Federal Court  Cour fédérale

**Date: 20240502**

**Docket: T-228-23**

**Citation: 2024 FC 676**

**Ottawa, Ontario, May 2, 2024**

**PRESENT: The Hon Mr. Justice Henry S. Brown**

**BETWEEN:**

**CHRIS MARENTETTE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**PUBLIC JUDGMENT AND REASONS**
(Confidential Judgment and Reasons issued on May 2, 2024)

## I. Nature of the matter

[1] The Applicant seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and an order setting aside a investigation report dated January 4, 2023 adopted by his employer, the Canadian Border Services Agency [CBSA] on January 5, 2023, following his complaint pursuant to the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 [*Regulations*].

## II. Facts

[2] The Applicant has been employed since 1994 as a Border Services Officer with the CBSA.

[3] On April 18, 2021, the Applicant filed a Notice of Occurrence [Notice] pursuant to the *Regulations* with the National Integrity Centre [NICE], alleging seven incidents of workplace harassment and violence involving six supervisors that occurred between 1995 and 2020.

[4] The Notice set out details of the Applicant's allegations of workplace harassment and violence which are attached as Schedule A hereto. In an effort to continue the confidentiality of such proceedings recognized by prior jurisprudence of this Court, namely *Provonost v Canada (Revenue Agency)*, 2017 FC 1077 [*Provonost*] at paragraphs 14-15, Schedule A is redacted from the public version of these Reasons. The Court has also taken the liberty to anonymize other parts of these Reasons for the same reason.

[5] The Notice sets out the following allegations of workplace harassment and violence, as summarized in the Investigator's report:

> 1. In and around the year 1995, the principal party stated they were the victim of a hate crime/sexual harassment at work. The principal party alleged to have been the victim of inappropriate images towards them in public place.
>
> 2. In or about 2008-2009, the principal party alleged that they endured discrimination by the responding party and another employee who used inappropriate comments towards the principal party.
>
> 3. In 2016, the principal party alleged being unjustifiably targeted by CBSA for performance issues because of their body language.

> 4. In late 2019, the principal party alleged physical violence and the fact that the responding party used furniture to make noise towards the principal party.
>
> 5. Following the physical violence, the principal party alleges management contacted them to threatened them with discipline if they failed to report the workplace violence incident.
>
> 6. The principal party alleged being called derogatory names for months at the hand of the responding party.
>
> 7. In the fall of 2020, the principal party alleged that CBSA refused to grant an extension to their leave request.

[6] The essence of the Applicant's complaint is that he was subject to a pattern of workplace violence and harassment behaviour in the CBSA workplace culture. I find, and it is not disputed that a pattern of activity by definition involves incidents that may have occurred over a period of time, as is the case here.

[7] On May 27, 2021, the Applicant met with the Harassment and Prevention Resolution Advisor assigned to the Notice. The Applicant advised he wanted an investigation. On June 25, 2021, the Applicant received a Notice of Investigation.

[8] On November 16, 2021, the Applicant inquired about the status of the investigation. In January 2022, the Applicant filed a grievance because of the ongoing delay.

[9] On April 14, 2022, the CBSA retained and appointed an Investigator to investigate the Notice pursuant to the *Regulations.*

[10] On May 4, 2022, the Investigator interviewed the Applicant, and at that time, the Applicant outlined and provided additional information about his complaints. He also identified potential witnesses to his allegations.

[11] On May 6, 2022, the Investigator sent the Applicant the synopsis of his interview for review. The Investigator requested additional information related to the workplace violence and discipline reports discussed during his interview. The Applicant's interview synopsis is provided at Schedule B, and in accordance with the *Provonost* jurisprudence on confidentiality, is redacted from the public version of these Reasons.

[12] On May 19, 2022, the Applicant sent additional evidence to the Investigator related to Occurrence 4 and notes with respect to Occurrence 3.

[13] On August 11, 2022, the Applicant was told the investigation was complete. On August 15, 2022, the Investigator confirmed with the Applicant that the Investigator had articulated the purpose of his complaint as "to prove/demonstrate that he had been the victim of harassment and workplace violence throughout his career" and that "there is a clear pattern of harassment behaviour toward him, letting him feel that the management of the CBSA had unjustifiably targeted him." The Applicant agreed with this articulation.

[14] The Investigator interviewed four responding parties and spoke to one witness. Two of the responding parties were not interviewed. One had retired in 2012 and the NICE had not been able to contact them. The second was on leave, and the Investigator found that interviewing them was not required in the circumstances because when taking the allegation by the Applicant at

face value, the occurrence involving this responding party did not meet the definition of workplace harassment and violence.

[15] However, neither at this time nor any time was the Applicant given a synopsis (or any information) about what the responding parties and a witness told the Investigator about his allegations, nor was he given a copy of the Investigator's Preliminary Report.

