Federal Court Cour fédérale

Date: 20240111

Docket: T-2135-22

Citation: 2024 FC 45

Ottawa, Ontario, January 11, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DANIEL KOHL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Constable Daniel Kohl [Applicant] seeks judicial review of a decision of an Appeal Adjudicator [Adjudicator] of the Royal Canadian Mounted Police [RCMP] upholding the RCMP Conduct Board's [Conduct Board] decision to order the Applicant to resign within 14 days, failing which he would be dismissed.

[2] The application for judicial review is dismissed.

II. Background

A. *The Investigation*

[3] A member of the public filed a complaint [Complainant] against the Applicant with the Civilian Review and Complaints Commission concerning a March 17, 2017 meeting the Applicant had purportedly arranged between the Complainant and the Applicant's superior officer, Sergeant Gillies [Sgt. Gillies], for an award for the Complainant's dedication to traffic safety [Meeting]. Sgt. Gillies was unaware of the Meeting. The Applicant was scheduled to leave for another jurisdiction on March 16, 2017 but his departure was changed to March 17, 2017. On March 17, 2017 the Complainant attended at the District office to meet with Sgt. Gillies. Sgt. Gillies had to inform the Complainant that he was not there to present her with an award. On June 2, 2017, pursuant to the *Code of Conduct of the Royal Canadian Mounted Police* [*Code of Conduct*], an investigation was ordered into the Applicant's actions.

[4] During the investigation concerning the Meeting [Original Allegation], the Applicant provided the investigator with a copy of text messages between Sgt. Gillies and himself, which differed from that provided by Sgt. Gillies. Sgt. Gillies' exchange contained a derogatory message sent to him from the Applicant. As a result of this discrepancy, a second allegation under the *Code of Conduct* was added, namely that the Applicant had provided false information to the investigator [Second Allegation]. The Applicant explained that Constable X [Cst. X] sent

the derogatory message using the Applicant's phone and deleted the messages before the Applicant could see them.

[5] On April 5, 2018, Superintendent L [Supt. L] held a conduct meeting with the Applicant where the Applicant was advised that the Original Allegation would be addressed on April 11, 2018. The Applicant was also advised that the Second Allegation would be addressed through a new *Code of Conduct* investigation.

[6] On April 11, 2018, Supt. L rendered his decision in relation to the Original Allegation and the Applicant was forfeited two days' pay.

[7] The investigation into the Second Allegation was completed on July 23, 2018. On July 31, 2018, the Conduct Authority requested a supplemental investigation to provide a timeline for March 17, 2017 for Sgt. Gillies, the Complainant, Cst. X and the Applicant.

B. *The Conduct Board Decision*

[8] The Adjudicator's decision summarizes the detailed factual background and the findings of the investigation, the Conduct Board and the External Review Committee [ERC] at paragraphs 8 to 69, particulars of which are set forth in this section and the next.

[9] At a pre-hearing conference, the Conduct Authority Representative [CAR] requested that the Conduct Board summon Cst. X, who was living overseas. The Member Representative [MR], representing the Applicant, had not previously proposed Cst. X as a witness. The Conduct Board

ultimately determined that it was not necessary to hear from Cst. X as it may not be able to enforce a summons and, in any event, they were satisfied with the evidence in the record.

[10] The Conduct Board held a hearing regarding two allegations of dishonesty: (1) that the Applicant had omitted part of the text message exchange with Sgt. Gillies [Allegation 1], and (2) that the Applicant had submitted a false explanation for this omission by filing Cst. X's statement [Allegation 2]. It heard witnesses and submissions from both parties, and ultimately found that both allegations were established. The Applicant was ordered to resign within 14 days or he would be dismissed.

[11] On the issue of credibility, the Conduct Board preferred the testimony of the CAR witnesses to that of the Applicant.

[12] The Conduct Board found several issues with the Applicant's credibility and his inconsistencies touched every aspect of the evidence he provided. Some examples were as follows:

- his October 23, 2017 statement that he wanted to attend the Meeting but was unable to get a rental car and was worried he would miss his flight, conflicted with his oral evidence that it was never his intention to attend the Meeting given his plan to leave on March 16, 2017;
- his testimony to events unsupported by the evidence, such as the fact that he was unsurprised by the text messages because he had read the Investigation Report containing them, despite the fact that he could not remember how or when he was able to access the report before it was served to him;
- inconsistencies in where the Applicant was at various times on March 17, 2017 given his precise narrative of the events of that morning, including where he was when he sent messages to his Relocation Services Officer prior to boarding his flight on March 17, 2017;

- his making inaccurate or exaggerated accusations against other members such Sgt. Gillies and the A/OIC, which were not substantiated; and
- his claim on cross-examination that he was aware of the discrepancy in text messages when he filed his complaint was not credible given that his explanation for failing to include it was limited space on the form.

[13] The Conduct Board also found that though there were evidentiary gaps, they did not render the investigation insufficient. Further, it was speculative if all of the missing evidence would even have been available and if some of it would have been useful. Besides, the Applicant could have sought it out himself but did not do so. The investigator tried to contact Cst. X at home during the day, which was reasonable because he was suspended and required to check in weekly.

[14] Due to the preference for the evidence and testimony of the CAR over that of the Applicant, the Conduct Board found that the Applicant's account was not to be believed on the following important events and supporting facts in the narrative:

- events leading up to the March 17, 2017, meeting between Sgt. Gillies and the Complainant;
- the Applicant's position that he did not know of the discrepancy about the missing text when provided his written statement on October 23, 2017, which included a screenshot of the text message exchange with Sgt. Gilles;
- the Applicant's meeting with Sgt. Gillies, the investigator and Staff Sergeant S [S/Sgt S] who served him with the investigation material from the initial investigation;
- the conversation with the Applicant and Staff Sergeant B about Supt. L;
- the written statement of April 2, 2018, in which Cst. X claimed responsibility for the text message; and
- the location of Cst. X and the Applicant on March 17, 2017.

[15] The Conduct Board found that, in relation to Allegation 1, the Applicant knowingly provided incomplete and/or inaccurate information to the investigator. The Conduct Board found that the Applicant provided S/Sgt Sutherland with a "spontaneous explanation for the discrepancies, in which he admitted to omitting the text in question, ostensibly because he didn't feel it necessary to include it in a voluntary statement." Furthermore, the Applicant's statement that he saw the Investigation Report prior to being served with it is not credible.

