Federal Court Cour fédérale

Date: 20230109

Docket: T-834-21

Citation: 2023 FC 37

Ottawa, Ontario, January 9, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

FAREEZ VELLANI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Fareez Vellani, is a former member of the Royal Canadian Mounted Police ("RCMP"). The Applicant seeks judicial review of a decision of the delegate of the Commissioner of the RCMP, Steven Dunn ("Commissioner"), dated April 20, 2021 ("Conduct Appeal Decision"), affirming the decision of the RCMP Conduct Board ("Conduct Board Decision") to discharge the Applicant from his position as a member of the RCMP.

[2] The Applicant was discharged from his position as constable because he made false statements to fellow members of the RCMP and to the Insurance Corporation of British Columbia ("ICBC") regarding damages flowing from a single motor vehicle accident on February 13, 2015. In reporting the damage to the ICBC and the RCMP investigator charged with investigating the theft and vandalism ("Constable Hawkins"), the Applicant claimed that all of the damages were sustained during an incident of theft and vandalism on the night of February 12, 2015. The Applicant did not report his single motor vehicle collision to either the RCMP or the ICBC. The Applicant's misrepresentations on the causes of the vehicle's damages include:

A. A statement made on February 13, 2015 to the ICBC;

B. A statement made on February 13, 2015 to the RCMP member conducting the theft investigation, Constable Hawkins;

C. A statement made on February 24, 2015 to an ICBC adjuster;

D. A statement made on February 25, 2015 in an authored "Automobile Proof of Loss" solemnly declared before a notary public; and

E. A statement made on March 20, 2015 to an ICBC investigator.

[3] The Applicant submits that the Commissioner breached procedural fairness by failing to recognize that he was not given a fair opportunity to address the prejudicial proposition that he was seeking to evade police investigation in committing the misconduct. The Applicant further submits that the Conduct Appeal Decision is unreasonable because a) the Commissioner erred by perpetuating misconceptions regarding the Applicant's work circumstances and his related

mental health issues, and b) the Commissioner erred in his analysis of the Conduct Board's examination of the evidence.

[4] For the reasons that follow, I find the Conduct Appeal Decision is reasonable. The application for judicial review is dismissed.

II. Facts

A. *The Applicant and Incident at Issue*

[5] The Applicant graduated from the RCMP's training academy in 2007. He was then assigned to the General Policing Unit in Coquitlam, British Columbia, where he claims to have experienced overt racial discrimination from his Staff Sergeant. The Staff Sergeant was subsequently suspended and retired. Prior to his resignation, the Staff Sergeant allegedly told the Applicant to transfer to the Traffic Service Unit because "that's where all the useless people – as he called them – went." The Applicant indicated that working in this environment had a negative affect on his mental health.

[6] In August 2013, the Applicant began seeing a psychologist, Dr. Georgia Nemetz ("Dr. Nemetz"). He was diagnosed with depression and anxiety, and placed on disability benefits for one month. In October 2013, the Applicant returned to work. The Applicant stopped seeing Dr. Nemetz in September 2014, and did not have contact with her until after his suspension from the RCMP in March 2015, after which they resumed regular contact.

[7] Following his return to work in October 2013, the Applicant states that he left the Traffic Service Unit and returned to general policing in order to gain broader work experiences. The Applicant worked under a Sergeant who was closely related to the previous Staff Sergeant who had discriminated against him. The Applicant applied for a transfer, but before it could take place, the February 13, 2015 incident occurred.

[8] On February 12, 2015, the Applicant parked his vehicle at his friend's residence overnight. On the morning of February 13, 2015, at approximately 9:00 a.m., the Applicant departed from his friend's residence. Upon returning to his vehicle, the Applicant realized that the front passenger window of the vehicle had been broken and a number of personal belongings had been stolen.

[9] At 9:25 a.m. on February 13, 2015, the Applicant left his friend's house to drive back to his own residence. The Applicant has submitted that he was panicking because the insurance documents in his car indicated his address, and the thief might have been able to access the storage room within his garage, which contained valuables, including his gun safe and ammunition.

[10] While driving home, the Applicant contacted the RCMP non-emergency line to report the theft and the damage caused to his vehicle. The only damage the Applicant reported was the broken front passenger window. The Applicant states that he used his vehicle's hands-free Bluetooth device to make this call.

[11] While on the phone with the RCMP non-emergency line, the Applicant had a single vehicle collision that damaged the front windshield, hood and front bumper of his vehicle. The Applicant states that approximately 3 minutes and 7 seconds into his call with the RCMP non-emergency line, the glass that had remained secured in the broken passenger-side window frame shattered and fell, which startled him. The Applicant submits that he did not see the road in front of him, and partially drove over the centre medium, hitting a sign and causing further damage to his vehicle. The sound of the single vehicle collision was recorded during the Applicant's telephone conversation with the RCMP's non-emergency line.

[12] On February 13, 2015 at 9:57 a.m., once the Applicant arrived home and secured his premises, he called ICBC and initiated a theft and vandalism claim. The Applicant reported that his vehicle had been vandalized the prior night and the vehicle's side window, windshield and hood had been damaged. The Applicant did not report the collision.

[13] On February 13, 2015, at approximately 12:00 p.m., the Applicant spoke with Constable Hawkins, the RCMP member who conducted the theft and vandalism investigation of his vehicle. The Applicant told Constable Hawkins that his vehicle's front passenger window, hood and windshield had been damaged overnight. He also reported body damage to the driver's side of the vehicle and provided a list of stolen items. The Applicant did not tell Constable Hawkins about the collision.

[14] The Applicant then took his vehicle for repair. The Applicant advised the owner of the repair shop that all of the damage to the vehicle was the result of vandalism. The repair shop

owner did not believe that the damage sustained by the vehicle matched the Applicant's story. ICBC later placed the repair on hold as they thought the damage might have been from two separate claims.

[15] On February 24, 2015, the Applicant provided a verbal statement to an ICBC adjuster to support his insurance claim. In this statement, the Applicant repeated that the damage caused to the windshield, side window and hood of his vehicle were all caused by an act of theft and vandalism and did not discuss his collision.

[16] On February 25, 2015, the Applicant authored an "Automobile Proof of Loss" form, in which he solemnly declared before a notary public that all of the loss reported to ICBC was caused by the vandalism and theft. He did not report the collision.

[17] On March 20, 2015, the Applicant provided a statement to the ICBC investigator in support of his insurance claim. While providing his statement, the Applicant stated that the damages to the windshield, bumper and hood of his vehicle had been caused by an act of theft or vandalism, and not by a collision. Further, the Applicant rejected the suggestion that some of the damage might have resulted from a collision.