[16] It seems he was expected, by his Notice and in his single interview with the Investigator, to have comprehensively addressed not only all issues he raised, but also to have comprehensively anticipated and addressed all the responding parties and witness might tell the Investigator.

[17] On October 31 and November 30, 2022, the Applicant was informed again that the Investigator had completed the investigation. He was also told CBSA had received the Preliminary Report, which it was reviewing to ensure it was anonymized before its release.

[18] On December 19, 2022, the Applicant was told the Investigator was not able to meet with one of the responding parties because they were on leave.

[19] On January 5, 2023, the Applicant received the Investigator's final Report. He was informed that CBSA had adopted the Report and that the investigative process was finalized.

[20] As set out in the Report, the Investigator determined none of the occurrences alleged by the Applicant constituted workplace harassment or violence. Therefore, no preventative

measures were recommended. CBSA closed its file, taking the position that the matter was resolved.

[21] The Applicant filed a Notice of Application for judicial review on February 3, 2023.

[22] As part of this Application, the Applicant sought a Rule 318 certificate under the *Federal Court Rules*, SOR/98-106. On March 6, 2023 the Applicant received the full record of materials before the Investigator. Only at this time did the Applicant learn of the reports about him given to the Investigator by the responding parties and a witness.

[23] Also contained in the record was a checklist entitled "Workplace Harassment and Violence Prevention Regulations Checklist" [Checklist]. This Checklist was prepared by CBSA in response to his Notice. The Checklist lists the following as part of the investigation process:

> 20. Provide a copy of the investigator's preliminary report to the principal party.
>
> 21. Provide a copy of the investigator's preliminary report to the responding party.
>
> 22. Obtain comments from the principal party and responding party and send to investigator.

[24] Notably, none of these steps in the CBSA's Checklist took place. Had they been acted upon there might have been no basis for the Applicant's complaint based on procedural unfairness.

## III. The Investigator's Report

[25] The decision under review is the Investigator's 13-page report, dated January 4, 2023, as adopted by the CBSA on January 5, 2023. The Report includes a summary of the Investigator's mandate, the scope of the investigation, background, the process undertaken highlighting principles of timeliness, fairness and confidentiality, and a general description of the alleged occurrences prior to the Report's findings and conclusions.

[26] The Investigator's findings and conclusions are summarized by occurrence:

> [26] In relation to occurrence 1, given the totality of the circumstances, I find that the principal party could not proof on a prima facie basis that the occurrence took place. The principal party did not provide any evidence (email, file number, notes, witness etc.). Occurrence 1 does not meet the definition of harassment and violence.
>
> [27] In relation to occurrence 2, given the totality of circumstances, I believe that the responding parties were exercising their managerial responsibilities when they spoke to the principal party regarding the traveller's complaint and did not use any discriminatory languages towards the principal party. Occurrence 2 does not meet the definition of harassment and violence.
>
> [28] In relation to occurrence 3, the principal party was formally discipline following a traveler's complaint. The principal party did not provide any evidence showing that they were disciplined because of their sexual orientation. The investigator was provided a copy of the fact-finding report. Given the totality of the circumstances, I do not find that the responding party was suspended because of the "not normal" body language and was treated differently. The investigator finds that the responding party was acting within their managerial rights. Occurrence 3 does not meet the definition of harassment and violence.
>
> [29] In relation to occurrence 4, the principal party was clear that I did not need to investigate that allegation but wanted it to be included to demonstrate the clear pattern of abuse because of their sexual orientation. Given the fact that this occurrence is already

being investigated under the former workplace violence legislation, the investigator will not be making any findings.

[30] In relation to occurrence 5, the CBSA Code of Conduct manual is clear that any serious misconduct, will be promptly reported. Managers will promptly refer cases of serious misconduct to Security and Professional Standards to be addressed. The principal party did not indicate that the responding party was rude, screamed, shouted at them only that they felt threatened when reminded of their obligation to report the incident of workplace violence.

[31] It is a requirement to report the incident promptly to a manager. In this case, the incident occurred in late 2019. The principal party received a phone call from management in late 2019 and the principal party reported the incident by email later in 2019. The principal party stated that management called them and threatened them with discipline if they failed to report workplace violence. I find that the responding party acted within their managerial rights when they contacted the principal party to tell them that it was their obligation to file a workplace violence report. Occurrence 5 does not meet the definition of harassment and violence.

[32] In relation to occurrence 6, the principal party did not provide any evidence that the responding party was calling them derogatory names. The witness does not remember hearing the responding party calling the principal party derogatory names. Occurrence 6 does not meet the definition of harassment and violence.