[16] As for Allegation 2, the Conduct Board found that the Applicant pulled a prank on the Complainant and Sgt. Gillies, with the knowledge of Cst. X. The Applicant's claim to have met Cst. X at a coffee shop before his flight was not credible. Video and card log evidence at the District office make it very unlikely that Cst. X was at the coffee shop. The prank was further supported by the timing and tenor of the email exchange between the Applicant and Cst. X.

[17] The Conduct Board's conclusion states:

> "[The Applicant's] misconduct, is at its core, lying in the course of a Code of Conduct investigation, in which he was the subject member, in order to avoid accountability for his actions. The importance of the conduct process as a means to maintain public confidence in the RCMP is set out in a number of the decisions cited by the parties. The conduct process serves as a check and balance on the vast powers conferred on police officers. [The Applicant's] misconduct demonstrates a lack of honesty, integrity, professionalism and accountability. Whether by omission or by submitting a false statement, [the Applicant] purposely set out to undermine the conduct process. The prolonged nature and the deliberate planning involved in [the Applicant's] deceptive behaviour are particularly troubling to me. His actions demonstrate a lack of respect, if not contempt for, the conduct process."

C. *External Review Committee Decision*

[18] In accordance with the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (*RCMP Act*) the appeal of the Conduct Board's decision was referred to the External Review Committee for review. On June 8, 2022, the ERC, after reviewing the evidence before the Conduct Board, dismissed the Applicant's appeal of the Conduct Board's decision and upheld the Conduct Board's conduct measure.

III. The Adjudicator's Decision

[19] Pursuant to subsection 45.16(11) of the *RCMP Act*, the Commissioner has the authority to delegate their power to an adjudicator to make final and binding decisions in conduct appeals. The Adjudicator considered the material that was before the Conduct Board. The Adjudicator's decision covers the same issues and submissions that were considered by the ERC.

[20] The synopsis of the extensive Adjudicator's decision summarizes the decision:

> SYNOPSIS
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> The [Applicant] faced two allegations under section 8.1 of the RCMP *Code of Conduct* for providing a false, misleading written statement to a superior or a person in authority, while being involved as a Subject Member in a *Code of Conduct* investigation. The [Applicant] allegedly deleted a text message from an exchange before submitting the conversation to the Conduct Authority and then claimed the deleted offending text message was sent by a fellow RCMP officer without his knowledge.
>
> The [Applicant] contested both allegations. A Conduct Board found the allegations established and ordered the [Applicant] to resign within 14 days or be dismissed from Force. The [Applicant] appealed this decision.

> On appeal, [the Applicant] argues that the Board's behaviour raised a reasonable apprehension of bias; that the Board breached his right to procedural fairness when it did not call two crucial witnesses and when it held the [Applicant] to a higher standard of proof than the Conduct Authority Representative; and, that the decision is unreasonable because it was unsupported by the evidence. The [Applicant] also argues that methods employed by the investigator breached his right to procedural fairness. Accordingly, the [Applicant] sought full reinstatement, including all pay, benefits and overtime, that he would have received since the issuance of the decision.
>
> The appeal was referred to the RCMP External Review Committee (ERC) for review. The ERC found that Board did not demonstrate a reasonable apprehension of bias; did it not breach the relevant principles of procedural fairness; and, that the Board's decision was not clearly unreasonable.
>
> An Adjudicator found that the Board's decision was supported by the record and not clearly unreasonable, as well as that it was not reached in contravention of the applicable principles of procedural fairness. The appeal was dismissed.

A. *Preliminary Matter - New Evidence*

[21] Section 32 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [*CSO (Grievances and Appeals)*] confirms that new evidence may be admitted on appeal in certain circumstances.

[22] The Applicant sought to introduce new evidence consisting of a photograph taken from his cell phone [Photo] along with an affidavit attesting to the authenticity of the Photo [Affidavit], and an email from Air Canada indicating the boarding time of the Applicant's flight on March 17, 2017 [AC Email].

[23] The Adjudicator set out the criteria for admitting new evidence on appeal: (i) it would be in the interests of justice to do so; (ii) the evidence could not reasonably have been submitted at the hearing; (iii) it is relevant to an issue; (iv) it is credible; and (v) if believed, it could reasonably be expected to have affected the Conduct Board's decision (*Palmer v The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212 [*Palmer*]). All of these criteria must be met in order for the additional evidence to be considered on appeal (*David Suzuki Foundation v Canada (Health*), 2018 FC 379 at paras 13-19 [*David Suzuki*]).

[24] The new evidence was not admitted. The Photo is relevant and cogent, but the Applicant could have provided it to the Conduct Board prior to the hearing or determination of the conduct measures. It was in his possession before he replied to the investigation in March 2019, and he has not adequately explained why he did not provide it then. Additionally, given the myriad of concerns with the Applicant's credibility, both the Photo and the Affidavit cannot be presumed credible. The AC Email is also inadmissible. The Applicant had the Investigation Report before the conduct hearing and could have requested the AC Email if he wanted it before the Conduct Board. The AC Email also does not meet the test of relevance and cogency, since the time at which the Applicant boarded his flight does not speak to the aspects of the timeline that are in dispute, specifically where the text message was sent from, who sent the text message, and where the Applicant was at 11:51 am on the day of the Meeting.

B. *Procedural Fairness*

(1) Reasonable Apprehension of Bias

[25] The Applicant took issue with the following paragraph of the Conduct Board decision which he submits demonstrates a lack of an open mind:

> [161] Throughout these proceedings, I listened for, but did not hear, any evidence that [the Applicant] is self-aware, recognizes the seriousness of his actions, or takes any personal responsibility in any aspect of the circumstances leading up to his hearing. To the contrary, he perpetuated his deceptive behaviour during the hearing by asserting new facts, not previously received, which I have found unsupported by the evidence. I am left without any assurance that [the Applicant] will learn from this experience and that it will not be repeated.

[26] The Applicant claimed that the Conduct Board erred in finding that he pranked the Complainant and that it used this finding to bolster its credibility finding.

[27] The Adjudicator determined that paragraph 161 of the Conduct Board's decision did not give rise to a reasonable apprehension of bias. There is a presumption of impartiality, which decision-makers enjoy and the Applicant must rebut. The offending paragraph is under the section titled "Conduct Measures", which came after the Conduct Board had established the truth of the allegations on a balance of probabilities. Acceptance of responsibility for one's actions is a possible mitigating factor, and lack of remorse may be aggravating. The comments in paragraph 161 are an appropriate part of determining conduct measures.