[18] On March 27, 2015, the Applicant was served with a Conduct Investigation Mandate Letter ("Mandate Letter"). The Mandate Letter initiated an investigation to determine whether the Applicant had contravened the RCMP's Code of Conduct ("Code of Conduct").

[19] On March 27, 2015, the Applicant was served with an Order of Suspension. On April 14, 2015, the Investigation Report ("Investigation Report") was completed.

[20] On May 28, 2015, the Officer in Charge of the Applicant's detachment referred the matter to the Respondent as the possible range of sanctions exceeded their authority under the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 ("*RCMP Act*").

[21] On October 28, 2015, the Respondent signed a Notice of Conduct Hearing ("Notice") that set out the allegations under the Code of Conduct, which was served on the Applicant on November 6, 2015. The Notice appointed the RCMP Conduct Board ("Conduct Board") to make findings on two allegations under the Code of Conduct.

[22] On November 23, 2015, the Applicant's Member Representative ("MR") advised that he would be representing the Applicant. On December 21, 2015, the Conduct Authority Representative ("CAR") provided their witness list to the Conduct Board and the MR.

[23] On April 29, 2016, the Applicant pled guilty to a charge of providing false or misleading information contrary to paragraph 42.1(2)(a) of British Columbia's *Insurance (Vehicle) Act*, RSBC 1996, Chapter 231. The Applicant received a fine in the amount of $3,000.00 and a victim surcharge of $450.00 in restitution. In the reasons for sentencing, the late Justice Gulbransen of the Provincial Court of British Columbia accepted that the February 13, 2015 incident was a momentary panic and an isolated incident in the Applicant's life, finding that the

Applicant's psychological issues played a big role in the Applicant's decisions. Nonetheless, Justice Gulbransen underscored the Applicant's act of dishonesty.

[24] On June 13, 2016, the CAR made submissions to the Conduct Board on the allegations that the Applicant's misconduct was significant because it was deliberate and extended over a period of time. That same day, the Applicant signed an Agreed Statement of Facts ("ASF") in which he admitted to the allegations. The MR replied to the CAR's submissions by stating: "The Member believes that the ASF speaks for itself and has no further submissions to make in relation to the allegations."

[25] On June 15, 2016, the Conduct Board emailed both the MR and the CAR to issue its decision on the allegations. The Conduct Board found both allegations had been proven.

[26] On September 20, 2016, the Conduct Board held an in-person hearing ("Sanctions Hearing"). The purpose of the hearing was for the Conduct Board to determine the appropriate sanctions for the Applicant's misconduct.

[27] At the Sanctions Hearing, the CAR called Inspector Julie Moss ("Inspector Moss") as their only witness. Inspector Moss was asked about the challenges that RCMP members with misconduct records face, particularly in relation to the Supreme Court of Canada's decision in *R. v McNeil*, 2009 SCC 3 ("*McNeil*") and resulting "*McNeil* factors". Inspector Moss testified that there is anxiety around placing RCMP members with misconduct histories on investigations of certain incidents, as they would be required to disclose their relevant disciplinary history. This

could lead to staffing issues. When cross-examined by the MR, Inspector Moss admitted that she did not know the number of members subject to *McNeil* disclosures in her division, and only had communicated with one regional Crown about the Crown's concerns with respect to *McNeil*. The CAR submitted a list of aggravating factors for the Conduct Board to consider, and recommended the Applicant's dismissal as the proper outcome of the proceedings.

[28] The MR called the Applicant to testify at the Sanctions Hearing. The Applicant described his conduct related to the February 13, 2015 incidents as "impulsive" and explained that his depression and anxiety do not "come and go".

B. *The Conduct Board Decision*

[29] The Conduct Board issued an oral decision on September 21, 2016. In a written decision dated April 4, 2017, the Conduct Board found that the Applicant's actions represented a fundamental character flaw, making him unsuitable for further employment with the RCMP. The Applicant was served with the written decision on April 23, 2017.

[30] In its decision, the Conduct Board noted that misconduct involving issues of honesty and integrity can lead to a dismissal and considered the aggravating and mitigating factors. The Conduct Board identified the mitigating factors as the Applicant's accomplishments at work, including his awards; performance logs indicating that he is innovative and compassionate; letters of support; the Applicant's admission; and the Applicant's "heartfelt" apology to all those involved. The Conduct Board identified the aggravating factors as the Applicant's repeated misrepresentations; the Applicant's criminal conviction; the fact that the Applicant's actions

tarnished the RCMP's reputation; the *McNeil* considerations; and most importantly, the personal benefit sought by the Applicant. The Conduct Board Decision ordered the Applicant to resign from the RCMP within 14 days, or he would be dismissed.

[31] The Applicant appealed the Conduct Board Decision, submitting that the sanctions imposed by the Conduct Board were unreasonable, breached procedural fairness, and contained errors of law. The Applicant's appeal was referred to the RCMP's External Review Committee ("ERC") in accordance with subsection 45.15(1) of the *RCMP Act*. On October 27, 2020, the ERC Chair recommended that the appeal be dismissed.

C. *Decision Under Review: The Conduct Appeal Decision*

[32] On April 20, 2021, the Commissioner dismissed the Applicant's appeal and confirmed the Conduct Board Decision and the sanctions it imposed. Under subsection 45.16(11) of the *RCMP Act*, the Commissioner has delegated authority to make final and binding decisions on conduct appeals.

[33] In his review of the Conduct Board's Decision, the Commissioner held that the standard of review in the context of the RCMP conduct process was the "clearly unreasonable" standard.

[34] In response to the Applicant's submission that he was denied procedural fairness because he was not given the chance to explain how he was not motivated by personal gain, the Commissioner found the Applicant had failed to address the proposition that his misconduct was motivated by personal gain. The issue of the Applicant's motivation had been raised on several

occasions throughout the proceedings. The Applicant's failure to address this issue was therefore not a result of a lack of notice.

[35] With respect to the issues stemming from the Applicant's state of mind, including the Applicant's submissions related to his mental health as a mitigating factor, the Commissioner accepted that the Conduct Board had misconstrued the Applicant's evidence regarding his wellbeing at the time of the misconduct. Nonetheless, the Commissioner concluded that the Conduct Board's misconception was not manifested and determinative.

[36] With respect to the Conduct Board's appraisal of the Applicant's work performance record, the Commissioner concluded that the Conduct Board assessed the mitigating and aggravating factors, found the mitigating factors did not outweigh the aggravating factors, and reasonably concluded that the Applicant breached the terms of his employment with the RCMP. The Commissioner did not analyze the potential relationship between the Applicant's mental health status and his toxic work environment, and any effect this could have on the Applicant's performance evaluations.