[33] In relation to occurrence 7, the principal party did not provide any evidence (documentary, witness…) that CBSA exhibited any offensive or intimidating comments, bully the principal party to return to work. CBSA exercise their rights when they requested from the principal party to return to work. The investigator finds that the principal party could not prove that the CBSA declined to grant an extension to harass or discriminate against the principal party. Occurrence 7 does not meet the definition of harassment and violence.

[34] To have a clear pattern, the principal party would have to demonstrate that there have been a few founded incidents of sexual harassment and workplace violence because of their sexual orientation. The incidents would also have to be or have taken place at regular intervals. The principal party did not demonstrate a clear pattern showing that they were the victim of sexual

> harassment and were discriminated against because of their sexual orientation.
>
> [35] The investigator finds that the occurrence does not meet the definition of harassment and violence.
>
> [Emphasis in original]

## IV. Issues

[27] The Applicant raises the following issues:

1. What is the standard of review?
2. Did the investigation conducted by the Investigator and adopted by the Employer, violate the principles of procedural fairness?
3. Was the investigate Report authored by Maxime Boutin, and adopted by the employer, unreasonable?

[28] The Respondent raises the following issues:

1. Was the investigation procedurally fair?
2. Was the decision reasonable?

[29] Respectfully, the issues are whether the investigation leading to the Final Report was procedurally fair, and whether the investigative report/decision is reasonable. I need only deal with the first.

V. Relevant legislative provisions

[30] Employers in the federally regulated sector are required to comply with the *Regulations* which are enacted pursuant to paragraph 125(1)(z.16) of the *Canada Labour Code*, RSC 1985, c L-2:

> **Specific duties of employer**
>
> **125 (1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> > **(z.16)** take the prescribed measures to prevent and protect against harassment and violence in the work place, respond to occurrences of harassment and violence in the work place and offer support to employees affected by harassment and violence in the work place;

[31] The relevant prescribed measures in the *Regulations* are:

> **Information for investigator**
>
> **29** An employer or the designated recipient must provide the investigator with all information that is relevant to the investigation.
>
> **Investigator's report**
>
> **30 (1)** An investigator's report regarding an occurrence must set out the following information:
>
> > **(a)** a general description of the occurrence;
> >
> > **(b)** their conclusions, including those related to the circumstances in the work place that contributed to the occurrence; and
> >
> > **(c)** their recommendations to eliminate or minimize the risk of a similar occurrence.

> **Identity of persons**
>
> **(2)** An investigator's report must not reveal, directly or indirectly, the identity of persons who are involved in an occurrence or the resolution process for an occurrence under these Regulations.
>
> **Copies of report**
>
> **(3)** An employer must provide a copy of the investigator's report to the principal party, responding party, the work place committee or health and safety representative and, if they were provided with notice under subsection 15(1), the designated recipient.

## VI. Standard of review

[32] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA].

[33] In this connection, and while there is ongoing debate, I will follow the Federal Court of Appeal which relied on "the long line of jurisprudence, both from the Supreme Court and" the Federal Court of Appeal itself, that "the standard of review with respect to procedural fairness remains correctness": *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA (as he then was):

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied

> with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.
>
> [Emphasis added]

[34] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[35] I add that a procedurally unfair decision may nonetheless be upheld on judicial review if the answer is legally inevitable. In *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 [*Mobil Oil*], Justice Iacobucci for the Court held at pp. 228:

> In light of these comments, and in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness or natural justice which I have described. However, in light of my disposition on the cross-appeal, the remedies sought by Mobil Oil in the appeal per se are impractical. While it may seem appropriate to quash the Chairman's decision on the basis that it was the product of an improper subdelegation, it would be nonsensical to do so and to compel the Board to consider now Mobil Oil's 1990 application, since the result of the cross-appeal is that the Board would be bound in law to reject that application by the decision of this Court.
>
> The bottom line in this case is thus exceptional, since ordinarily the apparent futility of a remedy will not bar its recognition: Cardinal,

> supra. On occasion, however, this Court has discussed circumstances in which no relief will be offered in the face of breached administrative law principles: e.g., Harelkin v. University of Regina, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561. As I described in the context of the issue in the cross-appeal, the circumstances of this case involve a particular kind of legal question, viz., one which has an inevitable answer.

[36] *Mobil Oil* was followed by the Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204, per Justice Boivin JA at paragraphs 9-10, which I will follow:

> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
>
> [10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [Mobil Oil] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards*), 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).

