Protected A

2020 CAD 09

ROYAL CANADIAN MOUNTED POLICE

in the matter of a conduct hearing pursuant to the

Royal Canadian Mounted Police Act, RSC, 1985, c R-10

Between:

Staff Sergeant Bari Emam
Regimental Number 48889

(Applicant)

and

Deputy Commissioner Jennifer Strachan
Commanding Officer, "E" Division
Conduct Authority

(Respondent)

Conduct Board Decision

Motion for a Stay of Proceedings

Protected A

2020 RCAD 09

Gerald Annetts, Conduct Adjudicator

May 19, 2020

Ms. Sabine Georges, Subject Member Representative (for the Applicant)

Staff Sergeant Jonathon Hart, Conduct Authority Representative (for the Respondent)

INTRODUCTION

[1] The Conduct Hearing in this matter was initiated on January 18, 2018, and Assistant Commissioner MacMillan was originally appointed as Conduct Board. Subsequent to its initiation and the service of the *Notice of Conduct Hearing*, it became apparent that numerous relevant documents had not been disclosed to the Applicant and the Conduct Board. This resulted in a lengthy delay and in much back and forth between the Conduct Board and the Respondent, and between the Applicant and the Respondent. The missing disclosure was eventually provided to the Conduct Board and the Applicant, but numerous documents were vetted due to a claim of privilege by the Respondent. Much discussion again occurred, this time around the appropriate procedure to follow to determine the validity of the privilege claims.

[2] When Assistant Commissioner MacMillan retired from the RCMP in November 2019, I was appointed to replace him as the Conduct Board. At that time, I invited the Applicant to bring a formal motion to address procedural fairness issues that had been raised by both the previous Conduct Board and the Applicant. On January 10, 2020, the Applicant brought a motion for a stay of proceedings in which he alleged an abuse of process for the following failures on the part of the Respondent:

- The Respondent's claim of privilege over documents that are not privileged;
- A lack of full disclosure on the part of the Respondent;
- Non-compliance with the Conduct Board's direction by the Respondent;
- Circumvention of the RCMP's Investigation and Resolution of Harassment Complaints (IRHC) process by the Respondent;
- Insufficiency of the Respondent's investigation into the harassment allegations;
- Bias on the part of the Respondent in the course of the investigation;
- Institutional delay in getting the matter before the Conduct Board.

[3] The Applicant argued that the concerns cumulatively amount to an abuse of process that warrants a stay of proceedings. The Respondent filed a response to the motion on January 24, 2020, and the Applicant filed his rebuttal on February 14, 2020. Since my decision turns on the allegation surrounding the circumvention of the mandated process for the investigation and resolution of harassment complaints, I will start my analysis there.

CIRCUMVENTION OF THE HARASSMENT PROCESS

[4] The Applicant alleges an abuse of process on the part of the Respondent for circumventing the Investigation and Resolution of Harassment Complaints (IRHC) process and instead proceeding with an investigation under the conduct process. The Applicant argues that this was done in order to avoid the limitation period contained within the IRHC process.

[5] The relevant facts in relation to this aspect of the motion are as follows. On February 24, 2017, as a result of complaints made by KR and DK to the "E" Division Harassment Unit, Harassment Advisors from that Unit took statements from complainants KR, DK and AM. All three complainants alleged inappropriate conduct on the part of the Applicant. A subsequent meeting with members of the Professional Responsibility Unit, the Harassment Unit and the Conduct Unit followed on February 28, 2017, in which this file was discussed and the decision was made that it would no longer be investigated under the IRHC process, but rather under the conduct process. Additional interviews were subsequently conducted with two other alleged victims of harassment, resulting in Allegations 5 through 7.

[6] The reasoning provided in the briefing notes to proceeding under the conduct process instead of the IRHC process is that the Applicant was using his position/rank to approach or engage these employees. Therefore, it was suggested that a Code of Conduct investigation for "abuse of position" was more appropriate than a harassment investigation.

[7] At page 122 of the final disclosure package, it is clear that the National Conduct Management Section consulted with the Non-Commissioned Officer in Charge of the Office of Coordination of Harassment Complaints, who made the following recommendation (albeit two months after the February 28, 2017, meeting):

> […]
>
> If a complainant was willing to step forward and provide a 3919 articulating the behaviours including the 5 noted elements above, and/or if the [Employee Management Relations Officer] decides a 3rd party complaint is warranted then the harassment process could be utilized. From what I have read, and absent some the questions listed on the individual cases, I would suggest that the complaints are best suited in the [Code of Conduct] process.
>
> Sorry for the convoluted response, the harassment process has many more considerations and requirements.
>
> […]

[8] I note here that I cannot definitively determine if these harassment complaints were ever submitted by way of Form 3919, the form prescribed for use in policy. However, that is of no effect in this case given that the complaints were made directly to the Harassment Unit and the Respondent was specifically advised by the Office of Coordination of Harassment Complaints that the use of Form 3919 was the appropriate route to follow if "a complainant was willing to step forward and provide a 3919". The Applicant can hardly be faulted for the Respondent's failure to canvass that option with the complainants. With or without the submission of Form 3919, these were clearly complaints of harassment as defined in section 2.2 of AM XII.8.

[9] In this recommendation, the Conduct Advisor with the National Conduct Management Section also warned that there were potential limitation period issues involved:

> […]
>
> -If the complainant chose to initiate a harassment complaint, the [decision maker] would have to consider continuing with this file in the process given the last alleged behaviour was more than one year ago. In a sexual harassment case this is generally not an issue, just a consideration of timeliness.
>
> […]

[10] Following that consultation, the Conduct Advisor recommended to the Respondent that the conduct process be used:

> […]
>
> [The National Conduct Management Section] agrees with [the Office for the Coordination of Harassment Complaints (OCHC)] in that the possibility

> exists that the nature of the allegations could be sexual harassment, however, absent some the answers to the questions listed by OCHC on the individual cases above, it is suggested that the complaints are best suited in the conduct process.
>
> Furthermore, by referring this matter immediately to the [Commanding Officer] and consulting [the Conduct Authority Representative Directorate (CARD)], the [Commanding Officer] is in the best position to assess the information as she would also be the decision maker for any possible harassment matters. I have attached a pdf of the email sent from OCHC for your records but I did embed the entirety of the message in this response.
>
> I hope this offers the assistance you were seeking.
>
> […]

[11] This recommendation was followed by the Respondent, despite the fact that the alleged misconduct arose as harassment complaints made directly to the Harassment Unit and fell well within the definition of sexual harassment, per the *Administration Manual* XII.8 and section 2.1 of the Code of Conduct, which specifically prohibits any member from engaging in harassment:

> ***Administration Manual* XII.8**
>
> […]
>
> 2. 8. **Harassment** means any improper conduct by an individual that is directed at, and is offensive to, another individual in the workplace, including at any event or any location related to work, and that the individual knew, or ought reasonably to have known, would cause offence or harm. It comprises an objectionable act, comment, or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the Canadian Human Rights Act, i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and pardoned conviction.
>
> 2. 8. 1. Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.
>
> 2. 8. 2. Harassment includes sexual harassment.
>
> 2. 8. 3. Harassment, if established, is a contravention of the Code of Conduct [section 2.1] in respect of a member, and a member who has committed harassment may be subject to conduct proceedings under the [*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [RCMP Act].
>
> […]

> 2. 23. **Sexual harassment** means any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion, and is included under the definition of harassment above.
>
> […]
>
> **RCMP Code of Conduct, section 2.1**
>
> Members treat every person with respect and courtesy and do not engage in discrimination or harassment.