[37] With respect to the Conduct Board's reliance on Inspector Moss's evidence, the Commissioner found that while the Conduct Board Decision fails to mention the discrepancies revealed on cross-examination, there was no reviewable error, as the Conduct Board did not rely on Inspector Moss's evidence to determine how the *McNeil* factors would relate to the Applicant.

III. Legislative Scheme

[38] Paragraph 36.2(e) of the *RCMP Act* stipulates that conduct measures must be proportionate to the nature and circumstances of the contravention and should be educative and remedial rather than punitive:

36.2 The purposes of this Part are	**36.2** La présente partie a pour objet:
[…]	[…]
(e) to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive.	e) de prévoir des mesures disciplinaires adaptées à la nature et aux circonstances des contraventions aux dispositions du code de déontologie et, s'il y a lieu, des mesures éducatives et correctives plutôt que punitives.

[39] Paragraph 45.16(3)(a) of the *RCMP Act* states that the Commissioner may dispose of an appeal in respect of a conduct measure imposed by a conduct board or a conduct authority by dismissing the appeal and confirming the conduct measure:

45.16(3) Disposal of appeal against conduct measure (3) The Commissioner may dispose of an appeal in respect of a conduct measure imposed by a	**45.16(3) 6.2** Décision concernant une mesure disciplinaire (3) Le commissaire peut, lorsqu'il est saisi d'un appel interjeté contre une mesure disciplinaire imposée par le

conduct board or a conduct authority by	comité de déontologie ou l'autorité disciplinaire :
(a) dismissing the appeal and confirming the conduct measure; or	a) soit rejeter l'appel et confirmer la mesure disciplinaire;
(b) allowing the appeal and either rescinding the conduct measure or, subject to subsection (4) or (5), imposing another conduct measure.	b) soit accueillir l'appel et annuler la mesure disciplinaire imposée ou, sous réserve des paragraphes (4) ou (5), imposer toute autre mesure disciplinaire.

[40] Sections 45.16(9) and 45.16(11) of the *RCMP Act* state that a Commissioner's decision on appeal is final and binding (section 45.16(9)), and that the Commissioner may delegate any of the Commissioner's powers, duties or functions under this section to any person under the Commissioner's jurisdiction (section 45.16(11)):

Commissioner's decision final	**Caractère définitif de la décision**
45.16(9) A Commissioner's decision on an appeal is final and binding.	**45.16 (9)** La décision du commissaire portant sur un appel est définitive et exécutoire.
[…]	[…]
Delegation	**Délégation**
45.16(11) The Commissioner may delegate any of the Commissioner's powers, duties or functions under this section to any person under the Commissioner's jurisdiction.	**(11)** Le commissaire peut déléguer à ses subordonnés tel de ses pouvoirs ou fonctions prévus au présent article.

IV. Preliminary Issues

A. *Style of Cause*

[41] During the hearing, this Court informed the parties that the proper Respondent in this matter is the Attorney General of Canada. The parties agreed. The style of cause is hereby amended accordingly, effective immediately (Rule 76, *Federal Courts Rules*, SOR/98-106).

B. *Applicant's Motion*

[42] The Applicant filed a motion for leave to file new evidence on judicial review, and for leave to amend the Applicant's Notice of Application. The motion was heard alongside the submissions on judicial review. Noting that the request to amend the Notice of Application is corollary to the request to file new evidence, my finding on the new evidence is dispositive of this motion in its entirety.

[43] The Applicant seeks to adduce new evidence regarding his work performance, consisting of two affidavits. The first is the affidavit of Janaina Diniz, confirming the omission of certain performance logs referenced in the Conduct Board's reasons. The second affidavit details his efforts to obtain his performance evaluations and clarify the records tendered at the sanction hearing, with appending performance logs that were before the Conduct Board but not retained on appeal, and three performance evaluations that were never before the Conduct Board and which the Applicant claims he had difficulty obtaining.

[44] The Applicant submits that these additional performance logs and evaluations include positive commentary on the Applicant's performance as a member of the RCMP. As a corollary, the Applicant also seeks to amend the Notice of Application to include the allegation that the Conduct Board breached his procedural rights by failing to adduce these records and thereby denying him an opportunity to challenge the Conduct Board's findings about his performance.

[45] In *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 ("*Forest Ethics*"), the Federal Court of Appeal laid out the test for whether new evidence can be adduced on judicial review. The moving party must first satisfy the Court of two preliminary requirements: (1) that the evidence is admissible on judicial review, and (2) that the evidence is relevant to an issue before the Court (*Forest Ethics* at para 4). Once these requirements are met, the moving party must then satisfy that the Court should exercise its discretion to admit new evidence, based on the following factors (*Forest Ethics* at para 6):

> 1. Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
> 2. Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
> 3. Will the evidence cause substantial or serious prejudice to the other party?

[46] The Applicant submits that the new evidence is admissible under the noted exception for reviews of procedural fairness (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8)

and that it is highly relevant to the procedural fairness issue posed in the amended Notice of Application, thereby meeting the preliminary requirements.

[47] The determinative factors out of the three *Forest Ethics* discretionary factors are the Applicant's diligence and the degree of relevance. The Applicant submits that he fulfilled his duty of due diligence to acquire and adduce these performance records on various occasions. He submits that he did not have a realistic opportunity to correct the record and when he realized that certain records were not before the Board or rendered on appeal, he acted accordingly as soon as practicable. The Applicant claims that his efforts in obtaining these records indicate how inaccessibly they were, and that any delay in adducing them lie at the RCMP's feet.

[48] On the issue of relevance, the Applicant submits that the performance evaluations and logs are relevant because they demonstrate the procedural unfairness resulting from their exclusion. The Conduct Board found, and it was upheld as reasonable on appeal, that the evidence of the Applicant's work performance revealed that he was an "under-achiever" with "occasional flashes of brilliance at work." The Applicant submits that this new evidence, pointing to additional positive evaluations and logs, shows that his best performance records were not adequately reviewed. The Applicant claims this reveals that the Conduct Board and the appeal adjudicator had deficient records before them concerning the Applicant's work performance, thereby denying him the fair opportunity to be heard.

[49] On the other hand, the Respondent submits that the motion should be dismissed because there is no evidence that the Applicant was denied the opportunity to adduce this evidence before

the Conduct Board, or that he attempted to do so on appeal. The Respondent submits that the clear delay in attempting to obtain this evidence and the lateness of this motion to adduce new evidence is indicative of the failure of the Applicant and his MR. Their failure in putting the Applicant's "best foot forward" when first given the opportunity to do so does not amount to a breach of procedural fairness.