[37] In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, Justice Rennie for the Federal Court of Appeal at paragraph 56 decided that:

> [56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.
>
> [Emphasis added]

## VII. Analysis

[38] The Applicant submits he was denied procedural fairness because he was denied both the right to know and respond to (1) the positions advanced by the responding individuals and the witness interviewed by the Investigator, and (2) the preliminary findings of the Investigator. Specifically, the Applicant submits (and it is not disputed) he was never shown or given any opportunity to respond to unfavourable, inaccurate, prejudicial, and contradictory statements reported to the Investigator by the responding parties and witness. He also submits (and it is not disputed) he was never shown or given any opportunity to respond to Investigator's Preliminary Report.

[39] I will say at the outset I agree with the Applicant and therefore the Court will grant judicial review and order this matter remanded for redetermination.

[40] The Applicant in my view reasonably and correctly submits that workplace harassment and violence investigations are afforded a high level of procedural fairness. In doing so he relies on Justice Gagné (as she then was) in *Renaud v Canada (Attorney General)*, 2013 FC 28 [*Renaud*] and other jurisprudence which entirely supports his position:

> [76] Weighing the factors that are the most relevant to the present case, I come to the conclusion that the duty of procedural fairness lying on a decision maker in the context of a grievance that includes allegations of harassment is a heavy one. First, a decision made in response to a workplace harassment complaint clearly may have serious consequences for everyone involved (not only the alleged victim, but also the respondents) and may compromise their respective personal and professional interests. On this point, I adopt the following remarks of Justice Gibson in *Puccini v Canada (Director General, Corporate Administrative Services, Agriculture*

*Canada)* (TD), 1993 CanLII 2973 (FC), [1993] 3 FC 557, at para 28:

> The laying of an harassment complaint is a serious matter. It exposes the complainant to serious prejudice. The laying of the complaint will inevitably become known in the workplace. The atmosphere there will inevitably become difficult. Sides will be taken. Relationships will be strained. . . . In each case of abuse of authority there is by definition a power imbalance. The complainant risks further abuse, however subtle, of that imbalance. On the other side, the alleged harasser will also suffer in terms of prestige, reputation, possible loss of authority and respect. It is therefore important that steps be taken to mitigate the negative effects and to deal with the complaint quickly. But it is at least equally important that the complaint be dealt with fairly, both in terms of the complainant and the alleged harasser.

[Emphasis added]

[41] The Respondent attempted to distinguish these cases suggesting (as I understood it) that the elevated duty of procedural fairness only protect the responding party, not the complainant. This suggestion is contrary to the jurisprudence.

[42] Very notably in the context of the *Regulations* in this case (enacted under the same statute, incidentally), Justice Martineau in *Provonost* adopted the reasoning of Justice Gagné (as she then was) in *Renaud* within the context of a workplace violence and harassment investigation under the *Canada Occupational Health and Safety Regulations*, SOR/86-304 [*COHS Regulations*]. The *COHS Regulations* were the predecessor regulations to those applicable in the case at bar.

[43] Frankly, I am unable to distinguish the present case from *Provonost* per Justice Martineau. Justice Martineau concluded and established:

> [7] On September 26, 2016, the investigator submitted his report, which was endorsed by the Assistant Commissioner, to the employer. The report was disclosed to the applicant and to the health and safety committee on October 28, 2016. At no time before the Assistant Commissioner's final decision was rendered was the applicant invited to make submissions on the investigation report.
>
> …
>
> [13] In *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at pages 838–840, 174 DLR (4th) 193, the Supreme Court teaches us that five factors must be considered to determine the content of the duty of procedural fairness: the nature of the decision made and the process followed in making it, the nature of the statutory scheme, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person, and the choices of procedure made by the agency itself. Although the Regulations do not provide a specific procedure, it should be noted that the investigation has significant consequences on staff relations in the work environment in question, as well as on the professional career and the psychological condition of the alleged victim and any person referred to in the work place violence or harassment complaint. These considerations are determinative in this case. In fact, the duty of procedural fairness in the context of harassment allegations is a particularly heavy one (see in particular *Renaud v Canada (Attorney General)*, 2013 FC 18, aff'd *Renaud v Canada (Attorney General)*, 2013 FCA 266). Even though *Renaud* involved a harassment complaint under the Treasury Board's Harassment Policy, the same stringency applies here, since harassment can constitute violence for the purposes of Part XX of the Regulations.
>
> [14] In this case, the applicant criticizes the investigator for, among other things, only meeting with her once, at the very beginning of the investigation, and for failing to allow her to counter any unfavourable testimony and/or make her submissions before the final investigation report was sent to the employer. The respondent claims that the initial meeting was sufficient: the applicant spent three hours on that occasion explaining her version of the facts to the investigator. The respondent states that the witnesses interviewed were not proposed by the employer, but rather were

