Raymond in order to prove that she has been denied procedural fairness. As per the Supreme Court of Canada in *Kane,* the "court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so." (*Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1116; See also *Canada (Human Rights Commission)* at para 195). I find that the Applicant has demonstrated that she might have suffered prejudice by (a) the Initial Decision-Maker relying on material obtained from the consultation with Sgt. Raymond, (b) being prevented from participating in the meeting with Sgt. Raymond and/or (c) not being provided with the opportunity to address the outcomes of the meeting with Sgt. Raymond prior to the issuance of the Initial Written Decision. Consequently, I am satisfied that that the Initial Decision-Maker's breach of procedural fairness may have reasonably prejudiced the Applicant.

[64] The Respondent's submission that the outcome of the decision did not change between the Initial Verbal Decision and the Initial Written Decision is in essence an argument that the decision would not have differed had there been no consultation with Sgt. Raymond. As instructed by the Supreme Court of Canada, the denial of a fair hearing "must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision" (*Cardinal v Director of Kent Institution* [1985] 2 SCR 643 at 661 [*Kent*]). It is not my role as a reviewing court to speculate what the Initial Decision might have been had the breach of procedural fairness not taken place (*Kent* at 661).

[65] A breach of procedural fairness will ordinarily render a decision invalid. There are however limited exceptions to the foregoing, notably in instances where the merits of the claim are such that it would be in any case hopeless or the outcome is legally inevitable (*Canada (Human Rights Commission)* at para 203; *Canada (Attorney General) v McBain*, 2017 FCA 204 at 10 [*McBain*]). In such cases, a reviewing court may disregard a breach of procedural fairness. Considering the record, I find that this exception does not apply this to judicial review. By the Respondent's own admission, the Initial Decision Marker had "doubts in her mind" and was "seeking input from someone with more knowledge". Consequently, the outcome of the conduct review process cannot be said to be hopeless or legally inevitable.

[66] To summarize, an *ex parte* discussion was had, that concerned, at least in part, factual issues, with a person who had not heard all the evidence and was not involved in the Applicant's RCMP conduct process. The Applicant was not afforded an opportunity to be present, or address

what was discussed or the outcome of the discussion. These points, in and of themselves and combined, are such that there was a breach of procedural fairness.

C. *Was the breach of procedural fairness cured during the appeal process before the Adjudicator?*

[67] Having concluded that there was a breach of procedural fairness, I find the Initial Decision to be invalid. The usual remedy would be to order a new hearing, however this would not be the case where a breach of procedural fairness has been cured in an appellate proceeding (*McBain* at para 10). The Respondent submits that if there was a breach of procedural fairness by the Initial Decision-Maker, it was cured by the Adjudicator such that the proceedings as a whole reached an acceptable level of fairness. The Applicant disagrees.

[68] In assessing whether an appellate proceeding has cured a breach of procedural fairness in the context of RCMP conduct proceedings, the Federal Court of Appeal adopted the following approach in *McBain*:

> [13] … *Taiga Works* adopts the five factors outlined by De Smith, Woolf & Jowell in *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) at 489-90, to determine whether an appellate proceeding has cured earlier procedural defects. These are: (i) the gravity of the error committed at first instance; (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing; (iii) the seriousness of the consequences for the individual; (iv) the width of the powers of the appellate body; and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.

[69] In the matter at hand, I find the breaches of procedural fairness that occurred at first instance, before the Initial Decision-Maker, to be serious. Moreover, I find they likely permeated

the proceedings before the Adjudicator. Relying on the after-the-fact email from Sgt. Adm with his "clarifying points", the Adjudicator found he concurred with the "Respondent" that the consultation was made "for no improper purpose and had no effect on the Respondent's decision on the allegations and the eventual conduct measures imposed in the [Initial Written Decision]." As noted above, the references to the "Respondent" in the Appeal Decision are references to the Initial Decision-Maker, as she was the "Respondent" in the appeal. Moreover, the Appeal Decision does not refer to Sgt. Adm's handwritten note of the consultation, nor is there any indication that the contents thereof were considered by the Adjudicator.

[70] As to the seriousness of the consequences, the Adjudicator noted that in *Smith* the conduct decision was considered significant by the Court because it could impact the member's career indefinitely. The Applicant submits that the consequences are serious given that the conduct measures will remain on her record indefinitely and impact her credibility if she is called to testify in criminal proceedings. I agree with the Applicant.

[71] This was not a *de novo* appeal where the Adjudicator had no regard at all to the prior decision.

[72] While the Adjudicator considered the issue of procedural fairness raised by the Applicant, and he was bound by the same duty of procedural fairness, the Adjudicator found that there was no breach of procedural fairness because, among other things, the Applicant had the opportunity to be heard at the conduct meeting and the "decision and conduct measures" did not vary between the Initial Verbal Decision and the Initial Written Decision. The Adjudicator failed

to grapple the impact the *ex parte* consultation had on the Initial Written Decision, as evidenced by the Initial Written Decision itself, the consultation notes, and the after-the-fact email from Sgt. Adm.

[73] Based on the foregoing factors, I find that the breaches of procedural fairness were not cured by the Adjudicator in the appeal process.

D. *The Remedy*

[74] Having found that there was a breach of procedural fairness and that the appeal process failed to cure the breach, I now turn to the remedy. In general, the remedy is to send the matter back to the same administrative decision-maker or another administrative decision maker in the same organization for redetermination. As stated by my colleague Justice Grammond, "[t]his approach makes it possible to adhere to the respective missions of the Court and administrative bodies. In this case, it is to the bodies established by the [*Royal Canadian Mounted Police Act*, RSC 1985, c R-10] that Parliament has entrusted the role of deciding grievances from RCMP members, and not to this Court" (*Frémy v Canada (Attorney General)*, 2018 FC 434 at para 48).

[75] I find that it is appropriate that the matter be remitted to a different Conduct Adjudicator for redetermination in accordance with the foregoing reasons. Having found the breach of procedural fairness to be determinative, it is unnecessary for me to assess the remaining two questions raised by the Applicant.

JUDGMENT in T-464-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;
2. The Appeal Decision of the Adjudicator is set aside;
3. This matter shall be remitted to a different Conduct Adjudicator for redetermination in accordance with these Reasons; and
4. Costs for the Applicant in the amount of $2,100.00.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MARIE-JEANNE CAROLA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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APPEARANCES:

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