(2) The Failure to Call Cst. X and Supt. L was a Breach of Procedural Fairness

[28] The Applicant referred to Cst. X as a key witness, given his written statement claiming responsibility for the text message. The failure to call him is based on the unproven belief that he was outside the country.

[29] Supt. L was summoned but advised that he was unable to testify without providing a reason. His evidence was crucial since he copied the investigator with an email stating that "dismissal should be contemplated/sought in this matter".

[30] The Adjudicator determined that the Applicant, who was represented, bore the responsibility of raising issues of procedural fairness at the first opportunity. The Applicant did not raise this issue despite knowing a month in advance that Cst. X and Supt. L would not be called to testify. The Applicant also explicitly agreed to not have Supt. L testify. Furthermore, the Applicant also did not object when he was informed that the Conduct Board decided not to call Cst. X. He waived his right to allege a breach of procedural fairness. It is also the obligation of the parties and not the Conduct Board to call witnesses.

C. *The Reasonableness of the Conduct Board's Decision*

[31] The Adjudicator disagreed with the Applicant that he was put to a higher standard of proof than the CAR witnesses and that two errors by the Conduct Board rendered its decision unreasonable.

[32] As for the alleged errors, first, the Conduct Board had found that the Applicant did not explain how he traveled from his hotel to the coffee shop and that it would have been unlikely for the Applicant to walk there in time. The Applicant testified that he took a taxi from his hotel to the coffee shop but erroneously only claimed the taxi ride to the airport. The Conduct Board did not follow up on this in questioning. Second, it found that the Applicant was unable to

explain how he arrived to meet with the Complainant within 50 seconds of being dispatched. The Applicant stated that someone else had put the times into the system on his behalf.

[33] The Adjudicator found that these two errors did not render the decision patently unreasonable. The two errors pertain to the Conduct Board's findings on the Applicant's credibility, but the Conduct Board had numerous reasons to question his credibility other than these two errors. These numerous reasons show a rational line of analysis to support that the Applicant lacks credibility.

[34] The Applicant also acknowledged the credibility of the CAR witnesses called at the hearing. His claim that there are credibility issues with the report contradicts his submissions at the hearing. The A/OICs were both credible and the Applicant agreed. The Adjudicator found that the A/OICs were consistent across their statements and their testimony. There was also no support for the Applicant's claim that the A/OIC falsified records.

[35] The only issues raised by the Applicant's MR during the investigation were the investigators' failures to: obtain the Applicant's phone records; obtain information from Air Canada; and document the times they attempted to contact Cst. X. The Conduct Board addressed these gaps during the hearing and in its decision but found that the gaps were not critical flaws. The Applicant could have recalled the CAR's witnesses at the hearing but chose not to do so.

[36] The Conduct Board reasonably drew a negative inference from the Applicant's shifting and inconsistent evidence concerning timelines. The Conduct Board also did not err in handling

the Applicant's phone records. The Applicant could have contested their absence before the hearing and it was his responsibility to ask for them. The Conduct Board reasonably found that the phone records would not have resolved any evidentiary dispute as it would not resolve the question of who sent the text message. The Applicant's check-in time would not help his credibility since it was not in dispute when he was on the plane. The Applicant was also contradicted by the A/OIC's testimony when he said that the office was not busy when he and the A/OIC met. There was also no missing surveillance footage as the Applicant alleged and the Conduct Board found that this evidence was more credible than the Applicant's testimony.

[37] The Conduct Board's finding that Cst. X was deliberately not responding to the investigators is supported by the record.

[38] The Applicant did not raise the issue of not receiving a warning before making statements. He had an obligation to raise this argument at first instance and could not raise it on appeal.

[39] The Adjudicator found that the Conduct Board's decision was not clearly unreasonable.

IV. Issues and Standard of Review

[40] After considering the parties' submissions, the issues are best characterized as:

1. Was the Adjudicator reasonable in finding no breach of procedural fairness at the Conduct Board?
2. Was the Adjudicator reasonable in refusing the Applicant's new evidence?

3. Was the Adjudicator's decision reasonable?

[41] The parties disagree on the standard of review for the Adjudicator's finding on procedural fairness before the Conduct Board.

[42] On review to this Court is the determination by the Adjudicator that the decision of the Conduct Board was not tainted by unfairness. In this circumstance, the Respondent is correct that the Adjudicator's decision on the procedural fairness of the decision below it is reviewable on a reasonableness standard (*Persaud v Canada (Attorney General)*, 2023 FC 811 at para 57; *Rodriguez v Canada (Citizenship and Immigration)*, 2022 FC 774 at paras 16-19).

[43] As the Supreme Court of Canada stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65:

> [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[44] On the question of the admission of new evidence, the parties submit that the standard of review is correctness.

[45] In my view, the standard of review for the admission of new evidence in appeals of conduct decisions is reasonableness. *Vavilov* sets a presumptive standard of reasonableness for

the review of decisions from administrative bodies, except in certain circumstances (at para 23). The Applicant states that the standard is correctness because the question of the proper test for the admission of new evidence on appeal to the Commissioner is one of law.

[46] Questions of law are not always subject to a standard of correctness on judicial review. Administrative decision-makers are reviewed on a standard of reasonableness when interpreting their home statutes (*Vavilov* at para 25). Exceptions to this presumption include legislated standards of review, statutory appeal mechanisms, constitutional questions, general questions of law of central importance to the legal system as a whole, questions related to the jurisdictional boundaries between two or more administrative bodies, and circumstances of concurrent first instance jurisdiction between courts and administrative bodies (*Vavilov* at para 17; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 26-28).

[47] In the case of appeals to the Commissioner, the admission of new evidence is guided by subsection 25(2) and section 32 of the *CSO (Grievances and Appeals)*, with further explanation given in section 5.3.1.5 of the *Administrative Manual*, chapter II.3 “Grievances and Appeals”. The admission of new evidence is therefore rooted in the governing regulations. When the Adjudicator decided to dismiss the Applicant’s evidence, it did so in light of the regulations and manual, as an exercise of interpreting the law in light of its home statute.

[48] The parties did not state which one of the means of rebutting the reasonableness presumption in *Vavilov* applies to this case. The Adjudicator may have applied the test for

admitting new evidence set out in *Palmer*, but the Adjudicator's finding and application of *Palmer* does not impact the law of admitting new evidence generally. The Adjudicator was applying *Palmer* within the context of the established regulatory framework for admitting new evidence on appeals of Conduct Board decisions. The legal system as a whole does not operate within that framework and any use of *Palmer* made by the Adjudicator does not influence any decision-maker not in the Adjudicator's role. The Adjudicator's decision does not impact the general law of admitting new evidence on appeal.