[50] The Respondent outlines the timeline of events, which it claims is indicative of the Applicant's lack of diligence. On September 20, 2016, an in-person hearing was held before the Conduct Board, where the MR represented the Applicant. During this hearing, the Applicant introduced and relied on a number of performance records to support his submission that he was a good member, with a positive employment record. There was no evidence that the Applicant and his MR attempted to adduce additional records regarding his performance, and faced barriers to accessing or tendering such records.

[51] The Conduct Board issued an oral decision on September 21, 2016, and the Applicant states that he was surprised that the decision characterized him as an under-achiever. The Respondent submits that this means the Applicant knew his performance was not a mitigating factor as early as September 21, 2016. The Applicant states that he attempted to obtain electronic copies of his performance evaluations on October 13, 2016, but the MR advised him he did not have electronic copies. On May 5, 2017, the Applicant commenced an appeal of the Conduct Board decision.

[52] The Applicant's motion record includes correspondence between the Applicant's counsel and the CAR Directorate showing that the Applicant was made aware of the complete collection of documents that were before the Conduct Board on October 18, 2017, 14 days prior to Applicant's appellate submissions were due. The Respondent submits that this date not only cures any alleged procedural defect regarding the inadequacy of records before the Conduct Board, but also signals the point at which the Applicant had full knowledge of the records before the Conduct Board. There is no evidence to show that that he attempted to obtain the additional performance records after this point, until May 2021, more than three years later.

[53] The Respondent also submits that even if the evidence was admitted, it is not sufficiently probative to assist the Court on the issue of whether the underlying decision was reasonable. It is not for this Court to reweigh and reassess the mitigating effects of the performance records.

[54] I agree with the Respondent. The Applicant brought this motion to adduce new evidence more than one full year after filing his Rule 306 affidavits. The timeline of events from the Conduct Board decision to the commencement of these proceedings shows that the Applicant had various opportunities to acquire and adduce this evidence when he filed his Rule 306 affidavits. He had full knowledge of which performance records were before the Conduct Board as early as October 18, 2017, and the evidence shows that the Applicant's first attempt to obtain these additional records was on May 13, 2021, when he reached out to a retired colleague to inquire about how to find them. This timeline exhibits a clear issue of timeliness and, in turn, a lack of diligence on the Applicant's part. Had the Applicant acted more diligently to obtain a more fulsome record of his performance evaluations and logs over his nine years as a RCMP

member, he may have tendered these records at the time that he filed his affidavits under Rule 306 in commencement of these proceedings.

[55] For these reasons, the Applicant's motion to file new evidence and amend the Notice of Application is dismissed.

V. Issues and Standard of Review

[56] This application for judicial review raises the following issues:

A. *Whether the Applicant had a fair opportunity to address the Commissioner's concerns.*

B. *Whether the Commissioner's decision is reasonable.*

[57] The parties agree that the first issue concerns procedural fairness. I agree. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") at paragraphs 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at para 54). In assessing procedural fairness, the Court must determine whether the Applicant "knew the case to be met and had a full and fair chance to respond" (*Firsov v Canada (Attorney General)*, 2021 FC 877 ("*Firsov*") at para 33; *Canadian Pacific Railway Company* at para 56).

[58] The parties further submit, and I agree, that the second issue is to be reviewed on the reasonableness standard. I find that this conclusion accords with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") *at paragraphs 16-17, 23-25, as no exception to the presumptive standard of reasonableness arise in this case (Laporte v Canada (Attorney General)*, 2021 FC 118 ("*Laporte*") at para 20).

[59] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[60] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 ("*Mason*") at para 36).

[61] Furthermore, this Court and the Federal Court of Appeal have affirmed that decisions of RCMP adjudicators are afforded considerable deference. At paragraph 38 of *Firsov,* this Court notes:

> [38] The jurisprudence of this Court and the Court of Appeal has recognized that RCMP adjudicators have a specialized expertise in maintaining the integrity and the professionalism of the RCMP. Therefore, their decisions in such matters are entitled to a considerable amount of deference*: Calandrini v Canada (Attorney General),* 2018 FC 52 at para 97 and cases cited therein.

VI. Analysis

A. *Whether the Applicant had a fair opportunity to address the Commissioner's concerns.*

[62] The Applicant submits that procedural fairness was breached because the Commissioner failed to recognize how he did not receive a fair opportunity to address the prejudicial proposition that he was seeking to evade police investigation in committing the misconduct.

[63] First, the Applicant submits that the Commissioner erred in concluding that he had a fair opportunity to address the issue of distracted driving, which he submits that he did not receive until the Conduct Board Decision was presented to him in writing. The Commissioner's analysis fails to appreciate that the Conduct Board had already reached a conclusion on this issue and failed to engage with the Applicant's subsequent evidence and explanation. The Applicant further submits that the Conduct Board's finding on this point was central to its disposition of the matter, and formed an important aspect of the Conduct Board's conclusion that the Applicant

suffers from a “fundamental character flaw” which makes him unsuitable for further RCMP employment.

[64] To support his position, the Applicant relies on the decision of *Huang v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7256 (FC) (“*Huang*”). In *Huang*, this Court found that the visa officer had breached the applicant’s right to procedural fairness by relying on a translated document without giving the applicant the chance to make submissions on the document or the allegations against him. At paragraph 5 of *Huang*, this Court notes:

> Based on her translation of the document, the visa officer concluded that the applicant had improperly obtained her Grade 2 certificate. This was a serious allegation which should have been put to the applicant by the visa officer. However, the problem is that the visa officer was not in possession of this information until after the applicant's hearing was completed. In my view, the visa officer breached the principles of procedural fairness by: a) relying on this document without the applicant having been given an opportunity to review the translation and make submissions thereon; and (b) by failing to put such a serious allegation of impropriety to the applicant so that he could respond. There are significant discrepancies between the translation by the visa officer's staff and the translation by applicant's counsel. These discrepancies should have been explored at the visa officer's interview.

[65] In this case, the Applicant submits that he could not have anticipated the Conduct Board’s finding that he was seeking to evade accountability for unlawful driving because he did not believe that he was driving improperly, and the CAR’s submissions did not reference unlawful driving. Additionally, the ASF only addressed the financial gain in avoiding a second deductible and did not mention the lawfulness of the Applicant’s driving. In preparing the ASF, neither party alleged that the Applicant was seeking to evade accountability for driving offences.

