Federal Court  Cour fédérale

Date: 20121108

Docket: T-915-12

Citation: 2012 FC 1306

Ottawa, Ontario, November 8, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

STEVE BLACK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act* RSC 1985 c F-7 for judicial review of a decision dated 11 April 2012 (Decision) of an Adjudication Board (Board) constituted pursuant to sections 43 and 44 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (Act). The Board determined, on a Preliminary Motion, that the Applicant was served with a Notice of Disciplinary Hearing "forthwith" as required by section 43(4) of the Act.

BACKGROUND

[2] The Applicant, Sgt. Steve Black, has been a member of the Royal Canadian Mounted Police (RCMP) since 1990. The facts that gave rise to this application are straightforward and not in dispute.

[3] On 27 November 2009, a complaint was made against the Applicant pursuant to the Act. The complaint was investigated and it was decided that formal disciplinary proceedings would be pursued. Under subsection 43(8) of the Act there is a one-year limitation period after a complaint is made for disciplinary proceedings to be commenced.

[4] On 19 November 2010, the Commanding Officer initiated formal disciplinary proceedings against the Applicant. On 22 November 2010, a Board was composed to hear the matter. There is no issue that this was within the one-year limitation period as stipulated by subsection 43(8) of the Act.

[5] On 30 September 2011, the Applicant was served with a Notice of Disciplinary Hearing (Notice). This was 10 ½ months after proceedings were initiated. The Notice is attached as Exhibit "A" to the Applicant's Record. The Notice is 24 pages long and sets out the allegations against the Applicant, the procedures of the hearing, and the potential witnesses and evidence that were to be used in the proceedings. Listed as evidence are things such as transcripts of interviews with a variety of people, expert opinions, photos, notebooks, lab reports, personal statements and letters, and physical items such as clothing.

[6] During this period of lapse, specifically between 22 November 2010 and 4 January 2011, the Appropriate Officer Representative (AOR) assigned to the matter, Denise Watson, went on planned special leave. She then went on extended medical leave in June or July 2011. Sgt. Jon Hart was assigned carriage of the complaint on 16 September 2011. The Notice was signed on 27 September 2011 and served on the Applicant on 30 September 2011.

[7] The Board held a two-day hearing on April 10 and 11, 2012. The Applicant brought a preliminary motion to determine whether the Board had jurisdiction to hear the dispute given the time lapse between commencement of the proceedings and service of the Notice, and the requirement in subsection 43(4) of the Act that service be "forthwith." The Board found that the Applicant had been served "forthwith" and the Board had jurisdiction to hear the complaint.

DECISION UNDER REVIEW

[8] The Board rendered its Decision on 11 April 2012. It started by reviewing the basic facts leading to the preliminary motion, as summarized above. The Board reiterated there was no issue that the statutory requirements of subsection 43(8) of the Act had been satisfied. It then clarified that the preliminary motion had to do with whether or not the AOR had satisfied the notice requirements dictated by subsection 43(4) of the Act. The Board accepted the Applicant's contention that if service of the Notice did not comply with subsection 43(4) it would lose jurisdiction to proceed with the action.

[9] The Board pointed out that the Applicant made clear in his submissions that this was not a motion for abuse of process; it was an issue of statutory interpretation. At issue was the meaning of subsection 43(4), which states as follows:

> Forthwith to being notified pursuant to subsection 2 the Appropriate Officer shall serve the Member alleged to have contravened the Code of Conduct with a notice in the writing of the hearing.

The Board clarified that the word "shall" was not in issue; the issue was with the word "forthwith."

[10] The Board stated that the case of *Nicholson v Haldimand-Norfolk (Region) Police Commissioners*, [1981] 1 SCR 92, 117 DLR (3d) 750 imports the principles of natural justice into police disciplinary matters. This means the Applicant must be provided adequate notice of the alleged misconduct and disclosure of the case to be met. However, the Board stated the issue before it was not that simple; it had to decide what Parliament intended by deliberately using "forthwith" as the opening word in subsection 43(4) rather than setting out a specified time period. The Board reiterated that the Applicant's motion was not about delay or prejudice.

[11] The Board cited the Ontario Court of Appeal's decision in *Wilder v Ontario (Securities Commission)*, 24 OSCB 1953, 197 DLR (4th) 193 and Professor Elmer Dreiger's *Construction of Statutes* as setting out the proper approach to statutory interpretation. The Board said that "the words of an Act are to be read in their context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the objectives of the Act, and the intention of Parliament." The Board stated that this is the approach taken by the Supreme Court of Canada. It is also consistent with section 12 of the *Interpretation Act*, and counsel agreed it is the preferred approach to statutory interpretation.

[12] The Board then discussed the RCMP External Review Committee decision in *Appropriate Officer Depot Division v Constable Cheney,* D-119, 10 February 2011 [*Cheney*]. It quoted paragraphs 63 and 64 of that decision, which says that:

> There does not appear to be any binding authority for the definition of "*forthwith*" in the context of section 43(4) of the *Act*. Nonetheless, I find that the Board's interpretation was reasonable. In my view, the obligation to serve the Notice "*forthwith*" *"must be gauged in the context and circumstances at hand*" (*Universal Foods Inc. v. Hermes Food Importers Ltd.*, [2003] FCJ No. 613, paras.19-26). The Federal Court of Canada also addressed the question in *Smith v. Canada* [1991] 3 F.C. 3 (T.D.) in which it stated:
>
> > *Finally, ... we are satisfied that the word "forthwith" in s. 3(1) of the statute must be read as meaning "immediately" or "as soon as possible in the circumstances, the nature of the act to be done being taken into account": 37 Hals., 3d. ed., p. 103; or "as promptly as is reasonably possible or practicable under all the circumstances": R. v. Bell, [1969] 2 C.C.C. 9 at p. 18 ... .*
> >
> > *Reference to all reported cases seem to support the twin proposition that "forthwith" does not mean instantly (R. v. Cuthbertson, supra), but, rather, without any unreasonable delay, considering "the objects of the rule and the circumstances of the case": per Jessel M.R., Ex parte Lamb (1881), 19 Ch. D. 169 at p. 173 ... . See also Mihm et al. v. Minister of Manpower & Immigration, [1970] S.C.R. 348 at p. 358*
> > ...
>
> I find that interpreting "*forthwith*" as meaning *"immediate"* and *"without delay"* in the present context would impose an unrealistic standard, given that there are several steps involved in preparing the Notice of Hearing. For example, according to section 43 of the *Act*, the Notice of Hearing must contain, among other elements, a statement of each alleged contravention with particulars for each. Furthermore, the Notice must be accompanied by a copy of any written or documentary evidence, statements of potential witnesses, and a list of exhibits.