[49] The parties agree that review of the merits of the Adjudicator's decision is to be on a standard of reasonableness. I agree—reasonableness applies to judicial review of appeal decisions from the Adjudicator (*McGillivray v Canada (Attorney General)*, 2021 FC 443 at para 27).

V. Analysis

A. *Procedural Fairness at the Conduct Board*

(1) Applicant's Submissions

[50] The more that is at stake for an individual in a certain proceeding, the higher the degree of procedural fairness owed (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 25). The fact that the Applicant's entire career was at stake, and the court-like structure of a Conduct Board proceeding meant that significant procedural fairness was owed (*Smith v Canada (Attorney General)*, 2019 FC 770 at paras 39-40 [*Smith*], aff'd on appeal *Smith v Canada*, 2021 FCA 73).

(a) *Bias*

[51] The test for determining whether there is a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension of bias (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, 68 DLR (3d) 716 at 394). A reasonable apprehension of bias will arise when there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 89 DLR (4th) 289 at 638).

[52] The Conduct Board predetermined the matter when it decided that Cst. X's evidence was neither material nor necessary to resolve a significant conflict in the evidence.

[53] Predetermination of the matter is also evidenced in the Conduct Board's statement that it listened for remorse "throughout the proceedings" and by commenting on the fact that the Applicant "perpetuated his deceptive behaviour". Given that the Applicant only testified in the process of determining whether he breached the *Code of Conduct* and did not testify during the conduct measures phase, listening for remorse "throughout" could not be listening for the purpose of determining if there was aggravating behaviour. This is irrelevant when determining if a member has breached the *Code of Conduct*. Furthermore, defending oneself from allegations cannot be an aggravating factor (*Reid v College of Chiropractors of Ontario*, 2016 ONSC 1041 at para 117 [*Reid*]).

[54] Both Cst. X and Supt. L could have testified via phone or video since a different CAR witness was allowed to testify by phone. The real reason for declining to call Cst. X and Supt. L was that the matter was predetermined.

[55] The Applicant, being aware that he has the onus on raising issues of procedural fairness at the earliest possible opportunity, did not know of the Conduct Board's predetermination of the issue until it released its decision.

(b) *The Conduct Board Failed to Call Key Witnesses*

[56] Cst. X's evidence could have corroborated the Applicant's defence. Supt. L's evidence could have showed the tainted nature of the conduct investigation where one of his emails stated that "dismissal should be contemplated/sought in this matter". The failure to call Cst. X and Supt. L also prevented the Applicant from cross-examining these witnesses (*Jackson v Region 2 Hospital Corp*, [1994] 145 NBR (2d) 51, 24 Admin LR (2d) 220 at para 5).

[57] This case is similar to *Willette v Royal Canadian Mounted Police Commissioner*, [1985] 1 FC 423, 56 NR 161 (FCA) [*Willette*], where the Court said at paragraph 30:

> …in the circumstances of this case where the evidence being relied upon by the board was, in its own words, "conflicting and contradictory in many respects", it erred in failing to do what it clearly had authority to do, that is, of calling the makers of the statements before the hearing to testify viva voce and be cross-examined. Many of those witnesses were members of the R.C.M.P. and could have been directed to attend.

[58] Even where a witness falls beyond the scope of the Conduct Board's control, the Conduct Board is obligated to take "all reasonable steps to arrange their attendance" (*Willette* at para 30).

[59] The Applicant's MR was employed by the RCMP and was an articling student at the time and was likely inexperienced and pressured by his lack of job security. The MR's supervisor did not attend the pre-hearing conference. Despite this, the MR did, in fact, raise the Conduct Board's failure to call Cst. X as a gap in the investigative process.

(2) Respondent's Submissions

[60] The Adjudicator's finding that the Conduct Board's decision did not breach the Applicant's rights to procedural fairness was reasonable or, alternatively, it was based on a correct application of the law.

(a) *Bias*

[61] Decision-makers benefit from a presumption of impartiality and there is a high standard of proof to meet by the party alleging bias (*Britton v Royal Canadian Mounted Police*, 2012 FC 1325 at para 36). The test for a reasonable apprehension of bias is a "real likelihood or probability of bias" (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para [*Yukon*]). The question to ask is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude (*Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 56).

[62] The Applicant had a responsibility to raise any procedural issue at the Conduct Board at the first opportunity, which he failed to do (*Chrétien v Canada (Attorney General),* 2005 FC 925 at para 44). Moreover, a party's course of conduct before a tribunal will constitute an implied waiver of any assertion of a reasonable apprehension of bias where the party fully participates in the proceeding before the tribunal without challenge to the tribunal's independence (*Toora v Canada (Citizenship and Immigration),* 2006 FC 828 at para 18; *ECWU, Local 916 v Atomic Energy of Canada,* [1986] 1 FC 103, 24 DLR (4th) 675 at paras 4-5).

[63] Paragraph 161 of the Conduct Board's decision must be read in context. The paragraph was in the context of deciding conduct measures, after the allegations were established on a balance of probabilities. The *Conduct Measures Guide* lists lack of remorse as an aggravating factor. The Conduct Board was listening for signs of remorse throughout the hearing, not an admission of guilt. The Conduct Board has the obligation to consider all the evidence, and since the Applicant chose not to testify for the conduct measures, this was the only testimony that the Conduct Board could consider. In fact, listening throughout the proceeding had the potential to result in a more favourable outcome for the Applicant. The Conduct Board's finding that the Applicant perpetuated deceptive behaviour was the result of weighing the mitigating and aggravating factors.

[64] Since the Applicant did not assert a reasonable apprehension of bias at the Conduct Board, including the failure to summon Cst. X, he cannot now raise it on judicial review. In the alternative, there is no reasonable apprehension of bias. The evidentiary issues had little to do with Cst. X and the need for his corroborating evidence. There were real contradictions with the

Applicant's own evidence. For instance, on March 27, 2018, the Applicant stated that the text was embarrassing and that it did not need to be included whereas on March 28, 2018, he stated that his son deleted the text because it contained a "bad word".