> identified by the investigator when he reviewed the file. Moreover, the respondent submits that the confidential nature of the investigation and the investigator's obligation to conduct it in an expeditious manner justify the failure to send the applicant the testimony and/or a preliminary version of the report that the investigator intends to send to the employer.
>
> [15] Procedural fairness was breached. It was impossible for the applicant to anticipate the testimony of the executives and/or employees interviewed after the meeting on July 6, 2016. The investigator should have given her a reasonable opportunity to rebut any unfavourable evidence that was gathered in her absence and to respond to any of the managers' allegations that their behaviour in the work place did not constitute violence or harassment. Even though the investigator had to act quickly, and his investigation had to be confidential, he had to ensure that every person who could be affected by the findings in his report was heard and was able to make submissions to him.
>
> [16] Moreover, the applicant also disputes the reasonableness of the investigator's findings, given the complete lack of analysis of the evidence in the file. In fact, on reading his report, there is no way to understand how the investigator arrived at the conclusion that the managers' alleged acts did not constitute violence within the meaning of the Regulations. The investigator could not simply state that this was a matter of the employer legitimately exercising its management rights. In short, the Court cannot find, based on the reasons provided, that the investigator conducted a thorough and serious analysis of the file.
>
> [Emphasis added]

[44] With respect, I find the foregoing applies with minor modifications to the case at bar.

[45] Part XX of the *COHS Regulations* at issue in *Provonost* was replaced with the *Regulations* in the case at bar. Current to December 31, 2020, the older *COHS Regulations* included the following notification and investigation procedure:

> Notification and Investigation
>
> **20.9 (1)** In this section, competent person means a person who

**(a)** is impartial and is seen by the parties to be impartial;

**(b)** has knowledge, training and experience in issues relating to work place violence; and

**(c)** has knowledge of relevant legislation.

**(2)** If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as feasible.

**(3)** If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.

**(4)** The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

**(5)** The employer shall, on completion of the investigation into the work place violence,

**(a)** keep a record of the report from the competent person;

**(b)** provide the work place committee or the health and safety representative, as the case may be, with the report of the competent person, providing information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent; and

**(c)** adapt or implement, as the case may be, controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence.

**(6)** Subsections (3) to (5) do not apply if

**(a)** the work place violence was caused by a person other than an employee;

**(b)** it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and

> **(c)** the employer has effective procedures and controls in place, involving employees to address work place violence.

[46] The Applicant submits, and I agree that the Regulatory Impact Analysis Statement [RIAS] for the *Regulations* supports his position. This RIAS is published in the *Canada Gazette*, Part II, Vol 154, No 1. It says the objective of the *Regulations* is to create a consolidated regime that encompasses the full continuum of harassment and violence to increase protections for workers and eliminate the current duplication regarding prevention of work place harassment and violence. The RIAS properly explains that the continuum demonstrates that harassment can quickly escalate to acts of physical violence. The RIAS also says it is expected that the new regime will reduce federal jurisdiction workers' exposure to harassment and violence in the work place.

[47] The scheme is remedial in nature, which in my view and as submitted by the Applicant, demands a high degree of procedural fairness given the comprehensive investigative process involved.

[48] The RIAS outlines the following objectives for the *Regulations*:

> 1. **Change the culture of harassment and violence in the work place**: Create a culture change in the work place where civility and respect are the standard.
>
> 2. **Greater empowerment for affected employees:** While negotiated resolution is emphasized as a first step, in the case where that step does not complete the resolution process, the employee who is the object of the occurrence (principal party) will have a voice to decide on the next step for resolution, which could be conciliation, investigation or both.

> 3. **Acknowledgement of a continuum of behaviours that qualify as harassment and violence:** To support the concept of a continuum of inappropriate behaviours, all forms of harassment and violence, ranging from teasing and unwanted advances to assault, will be captured.
>
> 4. **Emphasize the importance of prevention:** Prevention is the most critical step to effectively reduce the number of occurrences of harassment and violence. Prevention also alleviates the nancial burden on employers by reducing the need for outside conciliators or investigators to be involved in the resolution process.
>
> 5. **Importance of privacy and confidentiality**: In an effort to encourage those who have experienced or witnessed harassment and violence in the work place to come forward.
>
> 6. **Predictable timeframes for resolution**: In order to support all parties and minimize negative impacts on the work place.
>
> [Emphasis in original]

[49] The RIAS anticipates the following impact of the *Regulations*:

> By creating a single, streamlined regime that would encompass the full continuum of actions from teasing and bullying to physical violence, the legislation and the Regulations will increase protections for workers and eliminate the current duplication regarding prevention of work place harassment and violence. The continuum demonstrates that harassment can quickly escalate to acts of physical violence. It is expected that the new regime will reduce federal jurisdiction workers' exposure to harassment and violence in the work place.

[50] Turning to the circumstances of the case here, the Applicant submits this process is important to him as a complainant because the incidents he experienced resulted in him no longer using the locker room, feeling humiliated, and experiencing ongoing stress.