The Applicant further submits that the Conduct Board knew it was making an additional finding, above and beyond what the CAR had suggested, since it stated that it would "go further, however, and add that additional motivation was to avoid being held accountable for his single-motor-vehicle accident." The Applicant cites the decision of the Newfoundland Court of Appeal in *R v Woodward*, 1993 CanLII 8183 (NL CA), where the Court notes at paragraph 41:

> It seems to me that the trial judge drew inferences and conclusions that did not have a proper foundation in the agreed statement of facts. Nevertheless, the fact is that we do not know, and will never know, much of what confronted the appellant as he approached the area and up to the moment of impact. The point is of course, that it is not proper to speculate and rewrite the events, filling in the blanks negatively, thereby altering the tenor of the tragedy and reflecting an interpretation not dictated by the accepted facts. The objection is not to the admissibility of any of the evidence but rather the unduly harsh assessment taken of it. The appellant pleaded guilty to impaired driving causing death and his sentence must be on the basis of that conviction alone.

[66] The Applicant asserts that one of the most important aspects of the principle of procedural fairness is the right to be heard (*Woldemaryame v Canada (Citizenship and Immigration)*, 2019 FC 1411 at para 20, citing *Baker* at paras 21-28 and *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5). The Applicant submits that he should have been afforded a higher degree of procedural fairness because his livelihood is potentially at stake (*Kinsey v Canada (Attorney General)*, 2007 FC 543 at para 64), as well as because subsection 45.16(9) of the *RCMP Act* states that a Commissioner's decision on an appeal is final and binding. To support this assertion, the Applicant relies on paragraph 34 of *Firsov*:

> In the case of an RCMP disciplinary matter it has been held that the statutory scheme requires a higher degree of procedural fairness because subsection 45.16(9) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, (*RCMP* Act) states that a Commissioner's decision on an appeal is final and binding: *Smith v Canada (Attorney General)*, 2019 FC 770 (*Smith)* at para 40.

[67] The Applicant maintains that the Conduct Board should have sought submissions on this issue before releasing its decision (*Gill v Canada (Attorney General),* 2006 FC 1106 at para 60, citing: *Re Golomb and College of Physicians and Surgeons of Ontario*, 1976 CanLII 752 (ON SC)). Overall, the Commissioner's analysis fails to appreciate that the Applicant was entitled to specific notice that the Conduct Board was going to exceed the CAR's submissions, rather than merely general notice that the Conduct Board thought he might have some self-interest in committing the misconduct.

[68] Alternatively, the Applicant submits that the Commissioner erred in finding that he chose not to take up a fair opportunity to address the proposition that he was avoiding police investigation. The Applicant submits that the Conduct Board did not invite comments on its reasons, nor did it suggest that the reasons were subject to change. The Applicant maintains that the cause of the accident was the sudden shattering of glass and not distracted driving, as he was driving in compliance with the British Columbia *Motor Vehicle Act*, RSBC 1996, Chapter 318, by using his vehicle's hands-free Bluetooth technology during his call with the RCMP non-emergency line.

[69] The Respondent contends that the Commissioner did not err in finding that the Applicant failed to establish a breach of procedural fairness. The Applicant knew the case to meet and had

a full and fair opportunity to respond during the conduct proceedings. The Commissioner correctly found that the Applicant was provided adequate notice. The Respondent submits that the Mandate Letter, the Investigation Report, and the Notice each contained the relevant allegations. After the ASF was submitted, the Applicant and CAR were invited to make written submissions. The Applicant's MR made no submissions. In its written submissions to the Conduct Board, the CAR addressed the issue of the Applicant's motivation and personal gain, characterizing the Applicant's actions as a "self-benefitting act of dishonesty done with the intent to support a fraudulent insurance claim."

[70] Furthermore, the Respondent notes that the Conduct Board Decision was sent to the Applicant's MR on August 16, 2016, which gave the Applicant the opportunity to address how his misconduct was characterized during the Sanctions Hearing on September 20, 2016. The Conduct Board made an explicit finding that the Applicant wanted to avoid accountability for the collision. The Applicant's counsel was aware of this finding. The Applicant's failure to convince the Conduct Board otherwise, or the lack of cross-examination on this issue, does not amount to a breach of procedural fairness. While the Applicant may be unhappy with the Commissioner's decision, procedural fairness does not include the right to a particular outcome.

[71] I agree with the Applicant that the appeal regime set out in the *RCMP Act* provides for a high degree of procedural fairness (*Smith v Canada (Attorney General)*, 2019 FC 770 at para 40). In this case, I am satisfied that the Commissioner met the heightened procedural fairness obligation. The record indicates that the Applicant knew or ought to have known of the Conduct

Board's view that personal gain motivated his misconduct, and that he failed to convince the Conduct Board otherwise.

[72] The CAR's submissions to the Conduct Board state "[…] Cst. Vellani's actions should not be viewed by the board as a mere error in judgment, but as self-benefitting act of dishonesty done with the intent to support a fraudulent insurance claim." The Applicant's MR did not make submissions in response to these allegations, instead explaining that the ASF spoke for itself. In finding that both allegations against the Applicant were proven, the Conduct Board wrote on June 15, 2016:

> [11] The CAR has suggested [the Applicant's] motivation for misleading Constable Hawkins was to support a fraudulent insurance claim, and I agree. I will go further, however, and add that additional motivation was to avoid being held accountable for his single-motor-vehicle accident. […] Talking on a cell phone while driving is a dangerous activity in and of itself; doing so while in such an agitated state is even more dangerous. Constable Vellani is extremely fortunate that the resulting collision was with a sign post or some such object; it could just as easily have ben a pedestrian, a cyclist, or another motorist.

[73] The Conduct Board further found that the Applicant deliberately evaded accountability for his actions, noting: "He did not report this accident, and no one is better placed that a regular member, employed in contract policing, to know of the importance of reporting motor vehicle accidents."

[74] Even if one accepts the Applicant's proposition that the Conduct Board built on the CAR's submissions without adequately notifying the Applicant, I find that the Applicant had the

opportunity to respond to these findings during the September 20, 2016 Sanctions Hearing, where he was represented by counsel. It was at this hearing that, for the first time, the Applicant raised the notion that he had been using his hands-free Bluetooth device to make the call to the RCMP non-emergency line. The Applicant also testified at the Sanctions Hearing that:

> […] there was still a fair amount of glass on the passenger side doorframe that was still intact. As I drove around a corner I hit a bump in the road, and the remaining glass that was intact all shattered and fell inside the vehicle, and caught me off guard […].