[65] The Conduct Board properly weighed the probative value of Cst. X's testimony against the challenges of securing his oral testimony. It tried to reach him several times but was unable, and it believed him to be overseas. Furthermore, despite the Applicant being prohibited to contact Cst. X, his MR could have done so on his behalf. The Conduct Board used its powers under subsection 18(3) of the *Commissioner's Standing Orders (Conduct)*, (SOR/2014-291) [*CSO (Conduct)*] to control its own process, and the Applicant did not object until after the decision was rendered. The fact that another witness was allowed to testify via telephone does not mean that the Conduct Board predetermined the matter. The Conduct Board's decisions pertaining to the necessity of oral testimony of witnesses are entitled to deference.

[66] If the Applicant was truly concerned with the failure to call Cst. X, he could have raised his concern after the decision was rendered following the pre-hearing conference in May 2019 and, at the very least, raised it on appeal.

[67] The Applicant claims a reasonable apprehension of bias but has failed to specify exactly what the nature of that bias is. Alternatively, even if there was bias, it was cured on internal appeal because the issue was raised before the Adjudicator who took a diligent review of the Conduct Board's decision and process. The Applicant has not claimed bias on the part of the Adjudicator, and his findings are therefore entitled to deference.

(b) *The Conduct Board Failed to Call Key Witnesses*

[68] The Applicant was represented by a qualified MR. Allegations of his lack of experience, job security, and limited supervision are not established on the record. Furthermore, the Applicant did not raise the issue of adequacy of representation before the Adjudicator and has not presented any submissions in that regard on this Application. The Applicant should have raised this issue at the first opportunity and chose not to do so. The Applicant has not made submissions in his Memorandum of Fact and Law to support this allegation.

[69] The threshold for incompetency is high, and the Applicant must show that: (a) the representative's alleged acts or omissions constituted incompetence; (b) there was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and (c) the representative be given notice and a reasonable chance to respond (*Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148 at paras 29-30). The Applicant has established none of these.

[70] The argument that the Conduct Board should have called Cst. X and Supt. L contradicts section 18 of the *CSO (Conduct)*, which requires parties to provide a list of witnesses they want to call prior to the Conduct Board deciding which witnesses from the list will be called. The Applicant did not list these individuals and did not make any representations on the necessity of their evidence at the pre-trial hearing.

[71] At the hearing, the Applicant had full knowledge of the case he needed to defend against and the evidence he would need for that defence. The Applicant chose not to call any witnesses

and agreed to Supt. L's absence once the CAR advised at the pre-trial hearing that they did not intend to call him as a witness.

[72] *Willette* does not apply because it was decided under a completely different conduct regime that no longer exists. The need for procedural fairness was greater under the old statute because the investigated person's liberty was at stake. In *Willette,* the allegations against the member included criminal charges and the member claimed violations of the *Canadian Charter of Rights and Freedoms,* s 7, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11; the entirety of the evidence was in documentary form; and the member raised the Discipline Board's failure to compel witness testimony at the outset of the hearing. Here, the Applicant had a month's notice before the hearing and decided to participate without calling Cst. X and Supt. L. He waived his right to allege a breach of fairness.

(3) Conclusion

(a) *Bias*

[73] As stated by the Supreme Court of Canada in *Yukon,* the test for a reasonable apprehension of bias requires asking:

> [20] … what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.] (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))

[74] The threshold for finding a reasonable apprehension of bias is high, and decision-makers benefit from a strong presumption of impartiality. It is an inquiry that remains highly fact-specific (*Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras 76-77).

[75] Adding to the relevant considerations is the requirement in subsection 13(1) of the *CSO (Conduct)* that "[p]roceedings before a conduct board must be dealt with by the board as informally and expeditiously as the principles of procedural fairness permit." Therefore, the demands of procedural fairness must be considered alongside the benefits of an informal and expeditious process.

[76] I agree with the Respondent that the claim to have been "listening throughout" is not evidence of bias or predetermination of the matter before the Conduct Board. What the Conduct Board member said was "I listened for, but did not hear, any evidence that [the Applicant] is self-aware, recognizes the seriousness of his actions, or takes any personal responsibility in any aspect of the circumstances leading up to this hearing."

[77] The Applicant's submissions amount to characterizing this as listening only for aggravating factors but the Adjudicator found that the Conduct Board "was merely attempting to determine whether it could accept remorse or 'acceptance of responsibility' as a mitigating factor." This is a reasonable finding on the part of the Adjudicator based on the record. It is also a reasonable interpretation of the Conduct Board's statement. The reasonableness of this interpretation is bolstered, as the Adjudicator pointed out, by the fact that the Conduct Board's

statement was found under its discussion of conduct measures—i.e., after it had concluded on the allegations.

[78] The Applicant relies on *Reid* but paragraph 117 speaks to the irrationality of considering lack of remorse as an aggravating factor in determining a penalty where a lack of remorse is related to the individual's defence against professional misconduct and where a right of appeal is present. The circumstances here are different for three reasons. First, as the Respondent points out, the *Conduct Measures Guide* explicitly contemplates lack of remorse as an aggravating factor. Second, the subject of the conduct proceedings in *Reid* did not dispute what he did, only its impropriety under the standards of practice, policies and guidelines of the College of Chiropractors of Ontario. Here, the Applicant denies that he even sent the message for which he was brought before the Conduct Board. Third, here the Conduct Board found that the Applicant had "perpetuated his deceptive behaviour during the hearing by asserting new facts, not previously received, which I have found to be unsupported by the evidence [emphasis added]." If the mere fact of denial is not a legitimate aggravating circumstance, the manner of denial should be where it is disrespectful of the adjudicative and investigative processes.

(b) *The Conduct Board Failed to Call Key Witnesses*

[79] I find no reviewable error in the Adjudicator's assessment of the Conduct Board's failure to call Cst. X and Supt. L.

[80] As the Respondent correctly points out, section 18 of the *CSO (Conduct)* authorizes the Conduct Board to select from the list of witnesses requested by the parties those who will be

called to testify at the hearing and subsection 18(4) requires that list of witnesses must be accompanied by reasons for accepting or refusing any witnesses submitted on the parties' list. If one party objects, section 17 of the *CSO (Conduct)* provides that the party may bring a motion on the matter. This process represents the balance struck in the Regulations between procedural fairness and the benefits of informal and expeditious proceedings.