[51] The Applicant properly and reasonably relies on *Provonost*, where as already noted the applicant was not provided (1) an opportunity to rebut evidence that arose during the

investigation process, nor (2) an opportunity to see the preliminary report. Justice Martineau determined both failings were procedurally unfair, as I do with respect to the same failings here.

[52] Justice Martineau concluded, as do I in this case, that the applicant should have received a "reasonable opportunity" to respond to both, at paragraph 15:

> [15] Procedural fairness was breached. It was impossible for the applicant to anticipate the testimony of the executives and/or employees interviewed after the meeting on July 6, 2016. The investigator should have given her a reasonable opportunity to rebut any unfavourable evidence that was gathered in her absence and to respond to any of the managers' allegations that their behaviour in the work place did not constitute violence or harassment. Even though the investigator had to act quickly, and his investigation had to be confidential, he had to ensure that every person who could be affected by the findings in his report was heard and was able to make submissions to him.
>
> [Emphasis added]

[53] The Applicant submits procedural fairness was denied because the Investigator relied on evidence to make factual determinations based on statements contrary to the Applicant's position, without affording him an opportunity to respond. The Applicant points to the following examples in his memorandum:

- The Investigator appears to have relied on a Superintendent's statement that he had only used the word "normal" when quoting Mr. Marentette.
- The Investigator further appears to have relied on a Superintendent's statements denying that he called Mr. Marentette "madame."
- Finally, the Investigator appears to have relied on the responding parties' descriptions of what was discussed in meetings, such as the 2008/2009 unofficial discipline meeting, contrary to what Mr. Marentette had described in his Notice and interview.

[54] Additionally, as evidenced through the information disclosed by the Rule 318 certificate, the Applicant was denied procedural rights according to the CBSA's own "Workplace Harassment and Violence Prevention Regulations Checklist." Contrary to the steps set out in CBSA's own Checklist, I agree the Applicant was not provided with a copy of the Investigator's Preliminary Report and therefore was unable to comment. That Preliminary Report would of course have summarized what others told the Investigator about the Applicant.

[55] There are other cases to the same effect. For example, in *Kohlenberg v Canada (Attorney General)*, 2023 FC 1052, Justice Favel recognized jurisprudence of this Court affirming the right of an employee to know the case to be met, namely an opportunity to respond to prejudicial statements arising out of a workplace investigation:

> [35] I agree with the Respondent that the duty of fairness owed in an internal grievance process falls at the low end of the spectrum (*Kohlenberg No 1* at para 16; *Blois* at para 36; *Canada (AG) v Allard*, 2018 FCA 85 at para 41). With that said, this duty continues to exist. Namely, an employee "has the right to be informed of any prejudicial facts, and the right to respond to those facts" (*Kohlenberg v Canada (AG)*, 2022 FC 906 at para 23, citing *De Santis* at para 30).
>
> [36] Applying these principles to the matter at hand and based on a review of the record, I find that the Applicant's right to procedural fairness was breached. In response to questioning from the Court, the Applicant stated that the Final Report was only disclosed to the Applicant on October 15, 2019 as part of the CTR for this matter. The Respondent replied that it was their understanding that the Final Report was provided to the Applicant prior to this date and there is no indication in the record to suggest the contrary. Faced with conflicting responses, I find that an absence of correspondence from the date of the issuance of the Final Report, September 13, 2019, to the date of the ADM's decision, September 17, 2019, in any record lends credence to the Applicant's version of events. Accordingly, it is my determination that the breach of procedural fairness arose from the failure to provide the Applicant with a copy of the Final Report and an opportunity to respond to it

> (*Kohlenberg No 1* at paras 78-80; *Re Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 54).
>
> [Emphasis added]

[56] Very notably this very same constraining law is set out by the Supreme Court of Canada in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 [*Cardinal*], where Justice LeDain for the Court concluded at p. 661: "I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision."

[57] This is the remedy ordered in *Provonost*, and which for the same reasons will be ordered in this case:

> [22] For these reasons, the application for judicial review is allowed. The Assistant Commissioner's decision dismissing the applicant's violence complaint is set aside, and the matter is referred back to the respondent for redetermination after a new work place investigation is conducted by another competent person considered impartial by the parties and after the applicant has had the opportunity to be heard and make submissions on all the evidence gathered in her absence and to comment on the competent person's findings before the investigation report is sent to the employer.
>
> [Emphasis added]

[58] The Respondent submits that if the Court finds a breach of procedural fairness, judicial review should be dismissed because the result would be legally inevitable.