The Board stated that the excerpt from *Cheney*, above, went to the crux of the issue before it, and in that case it was determined that the word "forthwith" meant as soon as practicable in the circumstances.

[13] The Board stated that the Federal Court of Appeal considered section 43 of the Act in *Thériault v Canada (Royal Canadian Mounted Police)*, 2006 FCA 61 [*Thériault*]. The Board quoted paragraph 29 of that decision, which said:

> [B]y enacting the limitation period in subsection 43(8), Parliament sought to determine a starting-point reconciling the need to protect the public and the credibility of the institution with that of providing fair treatment for its members and persons involved in it. Accordingly, the subsection 43(8) mechanism offers a flexibility which is desirable for purposes of investigation and prosecution; but it has its limits, and inevitably the time cutoff falls on inaction and resolves the matter in the offender's favour.

The Board stated that "if the Federal Court of Appeal in *Thériault* recognized the flexibility inherent in a rigidly defined one (1) year limitation period, the inherent flexibility of subsection 43(4) is even more obvious because no such time limitation attaches to subsection 43(4)."

[14] The Board pointed out that *Thériault* acknowledges that subsections 43(8) and 43(4) are related. The Board quoted paragraphs 35-38 as follows:

> Whether in cases of disciplinary or criminal proceedings, knowledge of an offence and of the identity of its perpetrator means that the person empowered to conduct investigations must have sufficient credible and persuasive information about the alleged offence and its perpetrator to reasonably believe that the offence has been committed and that the person to whom it is attributed was the perpetrator.
>
> In my humble opinion, this is the degree of knowledge required for the subsection 43(8) limitation to begin to run. It is not necessary at this point to have all the evidence that may prove necessary or that may be admitted at trial: see *Ontario (Securities Commission) v. International Containers Inc.*, supra. At this stage, it is also not

> necessary to have the details required to respond to a motion for particulars if one is made: ibid.
>
> Similarly, for purposes of the starting-point of the limitation, I do not feel that the appropriate officer must know the information that he is required to give the offender with the notice of hearing and which is contained in subsections 43(4) and (6) of the Act. Such disclosure of evidence to the offender is not dictated by the rules of limitation, but by the rules of natural justice and procedural fairness at the hearing.
>
> It is important for the two situations not to be confused in legal terms. It may well be that at the time the appropriate officer acquires knowledge of the existence of a contravention for the purposes of starting the limitation period, he does not have all the information necessary to meet the requirements of subsections 43(4) and (6); but at that stage he is not required to initiate a disciplinary hearing if, under subsection 43(1), he is not aware of the gravity of the offence and in the circumstances he cannot know whether informal disciplinary action will suffice. He may proceed with the investigation or require further investigation to satisfy himself and meet the conditions of subsections 43(4) and (6).

[15] The Board stressed that it is the body of information at the AOR's disposal that forms the key difference between subsections 43(4) and 43(8). All that is required to meet subsection 43(8) is to state, with reasonable particularity, the nature of the misconduct and the identity of the Member implicated. Once a Board has been struck and the requirements of subsection 43(8) fulfilled, the AOR must distill from a large body of information the particulars of the alleged offence. The difference in the wording between subsections 43(8) and 43(4) recognizes that this is a very different exercise from the procedural formality required of subsection 43(8).

[16] The Board took the position that the exercise of putting together the Notice once a Board has been struck requires a flexible timeline, and Parliament recognized this by making subsection 43(4) more elastic than subsection 43(8). For example, there may be significant operational

considerations involved in gathering the information required to draft the Notice, and sensitive cases may be compromised by premature disclosure.

[17] The Board stated that, based on testimony at the hearing, it was satisfied that the Applicant's disciplinary matters were sensitive and complicated. It was a serious and complex case that involved organizational conflict that took months to resolve. The Board said that "These factors provide valid, operational reasons for any delay in the issuance of the notice, and are a reflection of why Parliament granted subsection 43(4) a more flexible timeline than subsection 43(8). Parliament recognized, since each case is different, that the imposition of an inflexible timeline could lead to an unjust result." The Board then noted that not only were operational factors at play in this case, but also administrative ones.

[18] As noted in the Applicant's timeline, the AOR assigned to the Applicant's case for most of the 10 ½ months delay was away, first on planned special leave and then on an extended medical leave. The Board stated that an employer cannot reasonably be expected to predict when an employee is going to go on leave – it just happens and then the employer must deal with it. Nor can it be predicted what an employee will accomplish before going on extended medical leave. Sergeant Hart, who took over from Denise Watson as the AOR, was eventually called in to assist on some files. The Board found this reasonable administrative behaviour and stated that "If someone calls in sick on a Monday, their files do not get immediately reassigned on a Tuesday." The employer can only be expected to do what it can to address the outstanding issues left in the wake of the employee's departure. The Board found that by all indications, this is what happened in the present case.

[19] The Board reiterated that "forthwith" in subsection 43(4) means "as soon as reasonably practicable under the circumstances." The Board was satisfied that the threshold was met in this case. While it is true that the delay cannot in any way be attributed to the Applicant, the motion before the Board was very specifically about jurisdiction. The Applicant explicitly stated he was not presenting arguments about abuse of process, and so that analysis must be kept separate. The Board found that the requirements of subsection 43(4) of the Act were met, and that it had jurisdiction to hear the disciplinary matter.

ISSUES

[20] The Applicant formally raises the following issues in this application:

a. Is judicial review an appropriate remedy?

b. What is the standard of review applicable to the Decision?

c. Does the Board have jurisdiction to hear the disciplinary proceeding?

STATUTORY PROVISIONS

[21] The following provisions of the Act are at issue in this proceeding:

43. (1) Subject to subsections (7) and (8), where it appears to an appropriate officer that a member has contravened the Code of Conduct and the appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances,	**43.** (1) Sous réserve des paragraphes (7) et (8), lorsqu'il apparaît à un officier compétent qu'un membre a contrevenu au code de déontologie et qu'eu égard à la gravité de la contravention et aux circonstances, les mesures disciplinaires simples visées à l'article 41 ne seraient pas

informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.

suffisantes si la contravention était établie, il convoque une audience pour enquêter sur la contravention présumée et fait part de sa décision à l'officier désigné par le commissaire pour l'application du présent article.

(2) On being notified pursuant to subsection (1), the designated officer shall appoint three officers as members of an adjudication board to conduct the hearing and shall notify the appropriate officer of the appointments.

(2) Dès qu'il est avisé de cette décision, l'officier désigné nomme trois officiers à titre de membres d'un comité d'arbitrage pour tenir l'audience et en avise l'officier compétent.

(3) At least one of the officers appointed as a member of an adjudication board shall be a graduate of a school of law recognized by the law society of any province.

(3) Au moins un des trois officiers du comité d'arbitrage est un diplômé d'une école de droit reconnue par le barreau d'une province.

(4) Forthwith after being notified pursuant to subsection (2), the appropriate officer shall serve the member alleged to have contravened the Code of Conduct with a notice in writing of the hearing, together with

(4) Dès qu'il est ainsi avisé, l'officier compétent signifie au membre soupçonné d'avoir contrevenu au code de déontologie un avis écrit de l'audience accompagné des documents suivants :

(*a*) a copy of any written or documentary evidence that is intended to be produced at the hearing;

a) une copie de la preuve écrite ou documentaire qui sera produite à l'audience;

(*b*) a copy of any statement obtained from any person who is intended to be called as a witness at the hearing; and

b) une copie des déclarations obtenues des personnes qui seront citées comme témoins à l'audience;

(*c*) a list of exhibits that are intended to be entered at the hearing.

c) une liste des pièces qui seront produites à l'audience.

(5) A notice of hearing served on a member pursuant to subsection (4) may allege more than one contravention of the Code of Conduct and shall contain

(5) L'avis d'audience signifié à un membre en vertu du paragraphe (4) peut alléguer plus d'une contravention au code de déontologie et doit contenir les éléments suivants :

(*a*) a separate statement of each alleged contravention;

a) un énoncé distinct de chaque contravention alléguée;

(*b*) a statement of the particulars of the act or omission constituting each alleged contravention;

b) un énoncé détaillé de l'acte ou de l'omission constituant chaque contravention alléguée;

(*c*) the names of the members of the adjudication board; and

c) le nom des membres du comité d'arbitrage;

(*d*) a statement of the right of the member to object to the appointment of any member of the adjudication board as provided in section 44.

d) l'énoncé du droit d'opposition du membre à la nomination de tout membre du comité d'arbitrage comme le prévoit l'article 44.

(6) Every statement of particulars contained in a notice of hearing in accordance with paragraph (5)(*b*) shall contain sufficient details, including, where practicable, the place and date of each contravention alleged in the notice, to enable the member who is served with the notice to determine each such contravention so that the member may prepare a defence and direct it to the occasion and events indicated in the notice.

(6) L'énoncé détaillé visé à l'alinéa (5)*b*) doit être suffisamment précis et mentionner, si possible, le lieu et la date où se serait produite chaque contravention alléguée dans l'avis d'audience, afin que le membre qui en reçoit signification puisse connaître la nature des contraventions alléguées et préparer sa défense en conséquence.

(7) No hearing may be

(7) L'officier compétent ne

initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member if the informal disciplinary action referred to in paragraph 41(1)(*g*) has been taken against the member in respect of that contravention.

peut convoquer une audience en vertu du présent article relativement à une contravention au code de déontologie censément commise par un membre à qui la mesure disciplinaire simple visée à l'alinéa 41(1)*g*) a déjà été imposée à l'égard de cette contravention.

(8) No hearing may be initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member after the expiration of one year from the time the contravention and the identity of that member became known to the appropriate officer.

(8) L'officier compétent ne peut convoquer une audience en vertu du présent article relativement à une contravention au code de déontologie censément commise par un membre plus d'une année après que la contravention et l'identité de ce membre ont été portées à sa connaissance.

(9) A certificate purporting to be signed by an appropriate officer as to the time an alleged contravention of the Code of Conduct by a member and the identity of that member became known to the appropriate officer is, in the absence of evidence to the contrary, proof of that time without proof of the signature or official character of the person purporting to have signed the certificate.

(9) En l'absence de preuve contraire, un certificat présenté comme signé par l'officier compétent et faisant état du moment où ont été portées à sa connaissance une contravention au code de déontologie censément commise par un membre et l'identité de ce dernier, constitue une preuve de ce moment sans qu'il soit nécessaire d'établir l'authenticité de la signature ni la qualité du signataire.