[81] In the pre-hearing conferences, the parties identified only two necessary witnesses: the Applicant and the Complainant. In his Section 18 Response, the Applicant stated the following:

> No witnesses are being proposed by the Member. There is no evidence in dispute in the Investigation Report. There is a statement from [Cst. X] which is not contradicted by any admissible evidence.
>
> The conflict that is implied by the CAR has been created by speculation and not evidence. The following investigative steps were taken without success, or not taken at all:
>
> 1. A Production Order for phone records would have resolved the issue as to where the phone was at the time of the messages;
>
> 2. Airline records show [the Applicant] checked in online and there were no record of his arrival at the airport;
>
> 3. CATSA did not have any information available;
>
> 4. Video from the detachment did not show where [Cst. X] was at 11:51am;
>
> 5. No information is in the Investigation Report that identify times that an investigator attempted to communicate with [Cst. X]. Supt. [L] had initially tried in April 2018, but there were no further attempts documented.
>
> This lack of evidence has led to speculation that there is a conflict which requires a hearing to resolve. In the alternative, if the Conduct Board determines a hearing is necessary to resolve a conflict, the Member submits that he will be the only witness needed. [emphasis added.]

[82] As this excerpt shows, the Applicant did not object to Cst. X's absence. In fact, he and his MR were of the opinion that a hearing was not necessary and, were it deemed necessary, that the Applicant's testimony coupled with Cst. X's written statement would be sufficient for a defence.

[83] In an email summary of a pre-hearing conference dated May 21, 2019, the Conduct Board summarized the meeting between herself, the CAR, and the Applicant's MR. Among the takeaways was the following:

> **Evidence of Supt. [L]:**
>
> The CAR had determined that she does not require the oral evidence of Supt. [L]. The MR has no need to cross-examine Supt. [L]. The CB directed that Supt. [L] be removed from the witness list.

[84] The Applicant's MR expressed no need to cross-examine Supt. L. This is consistent with the MR's statement, excerpted above, that the only necessary witnesses was the Applicant.

[85] In light of this, it was open to, and reasonable for, the Adjudicator to find that the Applicant consented to the absence of testimony from and cross-examination of Cst. X and Supt. L, thereby waiving his right to allege a breach of procedural fairness.

[86] The Applicant claims that his MR highlighted gaps in the investigation and that this amounts to an allegation of breach of procedural fairness. However, given that the MR accepted the absence of Cst. X and Supt L, it was open for the Adjudicator to not view these complaints about gaps as complaints about procedural unfairness.

[87] For completeness, I agree that *Willette* differs from the present matter as it was decided under a different statutory regime. In addition, the extract from *Willette* relied upon by the Applicant states that *Willette* was a case "where the evidence being relied upon by the board was, in its own words, 'conflicting and contradictory in many respects'" (at para 30). That is also not the case here.

[88] For these reasons, in my view the Applicant cannot now argue before this Court against the Conduct Board's citing difficulty in reaching Cst. X as one of its reasons for not calling him. The Applicant was informed of this reason and did not protest when informed before the hearing that Cst. X would not be called.

[89] The Applicant claims that the Conduct Board predetermined the matter when it decided that Cst. X's evidence was neither "material" nor "necessary to resolve a significant conflict in the evidence." This is inconsistent with the Applicant's prior statements that he did not intend to request Cst. X as a witness, and that he did not believe a hearing was necessary. The Conduct Board gave reasons for why it did not believe that the Applicant had met with Cst. X at the coffee shop. The Adjudicator's deference to this finding is reasonable based on the record.

[90] The Applicant also argues that the failure to call Cst. X violated the rule in *Browne v Dunn* (1893), 6 R 67 (UK HL). Without commenting on whether this rule applies in the context of RCMP conduct hearings, I note that it does not apply to the Applicant's circumstances. The rule only applies when a witness is being examined and Cst. X was not. This submission is meritless.

(c) *Inadequate Representation*

[91] There is no evidence in the Certified Tribunal Record to base a claim of incompetence except the Applicant's uncorroborated statements. There is also no evidence that it was brought before the Conduct Board. The Applicant had different representation on appeal but this does not entail that his MR was incompetent.

[92] Information concerning MRs and the Member Representative Directorate [MRD] was submitted for this judicial review in the un-contradicted evidence in the form of an Affidavit of Sara Novell, Recourse Advisor to the Director General of Recourse Services Branch with the RCMP. As Ms. Novell explains, "[i]n the event that a member is dissatisfied with their Member Representative, the proper recourse is to raise it through the Director of the MRD so that a new Member Representative may be assigned to the case." Ms. Novell further states that, to her knowledge, "the Applicant never raised an issue with the representation he received…prior to the allegations made in his Affidavit" in support of his judicial review and that "[h]e never requested to have the MRD appoint a different Member Representative for his case."

[93] Questions of inadequate representation before administrative decision-makers are questions of procedural fairness and they must be raised at the first opportunity. Failure to do so constitutes an implied waiver of any perceived breach (*Alexander v Canada (Citizenship and Immigration)*, 2023 FC 438 at para 21; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26). The Applicant only raised this issue on judicial review to this Court. Not only should he have done it sooner, at least before the

Adjudicator when he was no longer represented by his MR, but the RCMP's MRD provides a means of addressing inadequacy of representation, as Ms. Novell explained.

B. *The Refusal to Admit New Evidence*

(1) Applicant's Submissions

[94] The Adjudicator improperly recited the *Palmer* test by stating that the second consideration for admissible evidence was that it "could not reasonably have been submitted at the hearing [emphasis added.]" However, *Palmer* stated that "evidence should generally not be admitted if, by due diligence, it could have been adduced at trial" [emphasis added] (at 775). This ensures flexibility in the test (*Barendregt v Grebliunas*, 2022 SCC 22 at para 43 [*Barendregt*]). The Adjudicator relies on *David Suzuki* for the proposition that all of these criteria must be met in order for the additional evidence to be considered on appeal, but it does not stand for this. The BCCA has recently reaffirmed the flexibility of the *Palmer* test (*David Suzuki* at paras 13-19; *Devins v Devins*, 2021 BCCA 213 at para 27 [*Devins*]).

[95] Had the Adjudicator applied the correct test, the evidence would have been admitted. Alternatively, even if he properly articulated the test, the application of it was incorrect.

[96] It is in the interest of justice to admit the Photo because it would resolve a gap in the evidence which the Conduct Board used to find against the Applicant's credibility. Further it would be unfair not to admit the Photo, especially since the MR only failed to submit it because he thought that evidence could not be adduced during the hearing. The Conduct Board and the

CAR told the Applicant that evidence could only be adduced during the conduct measures hearing.

[97] Not only is the Photo relevant to the factual dispute as it would prove that he saw the Investigation Report in advance of being served with it, but its absence allowed the Conduct Board to make two adverse credibility findings against the Applicant. Additionally, the Photo is credible. The Applicant swore to it in an affidavit and it is dated and possesses a location tag. If believed, the evidence would have a significant impact on the decision.

(2) Respondent's Submissions

[98] While section 32 of the *CSO (Grievance and Appeals)* states that the Commissioner "may accept any evidence submitted by a party", this discretion is limited by subsection 25(2), which prevents the admission of evidence that was not presented to the original decision-maker unless that evidence was not available at the time of the disputed decision. Deference is owed to the Adjudicator interpreting its own statute.

[99] Though the Adjudicator did not employ the same language used by the Supreme Court of Canada when laying out the second part of the *Palmer* test, the intent and meaning of the words is the same as that articulated by the Supreme Court in its subsequent jurisprudence. The characterization of the second prong of the test in *Barendregt* at paragraph 29—"the evidence could not, by the exercise of due diligence, have been obtained for the trial"—is almost identical to that of the Adjudicator.

[100] The *Palmer* test is purposive and ensures that the admission of new evidence on appeal is rare and that matters between parties become narrower on appeal (*Barendregt* at para 31). Due diligence forces litigants to put their best foot forward when first called upon to do so (at para 38). The application of *Palmer* here must be informed by the clear statutory language of the RCMP policies that impose an obligation of due diligence on the Applicant.

[101] The flexibility called for by the Supreme Court of Canada in *Barendregt* was in the context of a mobility case, with profound impact on children, families, and society (at para 8). The present case is distinguishable, as it relates to discrete matters of police misconduct.

[102] The Adjudicator correctly applied the test and reasonably refused to admit the Photo because the Applicant did not satisfy the requirements of due diligence and credibility. The Applicant could have provided the Photo to the Conduct Board prior to the June 2019 hearing or before the conduct measures were determined. The Applicant did not make an initial submission on the Photo, as it was included on appeal as a footnote and the Applicant did not attest to its authenticity. The Applicant's submission that he did not recall having taken the picture is simply not credible. The Adjudicator correctly identified the discrepancy between the Applicant's being "intrigued" enough to take the photo and failing to recall having taken it.

[103] It is in the interest of justice to uphold the Adjudicator's decision. Otherwise, the door will be opened to re-litigate issues after the fact, contrary to the rationale underlying *Palmer* and the purpose of the appellate system.

(3) Conclusion

[104] The Applicant has characterized the disputed prong of the *Palmer* test as that "evidence should generally not be admitted if, by due diligence, it could have been adduced at trial" (at 775). However, this is only part of what the Supreme Court said in *Palmer*. The full sentence distinguishes between criminal and civil cases:

> The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [emphasis added.]

[105] The disputed prong of the test, as it was set out in paragraph 29 of *Barendregt* is as follows:

> the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases) [emphasis added.]

[106] The increased strictness for civil cases is maintained. The Applicant is correct that there is flexibility in the test, but it is not the flexibility he wants. The statutory context must be considered in order to review the Adjudicator's use of the *Palmer* test.

[107] Section 32 of the *CSO (Grievances and Appeals)* states that the Commissioner "may accept any evidence submitted by a party" when considering an appeal. This broad permission is further limited on appeal by subsection 25(2), which states that an appellant is not entitled to submit evidence not before the original decision-maker where that evidence was available to the appellant when the decision was rendered.

[108] In light of these provisions, the interpretation of *Palmer* relied on by the Adjudicator was reasonable. The disputed prong of the test was interpreted in a manner consistent with subsection 25(2) of the *CSO (Grievances and Appeals)*, which explicitly excludes the submission of evidence on appeal where that evidence could have been reasonably submitted to the original decision-maker because it was available to the appellant.

[109] Furthermore, I would return to the Supreme Court of Canada's flexible approach to the *Palmer* test, where more flexibility is understandably allowed in criminal matters and a stricter test is observed in civil matters. It follows that the stricter standard for use in civil appeals should apply. Since this is, in effect, what the Adjudicator used, I find his characterization of the test to be reasonable.

[110] The Adjudicator was not unreasonable in his application of the test for admitting new evidence by leaning too heavily on due diligence. The Applicant is right that the British Columbia Court of Appeal recently held that "[t]he Court has the discretion to admit fresh evidence even if the due diligence requirement is not met" (*Devins* at para 27). However, again the Applicant did not cite the full sentence, which reads:

> The Court has the discretion to admit fresh evidence even if the due diligence requirement is not met, although the requirement should generally be applied "more strictly in civil than in criminal cases": *Ascent Developments Corp. v. Stonehenge Projects Inc.*, 2016 BCCA 287 at paras. 63–65 [emphasis added.]

[111] The *CSO (Grievances and Appeals)* also explicitly lays out a strict due diligence requirement in subsection 25(2), as the Respondent rightly points out. It was not, therefore, unreasonable for the Adjudicator to lean heavily on due diligence in her application of the test.

[112] The Adjudicator found that the Applicant did not satisfy the due diligence requirement with respect to the Photo he submitted in the form of a footnote. He could have submitted it to the Conduct Board prior to the hearing, given that it was in his possession before he replied to the investigation in March 2019. The Adjudicator found that the Applicant's explanation for why he did not provide the document at the appropriate time was inadequate. The Applicant claims that he forgot how he came to see the report before being served with it. Yet, he also claimed to have read the report in enough detail to notice the discrepancy in text messages between the report and his own submission. The Adjudicator found this hard to believe, and I think it was reasonable for him so to find.

[113] I note that the Applicant has not challenged the Adjudicator's decision on the Air Canada email with the flight boarding time.

C. *Reasonableness of the Adjudicator's Decision*

(1) Applicant's Submissions

[114] Reasonableness review does not grant immunity to the decision-maker. A reviewing body must intervene where decision-makers ignore key evidence.

[115] The Conduct Board failed to meaningfully grapple with Cst. X's statement, dismissing it based on video footage. This footage was insufficient to show that Cst. X could not have been at the coffee shop at 11:51 am. Cst. X does not appear on the video footage between 11:05 am and 12:38 pm. Furthermore, the Investigation Report stated that there were five possible exits and

that two were covered by video surveillance. However, the evidence shows that there were six exits to the building, including five exits that could be accessed without passing through areas covered by video surveillance. Finally, although Cst. X was shown to be on camera in the building for brief moments, this is not proof that he stayed in the building when he was not on camera given that no witnesses reported seeing him there.