[59] With respect, I disagree. Even if I were permitted to depart from the Supreme Court of Canada's instructions in *Cardinal*, I would follow Justice McHaffie who applied *Cardinal* in

*Tshisumpa v Canada (Citizenship and Immigration)*, 2022 FC 191, and concluded the Court should not speculate on what might have resulted if the process was procedurally fair. This with respect is particularly to the point when as here the Decision is so manifestly unfair:

> [25] Nor can I conclude that the RPD's determination was "legally inevitable" regardless of the breach of fairness: *Canada (Attorney General) v McBain*, 2017 FCA 204 at paras 9, 12. It may be that Mr. Tshisumpa's evidence would have been the same and his response to the CBSA officer's notes would have been the same. In such circumstances, the reasonableness of the RPD's credibility findings, if they had also been the same, would then come into play. However, the principles of fairness do not generally allow the Court to speculate on what might have happened in a fair proceeding: *Lin v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8444 (FC) at paras 21–23, citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 661.

[60] In *Chapman v Canada (Attorney General)*, 2019 FC 975, Justice Zinn found when the complainant could have provided additional evidence to rebut the contradictory statements made by witnesses, the Court on judicial review cannot conclude the decision maker would have reached the same result:

> [47] I am unable to accept that submission on the facts before the Court. Ms. Chapman submits that if she had been provided with the Report and given an opportunity to respond to the investigator's findings, she would have provided additional evidence to counter some of the statements made by witnesses, she would have asked that other witnesses with additional or contradictory information be interviewed, and she would have corrected some of the factual errors made by the investigator. Additionally, while the investigator noted both that "credibility is a factor in determining if breach of conduct has occurred" and that "direct, firsthand knowledge" is to be preferred and given greater weight than hearsay evidence, I note that much of the evidence in the report appears to be hearsay. If Ms. Chapman had seen the Report, she could have both offered explanations to bolster her own credibility, and pointed out the weaknesses in the evidence that the investigator relied upon. In those circumstances, the Court

> cannot conclude that the same result would have been reached by the decision maker.

[61] I note that the Applicant deposes in his affidavit and memorandum gives examples of rebuttal submissions he would have made (the Court has anonymized the following):

> • Mr. Marentette would have disputed the Superintendent's allegations that the word "normal" was only mentioned once in the 2016 disciplinary notice and was used to quote what Mr. Marentette had said in reference to his own body language (Occurrence 3). Mr. Marentette would have submitted that he never referred to his body language as "normal" and that it was the Superintendent who relied on the fact that his body language was "not normal". Moreover, Mr. Marentette would have told the Investigator to speak to his Union Representative who could corroborate what was said at the fact finding meeting;
>
> • Based on his own experience and the practices he had witnessed, Mr. Marentette would have disputed the Superintendent's allegation that it was common practice for those who have been suspended to be escorted off the work premises (Occurrence 3). Mr. Marentette would have also disputed the Superintendent's evidence that they maintained a distance from Mr. Marentette when escorting him; rather, it would have been clear to his coworkers that Mr. Marentette was being escorted;
>
> • In response to the Superintendent's evidence that Mr. Marentette said she did not know what it was like to be "queer" in their unofficial discipline meeting (Occurrence 2), Mr. Marentette would have disputed this allegation and explained that he does not use the word "queer" to describe himself. He would have also explained in response to her comments about her family members who were gay that he did not want to know, and never asked about, the Superintendent's relatives. Moreover, Mr. Marentette would have disputed the Superintendent's claim that he had told her a passenger called him "queer". Finally, Mr. Marentette would have disputed the Superintendent Lobsinger's allegation that she did not talk to Mr. Marentette about his hand movements or body language;
>
> • Mr. Marentette would have disputed the Superintendent's description of Occurrence 4, including the context for why Mr. Marentette was meeting with the Superintendent. In light of the Superintendent's allegations, Mr. Marentette would have also

> provided additional evidence on the Superintendent's demeanor during their meeting, including that the Superintendent was visibly upset with Mr. Marentette from the beginning of the meeting; and
>
> • In response to [deleted]'s email, wherein [they] stated that [they] did not witness any "inappropriate behaviour" between a Superintendent and Mr. Marentette, Mr. Marentette would have submitted that asking whether [deleted] witnessed "inappropriate behaviour" is not the same as asking [them] explicitly whether [they] witnessed the Superintendent call Mr. Marentette "madame". Mr. Marentette would have also provided more details of one specific occasion where [deleted] witnessed the Superintendent calling Mr. Marentette "madame".

[62] The Respondent also alleges the investigation procedure was fair in the circumstances because the Applicant had advanced notice of the process that was undertaken and raised no objections at that time. The Respondent distinguishes investigations under the new *Regulations*, arguing they do not necessarily require the principal party to respond to the position put forward by responding witnesses or know preliminary findings of the investigator. There is no merit in these arguments given the Courts' conclusions that *Renaud*, *Cardinal* and *Provonost* are applicable. I can find no reason why the Applicant would have expected his case to proceed otherwise than in compliance with longstanding jurisprudence.