…

…

Appeal to Commissioner

Appel interjeté au commissaire

45.14 (1) Subject to this section, a party to a hearing

45.14 (1) Sous réserve des autres dispositions du présent

before an adjudication board may appeal the decision of the board to the Commissioner in respect of

(*a*) any finding by the board that an allegation of contravention of the Code of Conduct by the member is established or not established; or

(*b*) any sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (*a*) is established.

(2) For the purposes of this section, any dismissal of an allegation by an adjudication board pursuant to subsection 45.1(6) or on any other ground without a finding by the board that the allegation is established or not established is deemed to be a finding by the board that the allegation is not established.

(3) An appeal lies to the Commissioner on any ground of appeal, except that an appeal lies to the Commissioner by an appropriate officer in respect of a sanction or an action referred to in paragraph (1)(*b*) only on the ground of appeal that the sanction or action is not one provided for by this Act.

(…)

article, toute partie à une audience tenue devant un comité d'arbitrage peut en appeler de la décision de ce dernier devant le commissaire:

a) soit en ce qui concerne la conclusion selon laquelle est établie ou non, selon le cas, une contravention alléguée au code de déontologie;

b) soit en ce qui concerne toute peine ou mesure imposée par le comité après avoir conclu que l'allégation visée à l'alinéa *a*) est établie.

(2) Pour l'application du présent article, le rejet par un comité d'arbitrage d'une allégation en vertu du paragraphe 45.1(6) ou pour tout autre motif, sans conclusion sur le bien-fondé de l'allégation, est réputé être une conclusion portant que cette dernière n'est pas établie.

(3) Le commissaire entend tout appel, quel qu'en soit le motif; toutefois, l'officier compétent ne peut en appeler devant le commissaire de la peine ou de la mesure visée à l'alinéa (1)*b*) qu'au motif que la présente loi ne les prévoit pas.

(…)

Is Judicial Review an Appropriate Remedy?

ARGUMENTS

The Applicant

[22] The Applicant submits that judicial review is an appropriate remedy because the Decision is final, exceptional circumstances exist that warrant judicial review, and the appeal process provided for in the Act is not an adequate remedy.

[23] The Applicant points out that the Board stated at the beginning of the Decision that the Decision was final. The Board also determined that the disciplinary proceedings should continue, although that hearing was adjourned *sine die*. The Applicant directs these comments towards the finality of the Decision, but submits that even if the Decision is not considered final, it involves exceptional circumstances that warrant the Court's intervention.

[24] The Applicant says that under exceptional circumstances the Court can intervene before a tribunal has rendered its final decision. This has been held to include an attack on the very existence of the tribunal (*Air Canada v Lorenz*, [2000] 1 FC 494 [*Lorenz*] at paragraph 37). The Applicant points to *Cannon v Canada (Royal Canadian Mounted Police Assistant Commissioner*, [1998] 2 FC 104 [*Cannon*], where Justice Andrew MacKay said at paragraph 17 that

> The norm is that this Court will not intervene in judicial review to set aside interlocutory decisions unless there are exceptional circumstances. The nature of special circumstances justifying intervention in the case of an interlocutory decision has been discussed by the courts. In *Pfeiffer v. Redling*, where the applicant challenged the constitutionality of a tribunal to which the

> Superintendent of Bankruptcy had delegated his powers, Madame Justice Tremblay-Lamer wrote:
>
> > In my opinion, since this issue involves an attack on the very existence of the tribunal, there is a special reason permitting judicial review at this stage of the proceedings. As the Court held in *Mahabir v. Canada (Minister of Employment and Immigration)*, [[1992] 1 F.C. 133 (F.C.A.)] "it is a final decision that disposes of a substantive question before the tribunal".

[25] The Applicant says that the present scenario is similar to the issue that arose in *Secord v Saint John (City) Board of Police Commissioners*, 2006 NBQB 65 [*Secord*]. In that case, the Court found that although the application for judicial review was in regards to a preliminary ruling, it brought into play a jurisdictional issue that was an attack on the tribunal's existence; it was thus a special circumstance permitting judicial review.

[26] The Applicant submits that the Decision is final and that it disposes of a substantive question that was before the Board, the question being whether the Board has jurisdiction to hear the disciplinary matter. The preliminary motion goes to the jurisdiction of the Board, and thus constitutes an exceptional circumstance warranting judicial intervention.

[27] The Applicant also submits that the appeal process provided for in the Act is not an appropriate remedy in this case. In *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, the Supreme Court of Canada set out a number of factors to be considered when the Court is called upon to determine whether to enter into a judicial review or require an applicant to proceed through a statutory appeal process. These factors are listed in paragraph 41 of that decision, and include "the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities)."

[28] The Applicant says that the appeal process provided in subsection 45.14 of the Act does not apply to anything other than contraventions of the Code of Conduct. As such, preliminary motions or any findings of the Board outside of the Code of Conduct are not subject to subsection 45.14. The Applicant also says that the determination by the Board that service of the Notice was made "forthwith" is outside the scope of the appeal process, and thus the remedy set out in subsection 45.14 of the Act does not provide for an appeal of this Decision. That being the case, there is no alternative remedy available to the Applicant on this issue, and so judicial review should not be denied on this basis.

[29] The Applicant further submits that if a statutory right of appeal does exist within the Act, the appeal process does not provide for an adequate remedy. The Applicant points to the decision in *Violette v New Brunswick Dental School*, 2004 NBCA 1 as setting out the relevant legal principles to be considered in determining whether an adequate alternate remedy exists. The Court held at paragraph 22 as follows:

> The general principle that one's administrative remedies must be exhausted before seeking judicial review is readily understood. What remains problematic is whether, on the facts of a particular case, the alternative remedy will be found "adequate." This much can be said with confidence: the adequacy of an alternative remedy is measured in terms of whether the appeals tribunal can effectively address the issues being raised on the review application. Thus, reviewing courts will consider the expertise and composition of the appeals tribunal. In short, consideration must be given to the nature of the alleged error and the ability of the appeals tribunal to address it effectively. If the appeals tribunal is unable to deal effectively with an issue or grant practical relief, the obligation to exhaust one's administrative remedies dissipates.

[30] The Applicant argues that a consideration of these facts reveals the appeal process to be inadequate, and that he should not be bound to exhaust it prior to seeking judicial review. In

order to access the appeal process the Applicant will have to go through a lengthy, and potentially embarrassing, disciplinary hearing. This would be at significant cost and inconvenience to the Applicant, and none of it will be necessary if the Applicant is successful on his preliminary motion. The appeal process is not a practical solution in this case, and the Applicant should not be required to go through the entire administrative appeal process before being able to seek judicial review.

[31] The Applicant further submits that judicial review is available to the Applicant because pursuant to sections 17 and 18 of the *Federal Courts Act*, the Federal Court has concurrent jurisdiction to hear cases where relief is claimed against the Crown and exclusive jurisdiction to issue a writ of certiorari. The Applicant requests that judicial review of the Decision be allowed to proceed.

The Respondent

[32] The Respondent submits that the Decision is not final, and there are no extraordinary circumstances involved that warrant judicial review in the face of the statutory right of appeal available under subsection 45.14 of the Act. The Respondent states that the cases of *Lorenz, Cannon,* and *Secord,* mentioned above, do not stand for the propositions cited by the Applicant.

[33] The Respondent says that *Cannon* stands for the proposition, at paragraph 30, that a "challenge to the board's constitution, and to the statutory basis underlying it pursuant to section 11(d) of the Charter… would be a special circumstance warranting intervention of the court on judicial review even though the decision impugned is clearly interlocutory in nature." These

special circumstances are very different from the jurisdictional issue presented in this application, and therefore *Cannon* does not apply.

[34] As for *Lorenz*, in that case the Court found that an allegation of bias was not an exceptional circumstance warranting judicial review. The Respondent points out that the Court noted at paragraph 39 that "With respect, I cannot agree with the proposition advanced… that the fact that an application for judicial review raises 'a question of jurisdiction' brings it within the 'exceptional circumstances' category." The Respondent says that, if anything, this case supports the position of the Respondent.

[35] In *Secord*, the Court held at paragraph 29 that "where the question of jurisdiction presents itself as a clear question of law, it is not premature to apply to the court to have that question determined." The Respondent states that the issue here is not one of law, but the application of facts to law. The Court in *Secord* went on to look at the alternate remedy issue, stating at paragraph 43 that

> In my view, when a question at a preliminary stage involves jurisdiction, the Court retains a discretion as to whether it will entertain a judicial review application. This will require the Court to look at all relevant factors, including an examination of the adequate alternate remedy and the nature of the question to determine whether the inconvenience of proceeding through the statutorily prescribed scheme outweighs the benefits of such. See: *Montgomery v. Edmonton (City) Police Service*, 1999 CarswellAlta 1114 (Alta. Q.B.) per Sullivan J. at para. 55.

[36] The Respondent submits that the appeal procedure in the New Brunswick *Police Act*, which is what was at issue in *Secord*, was specifically distinguished from the Act at issue in *Holdenried v Canada (Attorney General)*, 2012 FC 707 [*Holdenried*]. In that case, Justice Yvon Pinard stated at paragraphs 18-19 that

> …The applicant also relies on *Secord v. Saint John Police Commissioners*, 2006 NBQB 65 (N.B. Q.B.) [*Secord*] to support his position that where a jurisdictional issue is raised, this Court should exercise its discretion and hear the judicial review, despite the availability of alternative grievance mechanisms available. While this is true, the Court in *Secord* went on to specify that the Court should go on to consider other relevant factors, "including an examination of the adequate alternate remedy and the nature of the question to determine whether the inconvenience of proceeding through the statutorily prescribed scheme outweighs the benefits of such" (at para 43). Thus, the existence of a jurisdictional issue being raised in the present application for judicial review, which the applicant argues is not a true question, is not determinative of whether or not this Court should exercise its discretion.
>
> It is only in exceptional cases that courts should exercise their discretion, despite the existence of a comprehensive statutory grievance scheme. For example, where the integrity of the grievance procedure has been compromised, courts should exercise their discretion and hear the application for judicial review (*Lebrasseur v. Canada*, 2007 FCA 330 (F.C.A.) at para 18). However, this is not such a case where the integrity of the grievance process has been compromised. The grievance process outlined in Part III of the RCMP Act has been recognized as a comprehensive scheme providing effective redress in cases other than those concerning harassment (*Marshall v. Canada (Attorney General)*, 2008 SKQB 113 (Sask. Q.B.) at para 11; *Smith v. Royal Canadian Mounted Police*, 2007 NBCA 58 (N.B. C.A.) at para 3; *Merrifield v. Canada (Attorney General)*, 2009 ONCA 127 (Ont. C.A.) at para 10). As such, "where a grievance procedure, as prescribed in a statute, constitutes an adequate alternate remedy, it ought to be completely followed before turning to the Courts" (*Sauve v. Canada* (1998), 157 F.T.R. 91 (Fed. T.D.) at para 20).

The Respondent points out that in *Holdenried*, Justice Pinard found the application for judicial review was premature; the Act provided for an adequate alternative remedy, and the application was dismissed with costs.

[37] The Respondent submits this matter was thoroughly dealt with by the Federal Court of Appeal in *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61 [*CB Powell*]. The

issue in that case had to do with the Board's interpretation of the word "decision" in the relevant statute. The Court held, at paragraphs 30-33:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561 (S.C.C.); *Canadian Pacific Ltd. v. Matsqui Indian Band,* [1995] 1 S.C.R. 3 (S.C.C.); *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929 (S.C.C.); *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.) at paragraphs 38-43; *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.) at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.) at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City),* [2003] 1 S.C.R. 141, 2003 SCC 14 (S.C.C.); *Vaughan v. R.,* [2005] 1 S.C.R. 146, 2005 SCC 11 (S.C.C.) at paragraphs 1-2; *Okwuobi c. Lester B. Pearson (Commission scolaire),* [2005] 1 S.C.R. 257, 2005 SCC 16 (S.C.C.) at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 (S.C.C.) at paragraph 96.
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the

applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, supra at paragraph 38; *Greater Moncton International Airport Authority v. P.S.A.C.*, 2008 FCA 68 (F.C.A.) at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, supra at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C. S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C. C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Ont. Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) at paragraph 48.

Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, supra; *Okwuobi*, supra at paragraphs 38-55; *University of Toronto v. C.U.E.W., Local 2* (1988), 52 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

The Respondent states that it is not for this Court to interpret the word "forthwith" at this time; that should be left to the conclusion of the disciplinary process as set out in the Act.

[38] The Respondent also submits that *Holdenreid* establishes that the appeal process outlined in the Act provides the Applicant with an adequate alternative remedy, and in accordance with *CB Powell* there are no exceptional circumstances in this case warranting judicial review before the Applicant has completed the statutory appeal process. The Respondent requests that this application for judicial review be dismissed as premature, and that costs be ordered.

What is the Standard of Review?

The Applicant

[39] The Applicant submits that the question being considered involves the statutory interpretation of the Act, and thus the applicable standard of review is correctness (see *Shephard v Canada (RCMP)*, 2003 FC 1296 at paragraphs 19-20). The Applicant points to *Thériault*, above, which dealt with section 43 of the Act specifically. The Federal Court of Appeal found in that case that the appropriate standard of review was correctness (*Thériault* at paragraph 20). The Court has already determined that the standard of review applicable to the statutory interpretation of the Act is correctness, and the Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9 that this can be relied upon as determinative.

The Respondent

[40] The Respondent asserts that the matter at hand is not one of statutory interpretation, as claimed by the Applicant. There is no disagreement in regards to the interpretation of the word

"forthwith" in relation to the Act. The Applicant's challenge to the Decision is that the Board did not consider the facts at hand to constitute service of the Notice "forthwith." This argument goes to the application of the word "forthwith" to the facts, and thus according to *Dunsmuir* the standard of review ought to be reasonableness.

[41] As mentioned by the Applicant, the Supreme Court of Canada held in *Dunsmuir*, above, that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[42] In *Thériault,* the Federal Court of Appeal stated at paragraph 20 that "the correctness standard applies to the definition of these words by the administrative body and that of reasonableness to its application to the facts of the case." Both the Applicant and the Respondent agree that the word "forthwith" was correctly interpreted by the Board as meaning "as soon as reasonably practicable under the circumstances." As put forward by the Respondent, the Applicant's arguments go to how the Board applied the facts at hand to the "forthwith" requirement in subsection 43(4) of the Act – there was no dispute as to the legal definition of the word "forthwith". Thus, according to *Thériault,* the decision ought to be reviewed on a standard of reasonableness. Considering the factual nature of the dispute and the precedent established by *Thériault,* I agree with the Respondent that the applicable standard of review is reasonableness.

[43] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-

making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Does the Board have jurisdiction to hear the disciplinary proceeding?

The Applicant

[44] The Applicant states that subsection 43(4) of the Act creates a mandatory requirement that notice be served "forthwith." The meaning of the word "forthwith" must be interpreted in accordance with established principles of statutory interpretation. As set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at paragraph 21: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[45] The Applicant points out that the term "forthwith" has been given judicial consideration in the context of other statutes besides the Act. For example, in *MacEachern (Committee of) v Rennie*, 2009 BCSC 955 the statute in question dealt with disclosure obligations in court proceedings. The Court found, at paragraph 50, that "The word 'forthwith' does not mean 'instantaneously'; consideration must be given to what, from an objective point of view, is reasonably practicable in the circumstances." Similarly, in *Ghuman v Canada (Minister of*

Transport), 1983 CarswellNat 105 (FCTD) it was held at paragraph 31 that "The word "forthwith" has been held to mean in a contract and the ordinary transactions of life "with all reasonable celerity," or in other words "as soon as reasonably can be."

[46] In *Adams v Canada (Royal Canadian Mounted Police)*, 174 NR 314 (FCA) [*Adams*] the Federal Court of Appeal found that a 7-month delay in service of a Notice of Appeal did not amount to service "forthwith". However, the Court also found that the delay was condoned and so it did not matter in that case. Still, the Court stated at paragraph 7 that

> Subsection 27(3) requires that the notice of appeal be served "forthwith" (in French "sans délai"). In fact, service was effected on June 7, 1994, one day short of 7 months later. If there were nothing more to the matter, it would seem to me to be clear beyond any possible doubt that the appeal should be quashed for failure to comply with an essential procedural formality.

The Applicant submits that, considering what the Federal Court of Appeal said about a 7-month delay in *Adams*, it follows that a 10 ½ month delay is even less likely to meet the "forthwith" requirement.

[47] The Applicant argues that the facts demonstrate that the Notice was not served "forthwith." The AOR initially assigned to the matter, Ms. Watson, was on a planned leave for a significant period of time. She then went on extended medical leave. It appears as though no one was assigned to the file in her absence, and the Applicant's case was essentially ignored. The Applicant says this is highlighted by the fact that the Notice was served approximately two weeks after Sgt. Hart took over the file. Considering this, and that the Applicant in no way contributed to the delay, it is evident that service was not effected "forthwith."

[48] The Applicant says that because he was not served with the Notice "forthwith," the Board does not have jurisdiction to proceed with the hearing. As stated in *Gurney (HMIT) v Raymond John Petch*, 66 TC 743, [1994] STC 689, [1994] 3 All ER 731, [1994] 27 LS Gaz R 37, [1994] EWCA Civ 9 [*Petch*] at page 738, "Doing an act late is not the equivalent of doing it in time…Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether…" There is no power in the Act to extend the time limit for service of the Notice beyond "forthwith," thus if the requirement has not been met then the Board must lose jurisdiction (see *Vialoux v Registered Psychiatric Nurses Assn (Manitoba)*, [1983] 23 Man R (2d) 310 (Man CA) [*Vialoux*] at paragraph 13; *Kellogg Brown and Root Canada v Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499 [*Kellogg Brown Root Canada*] at paragraph 83).

[49] The Applicant submits the 10½ month delay in service of the Notice violated the statutory requirement that service be completed "forthwith" as set out in subsection 43(4) of the Act. As a result, the Board lost jurisdiction to proceed with the disciplinary hearing. The Applicant submits the Board erred in determining that service was completed "forthwith" and that the Decision ought to be quashed and a writ issued prohibiting the Board from proceeding with the disciplinary hearing.

The Respondent

[50] The Respondent submits that the Board's Decision was reasonable. The Board considered the *Thériault* decision, and noted that the Act intentionally differentiated between the strict one-

year limitation period set out in subsection 43(8), and the more flexible timeline provided in subsection 43(4).

[51] The Applicant relies on *Adams*, above, as demonstrating the error of the Board's Decision. However, the Respondent points out that the Notice of Appeal at issue in *Adams* was considered a "procedural formality" (*Adams* at paragraph 15), while the Notice at issue in this application clearly is not. The Respondent also submits that the Applicant's reliance on the decisions of *Petch*, *Vialoux*, and *Kellogg Brown & Root Canada* is misplaced. Those decisions all dealt with clear legislative limitation periods similar to that in subsection 43(8), and not a flexible time period like the one in subsection 43(4).

[52] The Respondent says that the reason for the flexibility inherent in subsection 43(4) is evident when one looks at the Notice, attached as Exhibit "A" to the Affidavit of the Applicant. Drafting the Notice requires reviewing and analyzing significant amounts of information. The Board considered the 10½ month delay in service of the Notice on the Applicant in the context of operational requirements, administrative factors such as leave, and the seriousness of the case. These considerations are all within the specialized experience and expertise of the Board, and they were taken into account in a reasonable way.

[53] The Respondent submits that a challenge to jurisdiction as a result of delay is not appropriate. The Applicant intentionally avoided presenting an abuse of process argument, but the Respondent states the analysis that should be happening is a review of the delay and its impact on the hearing, if any. The Supreme Court of Canada dealt with this issue in *Blencoe v British Colombia (Human Rights Commission)*, 2000 SCC 44, where it was stated at paragraph 101:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.),* [1991] 1 S.C.R. 1091 (S.C.C.), at p. 1100; *Akthar v. Canada (Minister of Employment & Immigration*), [1991] 3 F.C. 32 (Fed. C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

[54] The Respondent states that it is evident on page 46 of the Decision that the Board was aware of the possibility of a future abuse of process motion, and that the Board viewed the impact of the delay as best assessed in the context of the disciplinary hearing itself. This reiterates the prematurity of this judicial review application.

[55] The Respondent submits that if the application for judicial review is allowed, the Decision was reasonable. The Board considered the context of the delay and Parliament's intention to leave flexibility in subsection 43(4). Furthermore, the Respondent states that this issue naturally evolves into an analysis of the impact of the delay on the hearing, and the reasonableness of the Decision must be considered with that in mind. In conclusion, the Respondent requests that the application for judicial review be dismissed with costs.

ANALYSIS

[56] In *CB Powell*, above, the Federal Court of Appeal provided extensive general guidance on premature applications for judicial review in which jurisdictional issues are raised:

> 4. The Act contains an administrative process of adjudications and appeals that must be followed to completion, unless exceptional circumstances exist. In this administrative process, Parliament has

assigned decision-making authority to various administrative officials and an administrative tribunal, the CITT, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called "jurisdictional" issues.

…

30. The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

31. Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

32. This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g., Consolidated Maybrun, supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g., Consolidated Maybrun, supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.

33. Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin, supra*; *Okwuobi, supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 52 D.L.R. (4th) 128 (Ont. Div. Ct.). As

I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

…

39. When "jurisdictional" grounds are present or where "jurisdictional" determinations have been made, can a party proceed to court for that reason alone? Put another way, is the presence of a "jurisdictional" issue, by itself, an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed?

40. In my view, the answer to these questions are negative. An affirmative answer would resurrect an approach discarded long ago.

41. Long ago, courts interfered with preliminary or interlocutory rulings by administrative agencies, tribunals and officials by labelling the rulings as "preliminary questions" that went to "jurisdiction": see, *e.g., Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. By labelling tribunal rulings as "jurisdictional," courts freely substituted their view of the matter for that of the tribunal, even in the face of clear legislation instructing them not to do so.

42. Over thirty years ago, that approach was discarded: *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227. In that case, Dickson J. (as he then was), writing for a unanimous Supreme Court declared (at page 233), "The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so." Recently, the Supreme Court again commented on the old discarded approach, disparaging it as "a highly formalistic, artificial 'jurisdiction' test that could easily be manipulated": *Dunsmuir, supra*, at paragraph 43. Quite simply, the use of the label "jurisdiction" to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.

43. The inappropriateness of this labelling approach is well-illustrated by the ruling of the President of the CBSA in this case. In his ruling, the President considered his "jurisdiction." He did this by interpreting the words of subsection 60(1), determining the nature of C.B. Powell's request for a ruling, and deciding whether C.B. Powell's request fell within the scope of the subsection, as

> interpreted. These are questions of law, questions of fact and questions of mixed fact and law, respectively.
>
> …
>
> 45. It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see *e.g., Matsqui Indian Band, supra; Greater Moncton International Airport Authority, supra* at paragraph 1; *Lorenz v. Air Canada*, [2000] 1 F.c. 494 (T.D.) at paragraphs 12 and 13; *Delmas, supra*; *Myers v. Law Society of Newfoundland* (1998), 163 D.L.R. (4th) 62 (Nfld. C.A.); *Canadian National Railway Co. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386, 536 A.P.R. 386 (C.A.).
>
> 46. I conclude, then, that applying the "jurisdictional" label to the ruling of the President of the CBSA under subsection 60(1) of the Act in this case changes nothing. In particular, applying the "jurisdictional" label to the President's ruling did not permit C.B. Powell to proceed to Federal Court, bypassing the remainder of the administrative process, namely the appeal to the CITT under subsection 67(1) of the Act.

[57] I think it is clear from the general guidance provided in *CB Powell* that the parties can only proceed to the Court by way of judicial review after all adequate remedial recourses in the administrative process have been exhausted, and that the presence of a jurisdictional issue by itself is not an exceptional circumstance that allows a party to launch a judicial review application before the administrative process has been completed.

[58] In the present case, whether or not the jurisdictional issue ought to be considered an exceptional circumstance is not the sole issue raised. The Applicant also argues that exceptional circumstances exist in this case because there is no effective appeals process under the Act, so that he is deprived of an adequate alternative remedy, and he should not be put to the hardship

and embarrassment of going through a full hearing before the Board when this Court can examine the Board's Decision of the preliminary jurisdictional motion and dispose of the matter at this stage.

[59] On the issue of alternate remedy, the Applicant says that, under the Act and, in particular, the appeal process established under subsection 45.14, the Commissioner has no jurisdiction to consider and to determine whether the Board's Decision on jurisdiction was either correct or reasonable. The Applicant cites no authority for this position, and the Court is left to apply general rules of statutory interpretation. See *Re Rizzo*, above, at para 21. The words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[60] When I apply these principles in this case, I do not think it is possible to say clearly that the Commissioner, under the appeal scheme provided by the Act, could not consider and decide the jurisdictional issue raised by the Applicant. For the Court, at this stage, to decide that the Applicant has no adequate alternative remedy because the Commissioner has no jurisdiction under the Act to consider jurisdictional issues that arise on appeal from the Board, would be a serious and unjustified interference by this Court with the scheme of the Act.

[61] Paragraph 45.14(1) of the Act provides as follows:

45.14 (1) Subject to this section, a party to a hearing before an adjudication board may appeal the decision of the board to the Commissioner in respect of	**45.14** (1) Sous réserve des autres dispositions du présent article, toute partie à une audience tenue devant un comité d'arbitrage peut en appeler de la décision de ce dernier devant le commissaire:

(*a*) any finding by the board that an allegation of contravention of the Code of Conduct by the member is established or not established; or	*a*) soit en ce qui concerne la conclusion selon laquelle est établie ou non, selon le cas, une contravention alléguée au code de déontologie;
(*b*) any sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (*a*) is established.	*b*) soit en ce qui concerne toute peine ou mesure imposée par le comité après avoir conclu que l'allégation visée à l'alinéa *a*) est établie.

[62] In the present case, it seems to me that the Board did not make a decision under either paragraph 45.14(1)(*a*) or (*b*). The Board did not make any finding about a contravention of the Code of Conduct under (1)(*a*) and a decision on jurisdiction is not, in my view, a " sanction imposed or action taken by the board in consequence of a finding by the board that an allegation referred to in paragraph (a) is established," so that it falls under 1(*b*).

[63] However, paragraph 45.14(1) has to be read in conjunction with 45.14(3) which provides as follows:

(3)An appeal lies to the Commissioner on any ground of appeal, except that an appeal lies to the Commissioner by an appropriate officer in respect of a sanction or an action referred to in paragraph (1)(*b*) only on the ground of appeal that the sanction or action is not one provided for by this Act.	(3) Le commissaire entend tout appel, quel qu'en soit le motif; toutefois, l'officier compétent ne peut en appeler devant le commissaire de la peine ou de la mesure visée à l'alinéa (1)*b*) qu'au motif que la présente loi ne les prévoit pas.

[64] The Applicant argues that this subsection does not expand the grounds of appeal established under paragraph 45.14(1). It seems clear that paragraph 45.14(3) is intended to qualify paragraph 45.14(1) in one way to limit appeals to sanctions or actions that are not provided for in the Act. However, paragraph 45.14(3) does not refer to subparagraph 45.14(1)(*b*), so I do not see how the general authorization that an appeal lies to the Commissioner "on any ground of appeal" can be limited in the way argued by the Applicant.

[65] The Applicant has not convinced the Court that he does not have an adequate alternative remedy under the Act by way of appeal to the Commissioner, or that any special circumstance exists in this case to stray from the general principle that the administrative process under the Act should be allowed to run its course before the Applicant seeks judicial review. To rule at this stage that the Commissioner has no jurisdiction to hear an appeal from the Board's Decision would be to decide a matter of law of significant importance to the scheme of the Act without having heard from the Commissioner, and without giving the Commissioner an opportunity to consider this issue. The Court would be deprived of the Commissioner's expertise, legitimate policy judgments and valuable regulatory experience, and perhaps would be preventing the Commissioner from exercising these assets in other cases where jurisdiction becomes an issue. The Applicant's interpretation of paragraph 45.14(3) would allow immediate access to the Court on preliminary issues of jurisdiction and would thus, in my view, undermine the formal disciplinary scheme of the Act.

[66] Having decided this issue, it would be inappropriate for the Court to now pre-empt the Commissioner by addressing the correctness or the reasonableness of the Board's interpretation and application of subsection 43(4) of the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-915-12
STYLE OF CAUSE:	**STEVE BLACK**
	- and -
	THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 16, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 8, 2012

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