[116] Other errors impacted the Conduct Board's ability to properly assess Cst. X's credibility. Specifically:

- the Conduct Board did not consider that the Applicant took a taxi to meet Cst. X at the coffee shop;

- the Conduct Board found that the Applicant was unable to explain how he arrived at the scene of the traffic incident involving the Complainant 50 seconds after being dispatched, despite the fact that he had never been questioned on that issue;

- the Conduct Board found that the Applicant did not acknowledge the Complainant's offer to provide a statement, when he in fact asked her to provide a "much more detailed statement";

- the Conduct Board found the Applicant's accounts of his intention to meet with the Complainant were irreconcilable, when in fact his story was supported by the transcript;

- the Conduct Board found that the Applicant's timeline shifted in testimony from his section 15(3) response when, in fact, it was consistent with his oral testimony;

- the Conduct Board found that the Applicant could not name the people he met at the coffee shop, when he did so name them during his testimony, with the exception of one person;

- the Conduct Board found that it was unrealistic for the Applicant to have arrived at the CATSA line within five minutes of arriving at the airport, despite the Applicant's explanation that the airport was not that big; and

- the Conduct Board misstated the Applicant's evidence on why he did not meet with the Complainant.

[117] Credibility errors are not typically reviewed by Courts. However, the number of factual errors, combined with the Conduct Board's failure to meaningfully grapple with Cst. X's evidence, warrant the decision being set aside.

(2) Respondent's Submissions

[118] The Federal Courts have recognized that RCMP adjudicators have a specialized expertise in maintaining the integrity and the professionalism of the RCMP and that their decisions in such matters are entitled to a considerable amount of deference (*Calandrini v Canada (Attorney General*), 2018 FC 52 at para 97; *Firsov v Canada (Attorney General)*, 2021 FC 877 at para 38). Similarly, in the context of the RCMP's internal grievance process or for the interpretation of internal RCMP policies, the Federal Court has previously held that a great amount of deference is owed to the decision-maker (*Su v Canada (Attorney General)*, 2017 FC 645 at para 42 [*Su*]).

[119] The Applicant's submissions focus on the reasons of the Conduct Board and do not address how the Adjudicator's decision was unreasonable. The Applicant is asking the Court to reweigh the evidence and review the Conduct Board's decision on what amounts to a standard of correctness. The Applicant is not entitled to re-litigate the issues at every stage.

(3) Conclusion

[120] The Respondent rightly points out that the Applicant's submissions are directed to the Conduct Board's findings and not the Adjudicator's assessment of those findings. As pointed out above, the Adjudicator extensively reviewed the findings of the investigation and the Conduct Board and assessed the Conduct Board's findings. On the face of the record, I can see no error on the part of the Adjudicator.

[121] The Applicant submissions on this issue invite the Court to re-weigh the evidence. This is not the role of the Court on judicial review of the Adjudicator's decision. The Adjudicator agreed that the evidence supported the Conduct Board's conclusion that this evidence was more credible than the Applicant's testimony.

[122] The Applicant raised several alleged errors committed by the Conduct Board but only connected two of these errors to the decision of the Adjudicator. Nevertheless, the Adjudicator found that these two errors did not render the Conduct Board's decision as having no "tenable line of analysis" to support its decision. Though these errors went to findings on the Applicant's credibility, his credibility was still put in question for numerous other reasons. Specifically, credibility was at issue due to shifting timelines between his subsection 15(3) response and his oral testimony, his claim to have seen the Investigation Report prior to being served with it, his claim to have felt interrogated despite sending himself an email saying that the measures were only in the range of 2-3 days, and his claim of a "forceful interaction" with the A/CO because the A/CO did not know how messages got deleted from his phone and was not "tech savvy". The Adjudicator also highlighted several other areas where the Applicant's evidence was shifting and

not supported by the record. For example, his claim that one of the A/OC's had "made false records" was a misinterpretation of the A/OC's admission that his records may have been inaccurate.

[123] Furthermore, the Adjudicator noted that the Applicant agreed that the CAR's witnesses and the Investigation Report were credible. The Adjudicator therefore found that the Applicant's impeachment of the report's credibility contradicted his statements at the hearing.

[124] On his purported willingness to acknowledge the Complainant's offer to provide a statement, the Applicant does not engage with the findings of the Conduct Board. Specifically, he does not engage in his submissions to this Court with the fact that the Conduct Board found him to be playing a prank on the Complainant and his Supervisor, and he does not engage with the fact that there is no record of him responding to the Complainant's email in which she says "I can do up a statement for you though of course. You want one then?". The Applicant contested the finding that he was playing a prank before the Adjudicator, but he does substantively not do so now.

[125] On the shifting timelines, the Adjudicator found that they went to the core of his defence and that many aspects of the timelines differed. I agree with the Applicant that the shift in the timelines is not so severe. In testimony, he was not sure if he arrived at 11:15 am or 11:30 am and said that it was "somewhere in between there, I guess". In his submissions he stated that he arrived at "approximately" 11:30 am. Regardless, this does not render the Adjudicator's decision

unreasonable, since it was not the only reason to doubt the credibility of the events at the coffee shop.

[126] The Conduct Board also pointed to inconsistencies in the Applicant's memory of who else he met at the coffee shop, besides Cst. X. The Conduct Board found that the inconsistency was not only in the names but also in the fact that he met people there at all. In addition, the Applicant admitted during cross-examination that the other people he identified as being at the coffee shop with him did not recall being at the coffee shop.

[127] The Adjudicator reviewed the reasons of the Conduct Board on the highly deferential standard of patent unreasonableness. The Applicant has not established that it was unreasonable for the Adjudicator to find that the Conduct Board's reasons were not patently unreasonable. The Applicant's criticisms of the reasons of the Adjudicator and the Conduct Board do not undermine critical findings made by these two decision-makers. As stated by this Court, "this Court and the Federal Court of Appeal have recognized that RCMP adjudicators have a specialized expertise in maintaining the integrity and the professionalism of the RCMP" (*Caladrini* at para 97). The application must accordingly fail.

VI. Conclusion

[128] The Applicant claimed that the Adjudicator made three reviewable errors: failure to find a breach of procedural fairness before the Conduct Board; failure to articulate and apply the proper test for admitting new evidence; and failure to reasonably review the Conduct Board's decision in light of the relevant facts and law. For the reasons stated above, I have not been

persuaded by the Applicant's submissions on any of these fronts. Accordingly, I am dismissing this application for judicial review.

JUDGMENT in T-2135-22

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. The Respondent is granted costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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