[12] Proceedings are normally brought against subject members under the most specific provision of the Code of Conduct appropriate to the alleged misconduct. In this case, given that what is alleged in the Particulars fits perfectly within the definition of sexual harassment, one would expect proceedings to be brought under section 2.1 of the Code of Conduct. All other things being equal, it is unusual that the Respondent proceeded under the more general section 3.2 for abuse of authority and section 7.1 for discreditable conduct. It is only for Allegation 7 that the Respondent proceeded under section 2.1.

Framework for the Resolution of Harassment Complaints:

[13] In determining whether proceeding in the manner in which the Respondent did is appropriate, the first step in the analysis is to determine what the *RCMP Act*, the *Commissioner's Standing Orders* and policy say about how harassment complaints are to be dealt with. In paragraph 20.2(1)(l) of the *RCMP Act*, the Commissioner was given the authority by Parliament to establish procedures to investigate and resolve disputes relating to alleged harassment by a member.

> 20.2(1) The Commissioner may […]
>
> (l) establish procedures to investigate and resolve disputes relating to alleged harassment by a member.

[14] With that authority, the Commissioner created the *Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints)*, SOR/2014-290 [*CSO (IRHC)*]. Before going through those rules in detail, I will attempt to canvass the Commissioner's intent in creating those rules.

[15] First of all, in the summary section of *An Act to Amend the Royal Canadian Mounted Police Act*, which brought into place these provisions in 2014, it states:

> […] It modernizes the Royal Canadian Mounted Police's human resources management regime. In particular, it authorizes the Commissioner to act with respect to staffing, performance management, **disputes relating to harassment** and general human resource management. […]
>
> [Emphasis added]

[16] While the summary is not part of the preamble, it is still instructive in terms of determining the purpose and objective of the *RCMP Act*. It is important for the Commissioner's ability to act with respect to disputes relating to harassment to be specifically mentioned in the summary as one of the ways in which Parliament intended to enhance the accountability of the RCMP.

[17] Second, the Regulatory Impact Analysis Statement that accompanied the introduction of the new *CSO (IRHC)* includes this statement as the objective:

> […]
>
> Subsection 2(2) of the Act defines CSOs as "the rules made by the Commissioner under any provision of this Act empowering the Commissioner to make rules." Simply put, the CSOs are statutory instruments created under the Commissioner's authority which establish the essential components that are necessary for the implementation of various procedures. In particular, **these CSOs establish an RCMP-specific system to respond to incidents of harassment, by creating streamlined procedures for the investigation and resolution of harassment complaints, including access to an informal resolution process.** The new CSOs have been designed to overcome employees' concerns that the existing process is confusing, takes too long to complete, and does not hold parties accountable through appropriate application of available consequences. **The process created under the CSOs will apply to member complainants and respondents**, and will contribute to establishing safe, healthy and respectful workplaces for all RCMP personnel.
>
> […] [Emphasis added]

[18] The description section of that same document reads as follows:

> […]

The CSOs on [IRHCs] consolidate and standardize processes, procedures, and oversight of the manner in which the RCMP responds to harassment complaints in one administrative structure, and are intended to overcome existing challenges faced by the RCMP when addressing harassment complaints. Currently, the RCMP is subject to the requirements of the Treasury Board Policy on Harassment Prevention and Resolution, by virtue of the Financial Administration Act. Concurrently, the RCMP must also comply with the procedures established under Part IV of the RCMP Act in respect of responding to incidents of alleged member misconduct. The challenge in attempting to apply these two systems to a harassment complaint is that while the Treasury Board Policy is focused on preventing and informally resolving incidents that could become or be perceived as harassment, with a view to rebuilding workplace relationships, the Part IV process requires a member to defend him or herself against allegations brought by the employer in respect of contraventions of the Code of Conduct. There are no opportunities for informal resolution or relationship building within the RCMP conduct process, and the opportunities for complainants to play a role in that process are extremely limited. On the other hand, there are no authorities for the Treasury Board Policy to apply the RCMP conduct process if harassment is determined to have occurred, which means that the RCMP is faced with a choice when presented with a harassment complaint—either treat it as harassment under the Policy, or under Part IV. This situation has left employees, be they complainants or respondents, frustrated and skeptical about the RCMP's commitment to providing a respectful workplace.

The Accountability Act addresses these misalignments by providing the Commissioner with the specific authority to "establish procedures to investigate and resolve disputes relating to alleged harassment by a member," (see footnote 4) and by exempting the RCMP from compliance with Treasury Board policies and directives regarding the investigation and resolution of harassment complaints. The Force remains bound by the Treasury Board requirements to prevent incidents of harassment through early resolution, training and other preventative measures, and for remediating the workplace following the application of the new harassment investigation and resolution process. These CSOs will provide the framework within which complaints of harassment will be investigated and resolved. **The following components of the RCMP's [IRHC] process are included in the CSOs:**

- **The inclusion of harassment as a contravention of the Code of Conduct for public service employees and the Code of Conduct provided under the 2014 Regulations.**
- **A single, RCMP-specific, comprehensive regime for the [IRHC] based on a modified conduct investigation process** (that respects and

incorporates the requirements of Part IV of the RCMP Act and the relationship repair and improvement components of the Treasury Board Harassment Policy).

• A centralized, national intake office responsible for ensuring complainants' submissions meet the minimum requirements to activate the harassment investigation and resolution process and for providing support and advice to divisional harassment advisors.

• The elimination of the "screening process" that has been the subject of many complaints, replaced with the authority for a decision maker to determine appropriate next steps to assist the parties in moving towards informal resolution or mandating an investigation in a timely manner.

• **The opportunity for parties to pursue informal resolution of a complaint until the making of the final decision. The informal resolution process is supported by a professionalized informal conflict management system.**

• The authority for the decision maker to review complaints, support parties in seeking informal resolution, mandate and administer an investigation, determine if harassment has occurred, and impose conduct measures (where appropriate) on member respondents. The often heard complaint that the RCMP has used Part IV to "shield" members from repercussions arising from founded harassment will no longer be valid.

• The authority for delegated managers for public service employees to impose disciplinary measures after a finding of harassment remains in place.

• **Greater transparency in the harassment complaint process and improved communication with complainants, including**

  o **Providing parties with the opportunity to review and provide submissions on the preliminary harassment investigation report.**

  o **Advising the complainant of the results of the investigation and if any measures were imposed on the member.**

• A simplified appeal process for member complainants that will include review by the External Review Committee and access to the Commissioner for a final and binding decision to reduce the potential time frame until final disposition. Respondents may access the appeal process provided under Part IV of the Act, or, if that process does not apply, also pursue an appeal as provided for under the CSOs.

• A choice for public service employees to either submit a complaint through the RCMP harassment complaint process, or through a grievance process provided to public service employees under a collective agreement or Treasury Board policy. Members will not have this choice,

> however. Members are expected to raise harassment complaints through the process established under the CSOs.
>
> As noted, while the CSOs on [IRHC] will be an important resource for those who administer the new framework, they form part of a systemic approach to the prevention and resolution of inappropriate workplace behaviours in combination with the awareness, prevention and workplace recovery components that are dealt with under the RCMP's Respectful Workplace Program, the Gender and Respect Action Plan and more general human resources programs. In addition, at key junctures in an employee's career, training on harassment, diversity, and ethical behaviour are core components of personal development.
>
> […] [Emphasis added]

[19] Third, Force policy on IRHCs, which is intended to guide how the *Commissioner's Standing Orders* are to be interpreted and used, begins with (*Administration Manual* XII.8.1.1):

> The purpose of this policy, in conjunction with the Treasury Board Policy on Harassment Prevention and Resolution, and the Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints), is to provide the procedures for the investigation and resolution of harassment where efforts to prevent or resolve harassment through the respectful workplace program have been unsuccessful.

[20] This is also reflected on the RCMP Infoweb Professional Responsibility page, in which the "new" harassment process is discussed as follows:

> […]
>
> **Harassment Investigation and Resolution**
>
> The new harassment process brings requirements of the Code of Conduct and Treasury Board approaches into one timely and efficient harassment process.
>
> • **Rather than dual processes dictated by Treasury Board policy and Part IV of the RCMP Act, there is now a single RCMP-specific process created under Commissioner's Standing Orders to deal with harassment complaints involving members**;
>
> • **Harassment complaints will only be processed through the Harassment Investigation and Resolution Process**. Members may no longer submit a harassment complaint through the grievance process, in order to ensure thoroughness and consistency in the investigation and resolution of harassment complaints;

> • A new national Office for the Coordination of Harassment Complaints (OCHC) which will intake and monitor all harassment complaints;
>
> • **Rather than having different decision makers to determine if harassment has occurred and then to determine if a Part IV process should be initiated, these determinations will be made by a single decision maker when a member is the respondent**;
>
> • **Harassment is now specifically identified as a contravention of the RCMP Code of Conduct**;
>
> • The complainant and respondent will be provided a copy of a preliminary investigation report prior to a final decision being made and will be given an opportunity to respond to the information contained in the report;
>
> • Both complainants and respondents will be provided with copies of the final decisions, even when the decision has been made by a conduct board under Part IV;
>
> • Informal resolution will be available to parties up until the point of either a final decision or the initiation of a conduct board; and
>
> • Interim decisions can no longer be grieved once the process has been initiated. However, the parties have appeal opportunities once the final decision has been rendered.
>
> […] [Emphasis added]

[21] It is clear then that the *CSO (IRHC)* was created by the Commissioner to specifically address harassment complaints against members.

Significance of the Failure to Follow the Established Process:

[22] The next step in the analysis is to consider the significance of the fact that the process wasn't followed in this case and determine whether the Respondent has the freedom to arbitrarily choose which process to use. In doing so, it is important to note that the process for investigating complaints of harassment could have been left to the Commissioner's standing Orders (Conduct), SOR/2014-291 [*CSO (Conduct)*] to be investigated like every other Code of Conduct allegation. But it wasn't and that is important. The *CSO (IRHC)*, by virtue of subsection 5(1), is a specific type of conduct investigation under the *RCMP Act*, with its own rules, responsibilities, obligations and benefits to both the complainant and the respondent. Subsection 5(1) of the *CSO (IRHC)* deems IRHC investigations to be conduct investigations for the purposes of the conduct process:

> 5 (1) Subject to these Standing Orders, any investigation that is made as part of a harassment complaint investigation and resolution process is deemed to be an investigation made under subsection 40(1) of the Act.

[23] There is also guidance provided within the *Process Guide – Investigation and Resolution of Harassment Complaints* to deal with allegations of very serious incidents of harassment involving potential criminal conduct. These guidelines use the terms "conduct process" and "harassment complaint investigation and resolution process" interchangeably:

> […]
>
> 4.1.1.1 When a member respondent is believed to have committed a statutory offence refer to [*Operational Manual*] 54.2. [*Operational Manual*] 54.1, will apply for serious incidents. When the matter has been referred to, or is in the hands of the police force of jurisdiction, i.e. outside agency or RCMP, a decision maker should continue with the **conduct process**, unless there is a justifiable reason not to proceed.
>
> The decision as to whether a **harassment complaint investigation and resolution process** should be placed on hold awaiting the outcome of criminal proceedings will be determined on a case-by-case basis in consultation with the harassment advisor, harassment reviewers, divisional or national conduct advisors or labour relations.
>
> Consultation with local Crown Prosecutors and Criminal Operations Officer may be necessary to ensure that a harassment complaint investigation and resolution process does not interfere with a criminal proceeding.
>
> […] [Emphasis added]

[24] It is important to note that there is no similar provision dealing with separate IRHC process investigations and Code of Conduct investigations in relation to the same matter. The absence of policy to deal with that eventuality and this provision dealing with concurrent IRHC process investigations and criminal investigations/proceedings provides further confirmation that an investigation under the IRHC process is in fact a conduct investigation. It is a special type of Code of Conduct investigation, but a Code of Conduct investigation nonetheless.

[25] This specific investigative process has the following unique requirements: It requires the respondent member be provided with a copy of the complaint; it allows the respondent member the ability to participate in an informal resolution process where appropriate (*CSO (IRHC)*, subsection 4(1)); and to be provided with an interim investigative report to which they can

provide a response prior to the issuance of the final investigative report (*CSO (IRHC)*, subsection 5(3)). It also establishes a one-year limitation period from the date of the alleged harassment to ensure that these complaints are made and dealt with in a timely fashion (*CSO (IRHC)*, subsection 2(1)).

[26] Those provisions are all eminently justifiable given the unique nature of harassment complaints relative to other allegations of misconduct under the Code of Conduct. Complaints of harassment can be complex and complicated. They can be well founded or they can be the result of miscommunications or misunderstandings. There may be situations in which the respondent is not even aware that their actions or comments were offensive or unwelcome. There are also situations where allegations of harassment arise when a supervisor legitimately attempts to hold a subordinate accountable for poor performance. These complexities and others are why Force policy requires specially trained investigators to conduct these investigations, why each Division has Harassment Advisors, and why the Force has Harassment Reviewers to assist the decision makers in each Division. These specially trained people understand and appreciate the dynamics involved.

[27] This is also why there are unique requirements in the *CSO (IRHC)* and in the IRHC policy that are not present in the *CSO (Conduct)* or in conduct policy. Of course, those complaints that are determined to be well founded after the investigation can still proceed directly to a conduct meeting or a conduct hearing if deemed appropriate.

[28] It is obvious that there is a special regime mandated by the Commissioner to deal with harassment complaints differently than with other Code of Conduct allegations. It could not have been the Commissioner's intent then that a conduct authority can arbitrarily disregard the IRHC process in favour of the more general conduct process. Why then did the Respondent make the decision to do so in this case? The Applicant alleges that it was to bypass the limitation period contained within the IRHC process. That theory is compelling when you consider that the limitation period under the *CSO (IRHC)* had already expired for five of the seven Allegations before any complaint was received or any investigation initiated. Subsection 2(1) of the *CSO (IRHC)* states:

> 2 (1) A complaint by a member that they have been harassed by another member must be submitted in accordance with the harassment complaint and investigation resolution process **within one year of the last incident of harassment alleged in the complaint**.
>
> (2) The decision maker may, at the request of the complainant, extend the time limit in exceptional circumstances.
>
> [Emphasis added]

[29] Subsection 6(1) of the *CSO (IRHC)* requires the decision maker to first consider whether the complaint was submitted within time:

> 6 (1) The decision maker must decide in writing if a complaint was submitted within the period set out in section 2.
>
> (2) If the complaint was submitted within the period, and once the decision maker has sufficient information to make a decision, the decision maker must
>
> (a) initiate a hearing under subsection 41(1) of the Act; or
>
> (b) decide in writing if the respondent has, on a balance of probabilities, contravened the Code of Conduct set out in the schedule to the Royal Canadian Mounted Police Regulations, 2014.
>
> […]

[30] Those provisions make it clear that if the complaint was not submitted within the time limitation period and that there are no exceptional circumstances present to justify an extension of the time limit, then an IRHC investigation cannot be undertaken; the decision maker must then issue a written decision reflecting that the complaint was made out of time and the matter is concluded. This is reflected in *Administration Manual* XII.8, which outlines intake procedures for harassment complaints:

> […]
>
> 10. 3. The decision maker will review the complaint and the submissions accompanying the complaint, and will:
>
> 10. 3. 1. determine if the complaint has been submitted within the time limit or if an extension to the time limitation is to be granted; and
>
> 10. 3. 2. **if the decision maker determines the complaint was submitted outside the time limit, a final written decision will be provided to the parties and their respective managers/supervisors as soon as feasible.**

> **The decision will include a statement of findings and reasons for the decision**; or
>
> 10. 3. 3. if required, mandate an investigation in accordance with this Policy or the Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints).
>
> […] [Emphasis added]

[31] It is also reflected in the Process Guide – Investigation and Resolution of Harassment Complaints. Section 4.4.1 states:

> When the complaint is outside the one year time limit from the date of the last incident and/or the decision maker does not accept the exceptional circumstances for the complaint submission outside the one year time limit **the case is concluded**.
>
> The [decision maker] shall prepare a final written decision to the parties and their respective managers/supervisors as soon as feasible. The decision will include a statement of findings and reasons for the decision.

[32] In this case, ignoring the mandated IRHC process in favour of a generic conduct investigation had the effect of bypassing the limitation period prescribed under the *CSO (IRHC)*. It is important to emphasize here that the Respondent had the ability to extend the limitation period pursuant to subsection 2(2) of the *CSO (IRHC)* if exceptional circumstances were thought to exist. That was not done. Given the fact that the Respondent was alerted to this issue by the OCHC early in the process, the reasonable inference to be drawn therefrom is that those exceptional circumstances did not exist.

[33] Ignoring the mandated IRHC process also had the effect of depriving the Applicant of the resolution process available to him under the *CSO (IRHC)*, prior to a conduct hearing being initiated. Some of the incidents contained within the Particulars of the Allegations may have been suitable for that resolution process when the explanations contained in the Applicant's subsection 15(3) response are considered. In addition, ignoring the mandated IRHC process in favour of a conduct investigation denied the Applicant of his ability to provide a response to a preliminary investigation report. That response may have convinced the decision maker either that the Allegations were unfounded or that they were not serious enough to warrant the initiation of a conduct hearing.

[34] Regardless of the motives of the Respondent for proceeding under the conduct process, the Applicant argues that it amounts to an abuse of process. I agree. The Applicant has been prejudiced by the failure to follow the mandated IRHC process. Five of the seven Allegations were time barred under the IRHC process and should have been dismissed from the outset. With respect to the other two Allegations, the Applicant was denied his right to receive a copy of the complaint, the right to have the complaints considered for the resolution process, and the right to receive and comment on the preliminary investigation report.

[35] The doctrine of abuse of process arises out of the court's inherent jurisdiction to prevent misuse of the court's procedure in a way that would bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as the issue of estoppel, see (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63). It engages the inherent power of the court or an administrative tribunal to prevent misuse of its procedure, in a way that would be manifestly unfair to a party in the litigation before it, or would in some other way bring the administration of justice into disrepute. The case law confirms that the administration of justice and fairness are at the heart of the doctrine of abuse of process.

[36] I also find that the Respondent's actions in this case amount to a breach of the duty of procedural fairness. The Supreme Court of Canada set out in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 Canlii 699 (SCC), [1999] 2 SCR 817 [*Baker*], a non-exhaustive list of five factors that are relevant to determining the content of the duty of fairness owed to an individual who is the subject of administrative proceedings:

1. the nature of the decision being made and the process followed in making it;

2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

3. the importance of the decision to the individual affected;

4. the legitimate expectations of the person challenging the decision;

5. the choices of procedure made by the agency itself.

[37] I note that the last three of the factors identified by the Supreme Court apply in this situation. The Respondent touched on *Baker* in her submissions to the Conduct Board, but she misplaced her focus. Instead, she relied on *El-Helou v Courts Administration Service*, 2012 FC 1111 (CanLII), for the proposition that deference will ordinarily be extended to the procedural choices of an agency. While that is true, the problem with that argument in this case is that the choice of procedure to be followed by the Respondent is clearly set out in the *CSO (IRHC)* and in policy. It is the Commissioner of the RCMP, with the authority granted by Parliament, who mandated the use of the IRHC process under these circumstances. That requirement cannot be arbitrarily ignored by their delegate in order to bypass legal obstacles or for the sake of convenience.

[38] Closely related to that factor is the legitimate expectations of the Applicant. When the Commissioner of the RCMP, through the use of *Commissioner's Standing Orders*, makes rules respecting how complaints of harassment are to be investigated, the legitimate expectation of a member who is the subject of such a complaint is that those rules will be followed. That requirement becomes even more important in a situation such as this one, in which the decision being made is so important to the Applicant. The Court in *Baker* stated at paragraph 25 that the more important the decision is to the lives of those affected and the greater its impact on that person, the more stringent the procedural protections become. In so stating, the Court followed its own precedent in *Kane v Bd. of Governors of U.B.C.*, 1980 CANLII 10 (SCC), [1980] 1 SCR 1105, where it said that a high standard of justice is required when the right to continue in one's profession or employment is at stake. That is what is at stake here, which makes it even more important that the Respondent follow the process mandated by the Commissioner. The failure to do so amounts to a breach of the duty of procedural fairness owed to the Applicant.

[39] For all of these reasons, it would be unfair to the Applicant to allow the Respondent to arbitrarily bypass the rules mandated by the Commissioner and to opt for an alternative process that deprived the Applicant of his legal rights under the IRHC process. To allow the proceedings to continue would also bring the administration of justice into disrepute. Therefore, I direct a stay of proceedings as the appropriate remedy.

[40] My findings are not intended to cover all situations in which acts of alleged harassment come to the attention of a conduct authority/decision-maker. Without the benefit of submissions from counsel on those other situations, I decline to stretch my analysis further than the circumstances of this case.

[41] My determination of this issue means that the Applicant is successful with his motion and the proceedings against him come to an end. However, I will address the other issues raised in the motion for the sake of completeness.

SOLICITOR-CLIENT PRIVILEGE CLAIMS

[42] On July 5, 2019, pursuant to the Conduct Board's direction of February 25, 2019, and May 27, 2019, the Conduct Authority Representative (CAR) submitted a consolidated list of documents containing additional disclosure of 516 pages of material. The CAR acknowledged that 37 of the 109 source documents were vetted and claimed solicitor-client privilege over those vetted communications. At paragraph 15 of the *Notice of Motion*, the Applicant contested the privilege claim of nine of those documents, arguing as follows:

> […] it is reasonable to conclude that communications that do not involve neither the client nor the lawyer are not privileged. Specifically in this case, there are a number of documents that do not involve neither parties but there is a claim for privilege attached to them (documents 80, 81, 82, 94, 97, 99, 106, 108, 109). I submit the referenced documents are not protected by solicitor-client privilege or statutory privilege and therefore must be disclosed. […] [*Sic throughout*]

[43] The Applicant indicated at paragraph 22 of the *Notice of Motion* that he is contesting the claim of statutory privilege under subsection 47.1(2) of the *RCMP Act* made by the Respondent over documents 64, 67 to 79, 83, 84, 89 to 96. The privilege claim made over these 24 documents relies on the same argument articulated by the Respondent in relation to document 62 in the consolidated list of documents as follows:

> […] The CAR relies upon sec. 47.1 (2) RCMP Act to claim both the statutory privilege afforded via the RCMP Act and also solicitor- client privilege on this document as it is communication passed in confidence between the [Commanding Officer] of "E" Division as client and the

> Director of CARD in relation to a proceeding, for the purposes of Part IV of the RCMP Act. The CAR notes the Conduct Authority mandatory duty to consult with a Conduct Authority Representative s. 7.2.1.6.1 [*Administration Manual*] – ch. XII.1 Conduct prior to initiating a matter to a conduct hearing. The CAR further notes s. 17 [*Administration Manual*] – ch. XII.1 Conduct, Representative's Code of Ethics and in particular: "The duties and responsibilities of a person representing […] to the extent that it applies to the conduct process, are similar to those of a lawyer appearing before the courts. It is essential that a representative conduct himself-herself with the same standards that apply to the legal profession". The CAR asserts that the professional obligations of the CAR as a practi[s]ing lawyer necessitate not only respecting the present [Commanding Officer] of "E" Division instructions to me to claim privilege over the document but further recognizes that the privilege is organizational in scope and proper authority would need to be sought for a true waiver of privilege. […]

[44] The Applicant's argument against this claim of privilege is that those enumerated communications do not appear to be pertaining to seeking or receiving legal advice. I will limit my consideration to these contested documents to determine if they must be disclosed to the Applicant and to the Conduct Board.

[45] The Respondent has specifically claimed the privilege provided under subsection 47.1(2) of the *RCMP Act*. Therefore, I will quickly summarize the relevant provisions. Subsection 47.1(1) of the *RCMP Act* deals with representation of the parties to a proceeding before a board. It indicates that "a conduct authority may be represented or assisted by any person in any […] proceeding before a board".

[46] Subsection 47.1(2) of the *RCMP Act* states that if a "conduct authority is represented or assisted by another person, communications passing in confidence between them in relation to […] the proceeding […] are, for the purposes of this Act, privileged as if they were communications passing in professional confidence between the […] conduct authority and their legal counsel".

[47] Subsection 47.1 (3) states that "the Commissioner may make rules prescribing (a) the persons or classes of person who may not represent or assist a […] conduct authority; and (b) the circumstances in which a person may not represent or assist a […] conduct authority".

[48] Those rules referenced in subsection 47.1(3) of the *RCMP Act* are contained within sections 29 through 31 of the *CSO (Conduct)*. Of particular relevance to this motion are the following definitions contained within section 29:

> **assistance** means legal guidance and information provided […] to the conduct authority in respect of the subject member.
>
> **representation** means the act of representing a […] conduct authority, including providing legal advice, litigation or advocacy for the purpose of these Standing Orders.

[49] Section 31 of the *CSO (Conduct)* deals with conduct authority representation. The relevant provisions state:

> 31 (1) A Conduct Authority Representative may represent a conduct authority in the following circumstances:
>
> […]
>
> (b) a conduct authority intends to (initiate) a conduct hearing under subsection 41(1) of the Act; or
>
> […]

[50] Subsection 31(4) of the *CSO (Conduct)* contains a very important limitation relative to this motion:

> 31 (4) Only persons who are Conduct Authority Representatives are authorized to provide representation and assistance under subsections (1) […] to conduct authorities.

[51] My reading of that limitation is that only those persons employed by the CARD providing legal advice, litigation or advocacy fall within the ambit of subsection 47.1(2) of the *RCMP Act*. In other words, it is only the communications passing in confidence between a conduct authority and their conduct authority representative that, for the purposes of the *RCMP Act* are privileged, as if they were communications passing in professional confidence between a conduct authority and their legal counsel. Subsection 47.1(2) of the *RCMP Act* does not provide any such privilege of communications between a conduct authority and others or between a conduct authority representative and others. That privilege, if it attaches, must come from the common law.

[52] What then is the state of the common law surrounding privilege as it relates to lawyers and clients. The first point to be made is that "privileged" is not synonymous with "confidential". Courts are concerned with whether information is relevant, not with whether it is confidential. They will neither condone gratuitous production of private information nor shy away from exposing the most intimate private details if it is relevant and necessary to do justice. The law does not demand disclosure of irrelevant information, nor does it protect information merely because it is confidential. All relevant and material evidence is compellable in court proceedings unless the evidence is privileged.

[53] Where a class privilege applies, the evidence covered by the privilege is *prima facie* inadmissible. In recent years, courts have enhanced the protection afforded by solicitor-client privilege and clearly established litigation privilege as a separate species of class privilege. The most entrenched class privilege recognized by the common law is solicitor-client privilege. This privilege protects all communication made in confidence in the course of seeking or giving advice based on the professional's expertise in law.[1] Within those parameters, it is close to absolute. The Supreme Court of Canada has described it as follows:

> […] The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.[2] […]

[54] The important point to remember is that the onus is upon the party asserting privilege to prove that the communication took place on an occasion of privilege. Once that is established, the onus of proving an exception is on the party seeking to pierce the privilege. As a class

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[1] *The Law of Privilege in Canada*, loose leaf edition, Ch1 p 1-1 (2017, Thomson Reuters Canada)
[2] *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 [*Blank*], paragraph 26.

privilege, it presumptively applies. Most importantly, the privilege belongs to the client and not the lawyer. Only the client may waive it, but they may do so overtly or by implication.

[55] At one time, litigation privilege was viewed primarily as a subspecies of solicitor-client privilege and there was debate about when it applied. The decision of the Supreme Court in *Blank* made it clear that litigation privilege is a distinct class privilege, independent of whether or not the litigant has counsel. The Supreme Court established or affirmed the following principles:

- Litigation privilege exists to protect the efficacy of the adversary process by creating a "zone of privacy" in relation to pending or apprehended litigation.

- Litigants, whether represented or not, must be able to prepare their contending positions in private without adversarial interference and without risk of premature disclosure.

- The privilege persists only until the litigation is over and will come to an end, absent closely related proceedings, on the termination of the litigation which gave rise to the privilege. For the latter, see *R. v Campbell*, [1999] 1 SCR 565, at paragraph 16.

- Litigation is "not over until it is over". Thus the privilege may persist for as long as the litigants or related parties remain "locked in what is essentially the same legal combat".

- Litigation privilege does not permit a party to hide information that it is otherwise required to produce by simply placing the evidence in a litigation file. It attaches to material prepared for the dominant purpose of existing or contemplated litigation.

- Like solicitor-client privilege, litigation privilege may be waived and this may take place by disclosing it voluntarily or by implication.

- Litigation privilege is not nearly as important as solicitor-client privilege and in an appropriate case it may well yield to the imperative of a just result.

- While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.

- Of course there may be overlap between litigation privilege and legal advice privilege. Evidence that is subject to solicitor-client privilege does not lose that protection just because it is also subject to litigation privilege.

[56] Generally, disclosure of privileged information to a third party is a waiver of privilege, or perhaps more precisely, it is evidence that the holder of the privilege no longer intended it to be confidential. However, it may frequently be necessary to disclose that privileged information or advice to experts, investigators, agents or staff. These are individuals involved in the collection of information for the purposes of litigation or in the chain of receiving legal advice. This has never been regarded as waiving or abandoning privilege provided the person to whom the confidential information was confided would have understood that it was provided in privacy.

[57] Having set out the general principles involving both the statutory privilege provided by subsection 47.1(2) of the *RCMP Act* and the common law class privilege categories of solicitor-client and litigation privilege, I will apply those principles to the documents in dispute.

[58] I will deal first with whether the privilege provided under subsection 47.1(2) of the *RCMP Act* applies to the disputed documents. I reiterate that it is only the communications passing in confidence between the Respondent and the CAR that, for the purposes of this *RCMP Act*, are privileged as if they were communications passing in professional confidence between the Conduct Authority and their legal counsel (solicitor-client privilege). Subsection 47.1(2) of the *RCMP Act* does not provide any such privilege of communications between the Respondent and others or between the CAR and others. However, litigation privilege does not require the existence of a solicitor-client relationship; therefore, it may cover some of the documents specifically questioned by the Applicant if the dominant purpose of those communications was to prepare for anticipated litigation even where the communications did not involve the Respondent’s counsel:

- Document 64 is described as an email from the CAR to Staff Sergeant Greg Leong, who at the time was in Charge of the "E" Division Conduct Advisory Unit, Professional Responsibility Unit, in which he provided an overview of the previous discipline of a potential witness. I find that there is a *prima facie* case that this document is protected by litigation privilege as it relates to the preparation of the anticipated conduct hearing.

- Document 67 is described as an email from Inspector Mark Le Page to the CAR and is described as "CARD liaison with Unit to serve documents". The Respondent specifically relied upon subsection 47.1(2) of the *RCMP Act* "to claim privilege as communication passed in confidence between persons assisting the [Commanding Officer] of "E" Division as client and the CAR in relation to a proceeding, for the purposes of Part IV of the RCMP Act". That claim must fail given my finding that subsection 47.1(2) of the *RCMP Act* applies only to communications passing in professional confidence between the Respondent and her CAR. It does not provide any such privilege over communications between the CAR and others. The Respondent made no claim of solicitor-client privilege or litigation privilege and I do not see that either would apply. I would have directed that this document be disclosed to the Applicant and to the Conduct Board.

- Documents 68 through 77 are emails between the CAR and Staff Sergeant Greg Leong and they relate to the preparation of the *Notice of Conduct Hearing* on behalf of the Respondent. For the same reasons as stated for document 64, I find that these documents are protected by litigation privilege.

- Document 78 is described as an email from Staff Sergeant Greg Leong to the Respondent and it relates to conduct hearing notices for signature. Again, I find that Staff Sergeant Leong was assisting the CAR in preparation of the anticipated conduct hearing and this document is protected by litigation privilege.

- Document 79 is described as an email in response from the Respondent to Staff Sergeant Leong. For the same reasons, I find that this document is protected by litigation privilege.

- Document 83 is described as an email from a different CAR (Brad Smallwood) to Staff Sergeant Greg Leong relating to the signed original *Notice of Conduct Hearing*. I find that this document is protected by litigation privilege for the same reason as previously outlined.

- Document 84 is described as an email from the CAR to Inspector Mark Lepage relating to an update on documents for service. The Respondent claimed the protection of both subsection 47.1(2) of the *RCMP Act* protection and solicitor-client privilege. This document is not protected by subsection 47.1(2) of the *RCMP Act* for the previously provided reasons. Nor is there any indication in the rationale provided by the Respondent that the communication is in relation to seeking or giving legal advice, the basic requirement for solicitor-client privilege to apply. No claim was made for litigation privilege. Therefore, the privilege claim must fail and I would have directed that this document be disclosed.

- Documents 89 through 93, 95 and 96 are emails between the CAR and Staff Sergeant Greg Leong and Sergeant Jake Hutton, members of "E" Division Professional Responsibility Unit, and relate to preparations for the anticipated conduct hearing. These documents are protected by litigation privilege.

- Document 94 is a request by Staff Sergeant Greg Leong to Sergeant Jake Hutton to assist the CAR with pre-hearing preparations. Forwarding the request to Sergeant Jake Hutton in order to request that he assist the CAR does not amount to waiver of privilege. This document remains protected by litigation privilege.

- Documents 97 and 99 are described as an email from Inspector Wendy Mehat to Staff Sergeant Greg Leong and from Inspector Wendy Mehat to Karen Manhas relating to direction from the Respondent for disclosure from the CARD. The Respondent claimed statutory privilege under subsection 47.1(2) of the *RCMP Act* and not solicitor-client privilege or litigation privilege. For the same reasons as noted for Document 67, I find

that these documents are not covered by subsection 47.1(2) of the *RCMP Act* and I would have directed that they be disclosed.

- Documents 106, 108 and 109 are described as emails between Staff Sergeant Greg Leong and Assistant Commissioner Eric Stubbs in relation to providing "conduct updates". The Respondent claimed both privilege under subsection 47.1(2) of the *RCMP Act* and solicitor-client privilege. For the same reasons articulated for document 67, the claim of statutory privilege must fail. The claim for solicitor-client privilege must also fail because the Respondent provided no indication that the communications relate to seeking or giving legal advice. Rather they are described as conduct updates. The Respondent made no claim for litigation privilege, nor is any basis for same evident upon my reading of the description. I would have directed that these documents be disclosed.

[59] In conclusion, the Respondent failed to establish a *prima facie* case for privilege in relation to documents 67, 84, 97, 99, 106, 108 and 109. I would have directed that unvetted copies of these documents be provided to the Applicant and to the Conduct Board without delay.

FAILURE TO DISCLOSURE RELEVANT DOCUMENTS

[60] The next part of the Applicant's motion is that the Respondent failed to meet her duty of disclosure and had to be forced to disclose material which she originally claimed did not exist. This relates to a total of 516 pages of material, mostly involving the harassment investigation that was originally initiated into the Applicant's actions before the matter evolved into a Code of Conduct investigation. The Respondent initially denied that the "E" Division Harassment Unit had any files concerning the Applicant. It was only after the Respondent was provided with reference to such material within the investigative material by the Conduct Board that further inquiries were made and the material was located and disclosed.

[61] The Applicant makes the point that this disclosure was not provided to him until well after his initial subsection 15(3) Response was submitted to the Conduct Board. As such, he argues that he was prejudiced by not knowing the case against him prior to having to provide his subsection 15(3) Response. The Applicant indicates that he was specifically prejudiced in

relation to his response to Particulars 6 and 7 of Allegation 1. Some of the additional disclosure provides evidence that a second meeting occurred between the Applicant and his accuser, KR, that he initially denied, based on the original disclosure.

[62] The Respondent argues that she "has at all times fulfilled the obligation for disclosure". The Respondent concedes that additional disclosure was required, but that this is not unusual as both subsections 15(4) and (5) of the *CSO (Conduct)* and section 17.3 of the *Conduct Board Guidebook* "recognize that a subject member may request a further investigation to be made and that that a party can be ordered to provide further information". The Respondent submits that this is a complex matter with multiple complainants and a significant volume of material.

[63] The Respondent goes on to argue that she "has consistently maintained that the vast majority of the additional disclosure is neither relevant, material or necessary for a determination of the allegations". The Respondent concedes that the text messages referred to by the Applicant in relation to Particulars 6 and 7 of Allegation 1 are relevant, but she notes that they were in fact authored in part by the Applicant, therefore he should have known of their existence. The Respondent's position is that the late disclosure of the text messages in no way impeded the ability of the Applicant to defend himself. Finally, the Respondent submits that "corroboration is not necessary for an allegation of sexual misconduct and that ultimately the allegation still relies upon the yet to be heard testimony of the complainant [KR] prior to a determination by the [Conduct Board]".

[64] The Federal Court of Appeal in *Sheriff v Canada (Attorney General)*, 2006 FCA 139 [*Sheriff*], established that the level of required disclosure in disciplinary proceedings approaches the one established by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 SCR 326, in criminal cases. At paragraphs 31 to 34 of *Sheriff*, Justice Malone explained:

> [31] In contrast, our Courts have repeatedly recognized a higher standard of procedure for professional discipline bodies when the right to continue in one's profession or employment is at stake (see Kane v. Board of Governors of the University of British Columbia), [1980] 1 S.C.R. 1105, at page 1113; Brown and Evans, Judicial Review of Administrative Action in Canada, looseleaf edition (Canvasback Publishing: Toronto, 1998), at pages 9-57 and

> 9-58). This higher standard of disclosure exists regardless of whether the provincial jurisdiction recognizes the application of section 7 of the [*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]] in these cases.
>
> [32] The requirement for increased disclosure is justified by the significant consequences for the professional person's career and status in the community. Some Courts have noted that a finding of professional misconduct may be more serious than a criminal conviction (see Howe v. Institute of Chartered Accountants of Ontario (1994), 19 O.R. (3d) 483 (C.A.), per Laskin J.A. in dissent, at pages 495-496; Re Emerson and Law Society of Upper Canada (1983), 44 O.R. (2d) 729 (H.C.J.), at page 744).
>
> [33] The scope of disclosure in professional hearings continues to be expanded by provincial courts, which have applied the Stinchcombe principles in cases where the administrative body might terminate or restrict the right to practice or seriously impact on a professional reputation (see Hammami v. College of Physicians and Surgeons of British Columbia, [1977] 9 W.W.R. 301 (B.C.S.C.), at paragraph 75; Milner v. Registered Nurses Assn. of British Columbia (1999), 71 B.C.L.R. (3d) 372 (S.C.)). In Stinchcombe, the Supreme Court of Canada held that there is a general duty on Crown prosecutors to disclose all evidence that may assist the accused, even if the prosecution did not plan to adduce it. While these principles originally only applied in the criminal law context, the similarities between a criminal prosecution and a disciplinary hearing are such that the objectives are, in my analysis, the same, i.e. the search for truth and finding the correct result.
>
> [34] In this case, the Trustees face a suspension of their licence and injury to their professional reputation. In order to fully understand the case against them and to ensure a fair disciplinary proceeding, the Trustees must have access to all relevant material which may assist them. This is consistent with the Superintendent's earlier ruling in this case that the SDA had a duty to disclose all documents unless they were "clearly irrelevant."

[65] *Sheriff* is a Federal Court of Appeal decision and it is binding on me. It specifically distinguished the Supreme Court of Canada's decision in *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809, a case which some still cite as endorsing a lower standard of disclosure in these proceedings. *Sheriff* is good authority for the proposition that a conduct authority must disclose all evidence in her possession that may assist the subject member, even if the prosecution did not plan to adduce it. Therefore, a conduct authority has a duty to disclose all documents in her possession unless they are clearly irrelevant to any issue in the hearing.

[66] Therefore, the Respondent's argument that "the vast majority of the additional disclosure is neither relevant, material or necessary for a determination of the allegations" must fail. First, if the Respondent is differentiating between different categories of material, it is inappropriate not to address all of those categories. Ignoring some of those categories in favor of the "the vast majority" is not good enough.

[67] Second, as indicated above, unless the Respondent is able to demonstrate that the additional material is clearly irrelevant to any issue at the hearing, the Respondent's view on its relevance, materiality or necessity is itself irrelevant. The Applicant in entitled to receive that material, assess it, and make his own determination of whether and how to use it to make full answer and defence to the allegations against him.

[68] The Respondent's argument in relation to subsections 15(4) and (5) of the *CSO (Conduct)* must also fail. As articulated by the Applicant, there is a clear distinction between the Respondent's duty of disclosure and a request for further investigation by a subject member. The Respondent's duty of disclosure does not depend on a request for additional investigation on the part of the subject member. It is a separate and distinct obligation.

[69] The material contained in the 516 pages of additional disclosure, including the text messages in issue, was required to be disclosed by the Respondent. The Respondent clearly failed to disclose material, which should have been part of the original disclosure when the *Notice of Conduct Hearing* was served on the Applicant. This failure to disclose is closely tied to the next issue and I will deal with them together in determining the appropriate remedy.

NON-COMPLIANCE WITH THE CONDUCT BOARD DIRECTION

[70] The Applicant argues that the Respondent has on several occasions failed to comply with the direction of the Conduct Board and, in doing so, she caused unnecessary delay in this matter. This failure to comply relates to a direction from the Conduct Board to disclose material in the Respondent's possession and to identify to the Conduct Board and the Applicant the existence of material over which it claimed privilege.

[71] The Respondent does not deny that there were significant delays in the disclosure of a substantial amount of material in her possession. She justifies those delays by arguing that the direction of the Conduct Board was unprecedented and, consequently "necessitated a comprehensive assessment by both the Respondent and CARD as to the lawfulness of the direction". She questions the Conduct Board's suggestion that the direction it provided for cataloguing the documents over which privilege is claimed by description is a generally accepted practice of numerous administrative and other processes. The Respondent argues that this practice is not common but "new" to the RCMP Code of Conduct process and, to the best of her knowledge, this practice is without precedent in the RCMP Code of Conduct process.

[72] The Respondent further argues that the direction of the Conduct Board "is contrary to the spirit and intent of the CSO (Conduct) which specifies that proceedings are to be dealt with both "informally and expeditiously" […] [and the Respondent] by necessity, must now rely upon extensive criminal and civil law jurisprudence and codified practices to support a claim of privilege over the advice and instructions given by both the Respondent and also third parties"

[73] I have already briefly canvassed the general law on privilege claims. I will only reiterate my determination that several of the documents over which the Respondent claimed privilege are not in fact protected by privilege and should have been disclosed to the Applicant. The real gist of the Respondent's argument on the issue of failure to disclose and failure to follow the direction of the Conduct Board is her disagreement with the extent of the search for missing requested documents and how the determination was to be made on whether documents were privileged and exempt from disclosure. I will briefly address each of those issues.

[74] The conduct hearing in this matter was initiated by the Respondent on January 18, 2018, and the Conduct Board was appointed shortly thereafter. The *Notice of Conduct Hearing* and "Investigation Report Materials Package" were personally served on the Applicant on March 12, 2018. Under subsection 15(2) of the *CSO (Conduct)*, those materials are to be provided as soon as feasible after the conduct board has been appointed. That is in line with the goals of expediency and efficiency expounded within the current conduct process. Subsection 15(3) of the *CSO (Conduct)* then requires the subject member to submit their response to the allegations

within 30 days of being served with the *Notice of Conduct Hearing* and the investigation report. The Respondent acknowledges the goal of expediency in her response to the motion, yet it was not until July 5, 2019, that she provided the last of the disclosure. That followed several increasingly explicit directions issued by the Conduct Board after the initial directions were either misunderstood or ignored.

[75] Given the history of the communications between the Conduct Board and the Respondent and the Respondent's failure to abide by the initial direction, it is not surprising that the Conduct Board felt it necessary to be more explicit with the final direction in terms of the extent of the search and the reporting requirements of what was located and potentially subject to disclosure. The fact that the Respondent felt that the direction was unprecedented and "not a general practice found within the RCMP Code of Conduct process" is neither here nor there. It was lawful and reasonable, and it was necessary because of the Respondent's failure or refusal to do what was previously directed. The Conduct Board accurately outlined the generally accepted process for determining claims of privilege followed by criminal and civil courts and administrative tribunals and it directed that it be followed in order to resolve these disclosure issues.

[76] That was the Conduct Board carrying out its responsibilities pursuant to the authority of subsection 13(4) of the *CSO (Conduct)*. If a conduct authority disagrees with that direction, the appropriate course of action is to abide by the direction and file an appeal at the conclusion of the proceeding.

[77] While the actions of the Respondent in failing to follow the direction of the Conduct Board in a timely manner unnecessarily delayed these proceedings, I attribute that reluctance or resistance to a lack of experience or knowledge of the law as opposed to wilful disobedience. Therefore, I would not have found that it met the threshold for an abuse of process.

INSUFFICIENCY OF THE INVESTIGATION

[78] The Applicant argues that "the manner in which the Code of Conduct investigation was conducted lacks sufficiency and raises concern for bias". The basis for the Applicant's concern is that many witnesses with relevant information on KR's actions and behaviour in the workplace

were not interviewed and some of those who were interviewed were not allowed to share information they considered relevant to the investigation. This resulted in the Applicant's counsel interviewing and obtaining will says from eight additional witnesses. Their evidence contains information relating to KR's alleged inappropriate actions and behaviour in the workplace and in essence provides a motive for what is implied to be KR's false claims of harassment on the part of the Applicant.

[79] It would appear from the evidence of these additional witnesses that the investigators were narrowly focused on the specific incidents of harassment alleged by KR and the other complainants, perhaps at the expense of a thorough and complete investigation. I don't wish to condone those investigative practices. However, the law does not give the Applicant the right to a perfect investigation. It requires only that those conducting investigations act reasonably in doing so (see *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129). In the absence of bad faith on the part of the investigators, the procedural protections provided by the *RCMP Act* and the *CSO (Conduct)*, including the right to request further investigation, the ability to call his own witnesses, the ability to cross-examine witnesses at the conduct hearing and the right to make submissions on the issue are sufficient to ensure that the Applicant receives a fair hearing, despite a less than perfect investigation. An incomplete investigation on its own does not amount to an abuse of process and there is no evidence of bias or bad faith on the part of the investigators.

INSTITUTIONAL DELAY

[80] At the time this motion was brought forward, the matter had been ongoing for a total of 34 months from the date the investigation had been ordered. The Applicant argues that this amounts to undue delay warranting a stay of proceedings. He does not allege that the fairness of the hearing has been compromised due to the delay, only that he has already been suspended from duty (with pay) for three years.

[81] As correctly identified by the Appellant, the leading case on undue delay in and administrative proceeding is *Blencoe v British Columbia (Human Rights Commission)*, 2000

SCC 44, [2000] 2 SCR 307. The threshold is high. The Court summarized the prejudice against Mr. Blencoe due to the delay in that case as follows:

> […] In March 1995, while serving as a minister in the Government of British Columbia, the respondent was accused by one of his assistants of sexual harassment. A month later, the premier removed the respondent from Cabinet and dismissed him from the NDP caucus. In July and August of 1995, two complaints of discriminatory conduct in the form of sexual harassment were filed with the British Columbia Council of Human Rights (now the British Columbia Human Rights Commission) against the respondent by two other women, W and S. The complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. The respondent was informed of the first complaint in July 1995 and of the second in September 1995. After the Commission's investigation, hearings were scheduled before the British Columbia Human Rights Tribunal in March 1998, over 30 months after the initial complaints were filed. […]
>
> Following the allegations against Mr. Blencoe, media attention was intense. He suffered from severe depression. He did not stand for re-election in 1996.

[82] At paragraph 115, the Supreme Court of Canada talks about what will amount to unacceptable delay even when the fairness of the hearing has not been compromised:

> 115 I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

[83] The Court also made it clear that there is no constitutional right outside the criminal context to be "tried" within a reasonable time and that paragraph 11(b) of the *Charter* right to

trial within a reasonable time cannot be transplanted to an administrative proceeding as paragraph 11(b) is restricted to a pending criminal case. It held that the significant prejudice suffered by Mr. Blencoe was not enough to amount to an abuse of process, absent any indication that hearing fairness has been impaired.

[84] The Applicant does not argue that hearing fairness has been impaired by the delay in this matter, only that it caused prejudice to him as he had been suspended for nearly three years. He also argues that it "causes prejudice to the integrity of the process". While any such delays are unfortunate and do not reflect well on a conduct process that values expediency and efficiency, without more, the high threshold articulated by the Supreme Court has not been met for an abuse of process.

CONCLUSION

[85] The Commissioner mandated that the IRHC process be followed for complaints of harassment against members of the RCMP. The Respondent arbitrarily bypassed those rules and opted for an alternative process that deprived the Applicant of his legal rights and of the duty of procedural fairness owed to him. It would be unfair to the Applicant and it would bring the administration of justice into disrepute, to allow the proceedings to continue. Therefore, I direct a stay of proceedings as the appropriate remedy.

[86] The parties are reminded that section 45.11 of the RCMP Act sets out the provisions to appeal this decision and the rules governing such an appeal are contained in the Commissioner's Standing Orders (Grievances and Appeals).

May 19, 2020

Gerald Annetts — Date

Conduct Board