[75] Based on this explanation, the Conduct Board representative concluded that the Applicant "submitted a false claim […] but maybe also to evade the accountability for a single vehicle accident." In other words, the Applicant's testimony on this point was not fully accepted. There is no indication that the Applicant's MR addressed the issue of evading liability for distracted driving in subsequent oral submissions. I also agree with the Respondent that a disagreement with the Conduct Board's interpretation of the events does not mean that the Applicant's procedural fairness rights were breached. As noted by this Court at paragraph 75 of *Firsov:*

> It is not evidence of bias or an example of not being heard when a fact-finder prefers one version of events over another. Cst. Firsov is suggesting that the right to be heard includes a right to a particular outcome in his favour. This suggestion amounts to a request to the Adjudicator to re-weigh the evidence before the Conduct Authority and come to a different conclusion.

[76] The analysis in *Firsov* is applicable to this case. The MR's failure to make submissions and the Applicant's own failure to convince the Conduct Board of his motivations do not amount to a breach of procedural fairness in these proceedings.

[77] I do, however, find some merit in the Applicant's argument that the Conduct Board had already reached its decision when the Applicant was notified of it, and that it was unlikely that the Applicant's submissions during the Sanctions Hearing would change the Conduct Board's mind. It is evident that on June 15, 2016, the Conduct Board had concluded that the Applicant was evading accountability for distracted driving, and the Conduct Board explicitly noted that they were adding to the CAR's submissions. The Conduct Board's analysis remained consistent after the Sanctions Hearing, as made evident in the Conduct Board Decision of April 4, 2017.

[78] Nonetheless, I find that overall the Applicant has not successfully proven that his procedural fairness rights were breached. The Applicant had sufficient notice of the distracted driving allegation between the Conduct Board's June 15, 2016 decision, and the Sanctions Hearing on September 20, 2016. The MR's decision not to respond to the CAR's June 13, 2016 submissions, or to explore this area during the hearing, does not constitute a breach of the Applicant's procedural fairness rights.

B. *Whether the Commissioner's decision is reasonable.*

[79] The Applicant submits that the Commissioner erred by perpetuating misconceptions regarding the Applicant's work circumstances and related mental health issues. The Applicant further submits that the Commissioner erred by concluding that the Conduct Board did not rely on its problematic appreciation of Inspector Moss' evidence.

(1) Misconceptions regarding the Applicant's work circumstances and mental health issues

[80] The Applicant submits that both the ERC and the Commissioner agreed that the Conduct Board misconstrued the Applicant's testimony that he was doing better at the time of his misconduct, when he had actually testified that he was "at his wit's end." The Applicant further submits that the Conduct Board erred in its characterization of his job performance, and failed to engage with the Applicant's submissions regarding the context of his performance reviews.

(a) *Mental health as a mitigating factor*

[81] The Applicant submits that the Commissioner failed to rectify the Conduct Board's error in finding that stress related to the Applicant's work was not an underlying factor contributing to the misconduct. The Applicant submits that although the Conduct Board conceded that depression and anxiety could impair judgment, the Conduct Board erroneously stated that the Applicant was actually doing quite well. Contrary to these findings, the record indicated that the Applicant's stressors were increasing. Further, the Applicant submits that the Commissioner acknowledged that the Conduct Board might have viewed the case differently if it concluded that significant psychological factors were at play. The Commissioner's failure to grapple with the Conduct Board's error is significant because it removed the Applicant's mental health from consideration as an underlying factor. The presence of stressors could have partially explained his behaviour, and undermined the Conduct Board's finding that he suffers from a fundamental character flaw that makes him unsuitable for future RCMP employment.

[82] The Respondent submits that the Commissioner reasonably found that the Conduct Board correctly noted that while the Applicant's mental health was a mitigating factor, there was no definite link between his mental illness and his misconduct. The Respondent maintains that the Conduct Board reasonably found that the Applicant's mental health did not prevent him from complying with his employer's rules and policies, and the laws of Canada. In *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 ("*Elk Valley*"), the Supreme Court held that whether a protected characteristic is a factor in an adverse impact must be assessed on a case-by-case basis. At paragraph 39 of *Elk Valley*, the Supreme Court found:

> [39] It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence: *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41.

[83] The Respondent also relies on two decisions of the Federal Public Sector Labour Relations and Employment Board ("PSLREB"). In *Aujla v Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 38 at paragraph 146, the PSLREB noted:

> [146] Given all the evidence, and according to the ruling in *Elk Valley*, nothing before me would have prevented him from complying with the employer's rules and policies and the laws of Canada. He expressed this repeatedly throughout this process when

> he told Cst. Spencer, Mr. Ard, Dr. Jack, and me that he knew that what he was doing was a serious threat to his job.

[84] In *McNulty v Canada Revenue Agency*, 2016 PSLREB 105, the PSLREB found that in the absence of expert evidence, there was not a causal connection between the grievor's disability (alcoholism) and the misconduct (at paras 188-189). The Respondent maintains that a disorder is not always a causal factor in an employee's misconduct, and that there must be evidence connecting the disorder to the employee's inability to follow rules. In this instance, the Conduct Board had the advantage of seeing and hearing the Applicant's testimony, and identified the relevant facts and legal standards. The Respondent submits that the Commissioner gave the appropriate deference to the Conduct Board's conclusions.

[85] In my view, it was reasonable for both the Commissioner and Conduct Board to find that the Applicant had failed to demonstrate that there is a causal link between his mental illness and his misconduct. As noted by the Supreme Court in *Elk Valley,* a disorder is not always a causal factor in an employee's misconduct, and whether a protected characteristic is a factor in the adverse impact will depend on facts (at para 39). The Conduct Appeal Decision states:

> [144] Instead, the [Conduct] Board found the Appellant's previous issues with depression, anxiety and stress, whether due to his relationship break up and/or his work environment, did not significantly mitigate his actions, particularly since the brief report of his psychologist, whom the MR did not have qualified as an expert (Appeal, p 543), failed to disclose any causal connection between the Appellant's state of mind and his misconduct.

[86] I note that the letter from Dr. Nemetz, dated July 12, 2016, states:

> While I cannot clinically state that his psychological state caused his lapse of judgment I am comfortable suggesting that his depression and anxiety could certainly have clouded his judgment and have significantly reduced his resiliency to deal with any stressful situations.

[87] Dr. Nemetz's letter speaks for itself. Although Dr. Nemetz confirms the Applicant's condition and stressors, she was unable to make a causal link between the Applicant's psychological state and his misconduct. As such, I find that it was reasonable for the Commissioner to find that the Applicant's previous issues with depression, anxiety and stress failed to significantly mitigate his misconduct, or explain a causal relationship between his state of mind and his misconduct. The Commissioner's assessment of the evidence is entitled to deference. Pursuant to the standard set out in *Vavilov*, the Court may only intervene if there is a fundamental flaw in the Commissioner's reasoning process, or if his conclusions were untenable given the constraints imposed by the evidence (*Vavilov*, at paras 99-101, 105, and 125-126). I do not find anything unreasonable in the Commissioner's analysis on this point.

[88] Still, I do find that the Conduct Board and the Commissioner failed to fully appreciate the evidence presented in Dr. Nemetz's letter. The Commissioner seems intent on finding no causal connection between the Applicant's mental health and his misconduct. The Conduct Appeal Decision states:

> [153] Just the same, I find that it was not clearly unreasonable for the [Conduct] Board to determine that stress, relating to the Appellant's work, was not an underlying factor in the misconduct, as no expert evidence was presented to substantiate the Appellant's testimony (Appeal, p 458) that stressors – including those which may have been related to his work environment – were causally connected to the misconduct. [Emphasis added.]

[89] I do not find that this portion of the Commissioner's analysis shows an appreciation for the contents of Dr. Nemetz's letter in their entirety. In her letter, Dr. Nemetz found that it was possible that the Applicant's mental condition clouded his judgement and reduced his resiliency for stressful situations. She also indicated that she was "aware that his depression and vocational stressors were increasing and that he indicated a recurrence of his symptomatology." The Commissioner's analysis appears to operate at extremes: either the Applicant's mental health was causally connected to his actions and could explain his misconduct, or his mental health was not causally connected to his actions and he engaged in an extended campaign to defraud. This is significant, given the Commissioner's acknowledgement that the presence of mental illness as a mitigating factor may have caused the Conduct Board to place less emphasis on the Applicant's motivation for personal gain.

[90] That being said, while I do not find that the Commissioner characterized the evidence of mental health illness as well as he could have, I do not find the Commissioner's overall assessment of the Applicant's mental health and his misconduct rises to be unreasonable. The Commissioner provided intelligible reasons for the finding that mental health was a mitigating factor, yet does not explain the Applicant's actions.

(b) *Consideration of employment record*

[91] The Applicant submits that the Commissioner's analysis of his employment record failed to grapple with the Applicant's toxic work environment, which contributed to his history of depression and anxiety. The Commissioner recognized that the Conduct Board had erred in determining that the Applicant's performance review was "satisfactory" without assessing the

positive comments made about his performance. By upholding the Conduct Board's conclusion as not being "clearly unreasonable", the Commissioner's reasoning does not demonstrate a rational chain of analysis. To support this position, the Applicant relies on *Laporte*, where this Court notes at paragraphs 33-34:

> [33] The Respondent relies on the investigation report and witness statements, referenced in the Initial Decision, as forming the evidentiary basis for the Conduct Authority to draw the required link between the Applicant's conduct and his duties and functions as an RCMP member. The Respondent argues that the Initial Decision was based on the evidence and the Appeal Decision on this point was therefore reasonable.
>
> [34] Again, I must agree with the Applicant's position. Regardless of whether the evidence might be capable of supporting a finding of the required link, neither the Initial Decision nor the Appeal Decision demonstrates any analysis as to how the evidence results in such a finding.

[92] The Applicant submits that, as in *Laporte*, the Commissioner's analysis fails to explain *what* he read in the Applicant's evaluations that supported the Conduct Board's overall assessment and *how* he reached that decision. The Applicant submits that the Commissioner's characterization of his work performance does not make sense in light of his 2011 Mid-Review. The Applicant maintains that there is a difference between deference and adherence, and the Commissioner's failure to justify how the Conduct Board's treatment of this issue was explained demonstrates a failure apply the proper appellate scrutiny (*Canada (Citizenship and Immigration) v Balogun*, 2016 FC 375 at para 10).

[93] Furthermore, the Applicant submits that the Commissioner assessed his performance reviews from a time when the Applicant was in a toxic work environment and suffering from

anxiety and depression. The Commissioner's failure to recognize the interplay between his stressors and performance reviews merits judicial intervention. The Applicant cites this Court's decision in *Pizarro v Canada (Attorney General),* 2010 FC 20 ("*Pizarro*") at paragraph 65:

> The Court is concerned that the Commissioner and the Board went out of their way to undermine the causal relationship with work conditions and ignore the responsibility that RCMP management may bear for Pizarro's conduct. Not only was there expert evidence to that effect, further, there was no expert evidence to the contrary and lastly, but importantly, there was confirmatory opinion in the learned provincial court judge's decision – a matter which was before both the Board and the Commissioner.

[94] Similar to *Pizarro,* the Applicant submits that the Commissioner failed to engage with the Applicant's evidence of discrimination and harassment, absolving the RCMP of its contribution to the difficulties he faced. Instead, the symptoms of his mistreatment by the RCMP were used to undermine his contributions as a member of the RCMP.

[95] Finally, the Applicant submits that his experiences with the RCMP were different to those addressed in the Adjudication Board's decision in *The Appropriate Officer "E" Division v Corporal L.M.J. Fréchette, Reg. No. 46353* (2010), 4 AD 4th 264 ("*Fréchette*"), where an RCMP member provided false and misleading statements to the ICBC. In that case, Corporal Fréchette was involved in a motor vehicle collision involving another vehicle. Corporal Fréchette reversed her vehicle and collided with the other vehicle, which had been in a stationary position. The other vehicle reported the collision to the ICBC. Corporal Fréchette provided a statement that her vehicle had been hit from behind and she had not put her vehicle in reverse. However, video footage of the collision showed Corporal Fréchette's vehicle reversing and colliding with the

stationary vehicle. In *Fréchette*, Corporal Fréchette was reprimanded and given a 10-day suspension of pay because she had a superior performance record and the support of her commanding officer. The Applicant submits that the mitigating factors in the *Fréchette* decision would be unavailable to him on account of racism and stigmatization due to mental illness.

[96] The Respondent submits that the Commissioner found the Applicant's letters of reference, certificates, awards and volunteer services to be mitigating factors, but did not view his work performance as a mitigating factor because it reflected "average performance." The Respondent maintains that the Commissioner found the Conduct Board's assessment of the Applicant's performance to not be "clearly unreasonable" and that deference was owed to the Conduct Board's findings.

[97] I see merit in the Applicant's argument that the Conduct Board and the Commissioner failed to actively engage with his evidence that the performance evaluations in which his performance was criticized took place in a toxic work environment. I am not convinced that the Conduct Appeal Decision responds to the Applicant's submissions that the Conduct Board failed to consider the relationship between his negative performance reviews and his toxic work environment. The Commissioner does not appear to make a finding on this point. Rather, the Commissioner simply states that he is satisfied that the Conduct Board considered all of the Applicant's evidence, and repeats the Conduct Board's finding that he would not accept the performance evaluations as mitigating factors because average performance (as opposed to above average) was not a mitigating factor.

[98] In the Conduct Appeal Decision, the Commissioner concludes that "the [Conduct] Board's overall assessment of the Appellant's performance is not clearly unreasonable based on my reading of the few evaluations presented by the MR." The Commissioner goes on to state that the Conduct Board assessed the mitigating and aggravating factors, "[…] found the mitigating factors did not outweigh the aggravating factors, and concluded the Appellant breached the terms of his employment with the RCMP." In my view, these conclusions lack justification. The Applicant is left to question why the Commissioner agrees with the Conduct Board, or how the decision-makers addressed the relationship between the performance evaluations and the toxic work environment. I also note that the Applicant's dismissal is manifestly different from the results in the *Fréchette* decision, even though the circumstances were quite similar.

[99] Nevertheless, while the Commissioner's reasons on this point could have been more elaborate, I do not find that the Commissioner's analysis renders the Conduct Appeal Decision unreasonable overall. As noted by the Federal Court of Appeal in *Mason*, "[…] the failure of the reasons to mention something explicitly is not necessarily a failure of 'justification, intelligibility or transparency'" (at para 32, citing *Vavilov* at paras 94,122). Further, the Commissioner acknowledged that, upon reviewing the Applicant's performance evaluations, the Conduct Board "[…] expressly found that [it] would not accept the performance evaluations as mitigating factors because average performance (as opposed to above average) was not a mitigating factor."

(2) **Treatment of Inspector Moss' evidence**

[100] The Applicant submits the Commissioner erred in his treatment of the Conduct Board's multiple errors related to Inspector Moss's evidence. Specifically, the Conduct Board mischaracterized Inspector Moss's evidence as simply failing to concede points made in cross-examination, instead of finding that her evidence was limited by some of her admissions during cross-examination. Additionally, the Applicant submits the Commissioner unreasonably disposed of concerns related to Inspector Moss's evidence by concluding that the Conduct Board did not ultimately rely on her evidence in its analysis. The Applicant argues that this was an error because although the Conduct Board Decision does not name Inspector Moss, it does incorporate her evidence from the Sanctions Hearing. The Conduct Board Decision's reference to British Columbia being "risk averse" refers to Inspector Moss' evidence that *McNeil* disclosures are requested prior to charge approval. The Conduct Board thus relied on Inspector Moss's submissions without accounting for the limitations in her evidence. The Applicant further argues that errors in the Conduct Board's appreciation of Inspector Moss's evidence cannot be described as inconsequential merely because it is unclear what weight the Conduct Board gave to the existence of a *McNeil* record as an aggravating factor.

[101] The Respondent contends that the Commissioner correctly found that the Conduct Board did not mention Inspector Moss' opinion evidence when assessing the *McNeil* implications as an aggravating factor. The Commissioner noted that while the Conduct Board Decision fails to acknowledge discrepancies raised in Inspector Moss' cross-examination, it ultimately did not rely on her evidence to comment on how the *McNeil* factors were related to the Applicant. The

Respondent notes that the Conduct Board Decision does not make a finding on the severity of *McNeil* considerations as an aggravating factor in the Applicant's case. Even if the Conduct Board failed to acknowledge the limitations of Inspector Moss' evidence, it did not rely on her evidence to make its overarching conclusion that *McNeil* disclosure obligations are inherently an aggravating factor because they create a burden that would not otherwise exist. The Respondent asserts that the Conduct Board's failure to mention the discrepancies in Inspector Moss' evidence, or its conclusion that *McNeil* considerations are an aggravating factor are not errors worthy of review.

[102] I agree with the Respondent. The Commissioner reasonably upheld the Conduct Board's analysis of *McNeil* considerations as an aggravating factor. The Conduct Board did not mention Inspector Moss's opinion evidence, but instead made a general finding on *McNeil* factors. The Conduct Board Decision states:

> [123] The fifth aggravating factor resides in the so-called *McNeil* considerations. Stated plainly, the obligation to proactively disclose a relevant disciplinary history creates a burden that would simply not exist in the absence of a disciplinary record. By definition, this is an aggravating factor.
>
> [Emphasis added]

[103] The Conduct Board Decision further notes that "the severity of this aggravating factor, however, is still somewhat undecided because of the inconsistent application of the principles arising out of the *McNeil* decision."

[104] In the Conduct Appeal Decision, the Commissioner notes discrepancies and limitations in Inspector Moss' evidence that were overlooked by the Conduct Board. For example, in reference to Inspector Moss' evidence, the Conduct Board stated that "this testified to instances she knew of in which the Crown, upon learning of a potential police witness's disciplinary history, either withdrew existing charges or refused to lay them in the first place." However, Inspector Moss later clarified that she knew of only one instance where this took place. Despite these discrepancies, the Commissioner maintained that there is no reviewable error in the Conduct Board's analysis, since the Conduct Board did not rely on Inspector Moss' opinion evidence to make a finding on the severity of the *McNeil* factors in relation to the Applicant's situation. I find the Commissioner's analysis to be reasonable.

[105] Overall, I find that the Conduct Appeal Decision is reasonable as it reveals an internally coherent chain of reasoning and justified in light of the relevant legal and factual constraints (*Vavilov* at para 126).

VII. Costs

[106] Although the Respondent submits that the application for judicial review should be dismissed with costs, neither party made submissions regarding costs in their written or oral submissions. Any award of costs is ultimately in the discretion of the Court and, in the particular circumstances of this case, I decline to award costs against the Applicant.

VIII. Conclusion

[107] The application for judicial review is dismissed. As stated by RCMP Sergeant Bruce Pitt-Payne in his reference letter for the Applicant, "good people make mistakes." I can appreciate that the Applicant has suffered from difficult life circumstances, and likely had a lapse in judgment, probably due to a state of panic. I do not wish to minimize the hardships he may have faced in his personal and professional life that may have led to this mistake.

[108] Unfortunately, the Applicant's situation went beyond an initial mistake. He exhibited repeated dishonesty over the course of five weeks and misled fellow RCMP members and the ICBC. It is this misconduct that led to the strict punishment of dismissal from the RCMP, which may have been less severe had the Applicant acted with candor and truthfulness following his mistake. For the reasons outlined above, I do not find that there has been a breach of procedural fairness, and while the Conduct Appeal Decision is not without its flaws, it is reasonable overall.

JUDGMENT in T-834-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

There will be no order as to costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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