[63] The Respondent also attempts to distinguish *Renaud* and *Provonost* stating they do not apply to the current statutory context, which used to include serious consequences for individuals involved, personally and professionally. The Respondent submits that is no longer the case under the new *Regulations*, because the focus is on work place violence and harassment prevention, and recommendations to restore the workplace environment.

[64] I am not persuaded by these arguments. The fact remains the *Regulations* are aimed at providing the remedy of a workplace environment in which harassment and workplace violence is reduced and ideally eliminated: that in my mind is a personal remedy from the perspective of the employee.

[65] In addition, the Respondent alleged there is no duty to disclose the submissions of the responding parties and the witness or the Preliminary Report to the Applicant, because those matters were not addressed and specified in the *Regulations*. This argument has no merit because the duty of procedural fairness set out by the Supreme Court of Canada and this Court in *Provonost*, *Baker*, *Cardinal*, and *Renaud* does not require repetition in regulations. The duty of fairness is part and parcel of Canadian administrative law that restrains decision making in cases like this whether or not that that recognized in regulations, policies or programs of government.

[66] In oral submissions, the Respondent also submitted the occurrences complained of had been raised before in the context of other proceedings, such that the Applicant knew the case to meet. With respect this is also entirely speculative, and impermissibly invites the Court to engage itself in reweighing and reassessing the evidence on a point that formed no part of the Investigator's decision. The Federal Court of Appeal held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is

> no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[67] With respect to the Investigator's choice on interviewing witnesses, I agree this Court should exercise caution on reviewing the decision makers choice, and would follow Justice Little in *Andruszkiewicz v Canada (Attorney General)*, 2023 FC 528:

> [90] The key questions on procedural fairness involve "fairness" in the sense understood by Canadian law, according to well-developed and understood principles. Those principles include the right to have a meaningful opportunity to be heard through some level of participation in the process (as the case law and the context require). The legal standard is not "fairness" in an abstract sense (such as what the Court believes was right or wrong), nor is it what would have been advantageous to any one of the complainant/applicant, the respondents or the employer. As will become clearer below, arguments about procedural unfairness do not permit the Court to assume the function of the investigator by revisiting all of the process choices made by the investigator, determining whether the Court would have done the same thing in the same circumstances, and then substituting the Court's view for the investigator's. Procedural fairness is also not about a disagreement with how the investigator weighed the evidence.
>
> …
>
> [108] I am not persuaded that any of these concerns, individually or collectively, shows a valid concern about procedural fairness. The content of the questions to pose to a witness or a respondent is a matter for the investigator. The medium of communication, the order of interviews and whether or not to provide the questions in advance are all normally within an investigator's purview in the specific circumstances of an investigation. In my view, for the purposes of procedural fairness, the Court should be slow to second-guess the investigator's choices of this kind, absent (for example) a glaring oversight, or an error that affects the integrity of the investigation or undermines the investigator's central findings (none of which the applicant showed here). While it may be usual and desirable to interview individuals face-to-face, the

> applicant has not persuaded me that the investigator's use of telephone interviews in this case is a cause for concern about procedural unfairness.
>
> [Emphasis added]

[68] However, I am not persuaded this line of argument can save a process and Final Report as fundamentally flawed as this. It is a matter for a new Investigator.

## VIII. Conclusion

[69] For the foregoing reasons, judicial review will be granted.

## IX. Costs

[70] The parties agreed the successful party should receive $3,500.00 as their all-inclusive costs. The Applicant having succeeded, and the Court being satisfied the amount is reasonable, the Court will order the Respondent to pay the Applicant $3,500.00 as his all-inclusive costs.

**JUDGMENT in T-228-23**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is granted.
2. The CBSA's decision dismissing the applicant's workplace harassment and violence report is set aside.
3. The matter is referred back to CBSA for redetermination after a new investigation is conducted by a different investigator and after the Applicant has had the opportunity to see and make submissions on evidence gathered in his absence and to comment on the investigator's preliminary report before it is sent to CBSA.
4. The Respondent shall pay the Applicant $3,500.00 as his all-inclusive costs.

"Henry S. Brown"
Judge

**Schedule “A” – Notice of Occurrence**

- [redacted]
- [redacted]
- [redacted]
- [redacted]
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**Schedule “B”**

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**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-228-23 |
| **STYLE OF CAUSE:** | CHRIS MARENTETTE v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 23, 2024 |
| **PUBLIC JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | MAY 2, 2024 |

**APPEARANCES:**

| | |
|---|---|
| Andrew Astritis | FOR THE APPLICANT |
| Chris Hutchison | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |