Protected A

File 2019335744

2021 CAD 12

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

an appeal of a conduct board's decision pursuant to subsection 45.11(3) of the

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

BETWEEN:

Commanding Officer, "K" Division

Royal Canadian Mounted Police

(Appellant)

and

Cst. Vernon Pederson

Regimental number 56253

(Respondent)

Protected A

File 2019335744

(the Parties)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: April 30, 2021

SYNOPSIS

In December 2017, Cst. M reported to her supervisor that she had been the victim of alleged incidents of harassment and sexual assault by the Respondent between September 2011 and February 2012.

Cst. M's supervisor reported the matter up the chain of command. The Respondent's line officer was advised of the alleged incidents.

The complaint was referred to the Alberta Serious Investigation Response Team (ASIRT) and a Code of Conduct investigation was initiated into four alleged contraventions by the Respondent. The Code of Conduct investigator was supplied copies of the various statements obtained by ASIRT 11 months later.

In November 2018, the Respondent was served with a *Notice of Request for the Extension of Time Limitations*, pursuant to subsection 47.4(1) of the *RCMP Act*, informing him that a four-month extension to the time limitation prescribed would be sought. The *Request for the Extension of Time Limitations* was filed with the Director General of the Workplace Responsibility Branch (DGWRB). The Respondent provided a submission outlining his objection to the Appellant's request. In December 2018, following the expiry of the prescription period on December 6, 2018, the Respondent was served with an *Amended Notice of Request for the Extension of Time Limitations*. Subsequently, the *Amended Request for the Extension of Time Limitations* was filed with the DGWRB.

On January 30, 2019, the DGWRB granted the Appellant's request for an extension to the one-year time limitation, prescribed by subsections 41(2) and 42(2) of the *RCMP Act*, from December 6, 2018, to April 5, 2019.

Following the appointment of a Conduct Board on March 25, 2019, a *Notice of Conduct Hearing* was issued on April 1, 2019.

The Respondent sought a stay of proceedings on the basis that the extension decision was clearly unreasonable.

The Board concluded that the extension decision was clearly unreasonable and granted the Respondent's motion to stay the proceedings. The Appellant appealed.

The Conduct Appeal Adjudicator: confirmed the Board had the authority to consider the motion; agreed the Board should have applied the reasonableness standard, although nothing turned on this; found that the Board decision is not clearly unreasonable; and, dismissed the appeal.

INTRODUCTION

[1] The Commanding Officer, "K" Division, as a conduct authority (Appellant) appeals, pursuant to subsection 45.11(3) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, as amended (*RCMP Act*), the decision by a Conduct Board, dated September 26, 2019, to grant a stay of proceedings due to the expiration of the time limitation to initiate the conduct process, as set out in subsection 41(2) of the *RCMP Act*, concerning alleged contraventions by the Respondent of the RCMP Code of Conduct.

[2] The Appellant challenges the decision on the basis that the Board did not have the authority to review the reasonableness of the decision by the Director General of the Workplace Responsibility Branch (DGWRB). In his appeal submission, the Appellant contends that the Board made a manifest error by reviewing the extension decision, interpreting the relevant legislation to "expand his authority beyond what is was granted under the *RCMP Act*", and concluding that the extension decision was clearly unreasonable (Appeal, p 177).

[3] The Commissioner has the authority, under subsection 45.16(11) of the *RCMP Act*, to delegate her power to make final and binding decisions in conduct appeals. I have received such a delegation.

[4] I apologize to the Parties for the delays attributable to the RCMP in the adjudication of this matter.

[5] In rendering this decision, I have considered the material that was before the Board who issued the decision that is the subject of this appeal (Material), as well as the appeal record

(Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA), collectively referred to as the Record.

[6] Unless otherwise stated, I will refer to documents in the Material and the Appeal by page number. References to audio statements, if any, taken for the Code of Conduct investigation will be noted using the elapsed time of the individual's statement. In addition, references to legislative provisions reflect those in effect at the time of the events.

[7] For the reasons that follow, the appeal is dismissed.

BACKGROUND

[8] On December 6, 2017, Cst. M accused the Respondent of incidents of harassment and sexual assault that had allegedly occurred on various occasions between September 2011 and February 2012, including when he was her Cadet Field Trainer, while she was posted to the X Detachment.

[9] Cst. M reported the matter to her supervisor, who reported the matter up the chain of command. The Respondent's line officer was advised of the alleged incidents.

Code of Conduct proceedings and events leading up to the Board's decision

i. Mandate Letter

[10] On December 8, 2017, the Officer in Charge (OIC) of INSET "K" Division, signed a Code of Conduct Investigation Mandate Letter (Mandate Letter), which initiated an investigation into four allegations (Material, pp 65-66):

> **Allegation 1:**
>
> On or between September 19th, 2011, and December 27th, 2014, at or near [X], Alberta, [Cst. P], did while on duty, engage in sexual activity by inappropriately touching [Cst. M] in a sexual manner.
>
> It is therefore alleged that [Cst. P] contravened Section 7.1 of the RCMP Code of Conduct:
>
> ***"Members behave in a manner that is not likely to discredit the Force."***

Allegation 2:

On or between September 19th, 2011, and December 27th, 2014, at or near [X], Alberta, [Cst. P], did while on duty, engage in sexual activity by inappropriately touching [Cst. M] in a sexual manner and having her inappropriately touch [Cst. P] in a sexual manner.

It is therefore alleged that [Cst. P] contravened Section 7.1 of the RCMP Code of Conduct:

"Members behave in a manner that is not likely to discredit the Force."

Allegation 3:

On or between September 19th, 2011, and December 27th, 2014, at or near [X], Alberta, [Cst. P], did while on duty, abuse his authority as [Cst. M's] Cadet Field Trainer, by engaging in sexual activity with her.

It is therefore alleged that [Cst. P] contravened Section 7.1 of the RCMP Code of Conduct:

"Members behave in a manner that is not likely to discredit the Force."

Allegation 4:

On or between September 19th, 2011, and December 27th, 2014, at or near [X], Alberta, [Cst. P], did while both on and off duty, send inappropriate text messages to [Cst. M].

It is therefore alleged that [Cst. P] contravened Section 2.1 of the RCMP Code of Conduct:

"Members treat every person with respect and courtesy and do not engage in discrimination or harassment."

[11] The Record indicates that the Mandate Letter was served on the Respondent on December 8, 2017 (Material, p 69). An Order of Suspension was served on the Respondent on the same date (Material, pp 951-954).

Notice of Request for the Extension of Time Limitations

[12] On November 27, 2018, the Respondent was served with a Notice of Request for the Extension of Time Limitations, pursuant to subsection 47.4(1) of the *RCMP Act*, dated November 15, 2018, informing him that a four-month extension to the time limitation prescribed by subsection 42(2) of the *RCMP Act* would be sought (Material, pp 964-967).

[13] The Respondent was informed of his right to provide a submission to the DGWRB.

Request for the Extension of Time Limitations

[14] On November 28, 2018, a Request for the Extension of Time Limitations, dated November 27, 2018, was filed with the DGWRB (Material, pp 972-974, 981).

Respondent's submission to the DGWRB

[15] On November 29, 2018, the Respondent presented his submission to the DGWRB, outlining his objection to the request for an extension of the time limitation (Material, pp 975-980).

Expiry of the prescription period

[16] The prescription period expired on December 6, 2018.

Amended Notice of Request for the Extension of Time Limitations

[17] On December 19, 2018, the Respondent was served with an amended Notice of Request for the Extension of Time Limitations, dated December 17, 2018, advising him that a four-month extension to the time limitation would be sought with no explanation of what changes had been made to the original request (Material, pp 983-986).

[18] In addition, the Respondent was once again informed of his right to provide a submission to the DGWRB.

Amended Request for the Extension of Time Limitations

[19] On December 21, 2018, an amended Request for the Extension of Time Limitations, dated December 20, 2018, was filed with the DGWRB (Material, pp 991-994).

DGWRB extension decision

[20] On January 30, 2019, the DGWRB granted the Appellant`s request for an extension to the one-year time limitation, prescribed by subsections 41(2) and 42(2) of the *RCMP Act*, by 120 days from December 6, 2018, to April 5, 2019 (Material, pp 995-1006).

Appointment of Conduct Board

[21] On March 25, 2019, the Board was appointed.

ii. Notice of Conduct Hearing

[22] On April 1, 2019, a *Notice of Conduct Hearing* was issued.

iii. Investigation

[23] The Code of Conduct Investigation Report, dated December 6, 2018, was completed by Sgt. A (Investigator) (Material, pp 88-744).

[24] The Investigator reviewed various witness member statements obtained by the Alberta Serious Investigation Response Team (ASIRT), including a subject member statement provided by the Respondent, and a statement of facts by the Respondent. She also reviewed handwritten notes, emails, an employee profile, a briefing note, a digital copy of the PROS file, a Recruit Training Summary, a copy of the Learning, Training and Development Manual 2.2 Field Coaching Program, a Vancouver Police File, photographs of the viewing room at the X Detachment and other photographic evidence, the definition of "sexual misconduct" on the Infoweb, a copy of AM Chapter XII.8 Investigation and Resolution of Harassment Complaints, member character interviews, and a surreptitiously recorded conversation involving the Respondent.

iv. Conduct Board decision

[25] On September 26, 2019, the Board rendered a decision, granting a motion to stay the proceedings on all conduct allegations concerning the Respondent (Appeal, pp 8-28).

[26] At the outset, the Board considered his authority to hear the Respondent's motion (Appeal, p 12). The Board distinguished the facts and circumstances in the case of *Solesme* from the Appellant's situation, by explaining that "the conduct board had already been appointed at the time that the extension was sought" (Appeal, p 12).

[27] The Board considered the Appellant's argument that it did not have the authority to review the DGWRB's decision (Appeal, p 12). However, the Board disagreed, citing subsection 13(4) of the *CSO (Conduct)*:

> (4) If any matter arises in the proceedings that is not otherwise provided for in the Act, the Regulations or these Standing Orders, the conduct board may give any direction that it considers appropriate.

[28] In support of the finding that it had the authority to hear the motion, the Board also referred to the case of *Calandrini*, 2018 RCAD 10, in which a conduct board reviewed a DGWRB decision to extend a time limitation.

[29] In addition, the Board explained that he not only had the "authority" to review the DGWRB decision. In his view, he also had an "obligation" to do so (Appeal, p 13).

[30] The Board noted that the time limitation pursuant to subsection 41(2) of the *RCMP Act* commenced on December 6, 2017, and ended on December 6, 2018 (Appeal, p 13).

[31] Moreover, the Board considered the argument that the decision to grant an extension of time was both invalid and unreasonable (Appeal, p 13). The Board found that the Amended Request was made after the expiry of the time limitation. However, citing the Federal Court's decision in the case of *Calandrini v Canada (Attorney General)*, 2018 FC 52 [*Calandrini*], in which the authority to grant retroactive extensions was confirmed, the Board found that the DGWRB had the authority to issue the extension of time (Appeal, p 15). I outline the details of the Federal Court decision in *Calandrini* later in my analysis.

[32] The Board considered the concerns raised in relation to procedural fairness (Appeal, p 16). The Board noted that the standard of review for procedural fairness is correctness, citing the Supreme Court of Canada decision in the case of *Mission Institution v Khela,* 2014 SCC 24 [*Khela*]. The Board noted that "the level of procedural fairness must be assessed on a contextual basis", as explained by the Supreme Court of Canada decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. The Board found that the Applicant was "owed a substantial level of procedural fairness" (Appeal, p 16). With respect to the Applicant's right to be heard, the Board found that this right was respected. The Board explained

that although there was "room for improvement" in the Notice, it did not contain "a determinative deficiency". Rather, the Board was satisfied that the Amended Notice "contained sufficient information to enable the Applicant to know the case against him" (Appeal, p 21), and concluded that no breach of the principles of procedural fairness had occurred.

[33] The Board also considered whether the DGWRB decision was clearly unreasonable (Appeal, p 22). Specifically, the Board, following *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*], considered whether the decision to grant an extension for the time limitation in subsection 41(2) of the *RCMP Act* was "justified, transparent, intelligible" and fell "within a range of possible acceptable outcomes" (Appeal, p 23). The Board also referred to the Federal Court's decision in *Kalkat v Canada (Attorney General),* 2017 FC 794 [*Kalkat*].

[34] The Board found that the decision to pause the investigation into the allegations, until the completion of the ASIRT investigation, was not clearly unreasonable (Appeal, p 24). In addition, the Board explained that it had "noted several deficiencies, most notably the absence of any rationale for the granting of an extension to pursue a conduct hearing" (Appeal, p 24). In the Board's view, the "lack of a nexus between the rationale provided for seeking an extension and the articulation as to why it should be permitted to allow for the initiation of a conduct hearing" was "problematic" (Appeal, p 26).

[35] In considering the DGWRB decision, the Board noted that "significant deference is owed" to the original decision maker "in the administration of his process" (Appeal, pp 26-27). The Board found that there was "no rationale on which a reasonable person could rely to support the decision to grant an extension for the initiation of a conduct hearing" (Appeal, p 27). The Board explained that he could not satisfy himself that the DGWRB decision was "justified, transparent and intelligible", nor could he find that it fell "within a range of possible acceptable outcomes which are defensible in respect of facts and law" (Appeal, p 27). The Board concluded that the decision to grant a time limitation extension, "to permit the initiation of a conduct hearing", was clearly unreasonable (Appeal, p 27).

[36] For ease of reference, excerpts of the Board's findings are provided below (Appeal, p 28):

> [114] While I do have some concerns in relation to the sufficiency of the Amended Notice, I do not find that the deficiencies amount to a breach of the principles of procedural fairness.
>
> [115] However, given the absence of any rationale for a conduct hearing in both the request for the extension of the time limitation for a conduct hearing and in the DGWRB's decision that granted it, I find his decision to be clearly unreasonable.
>
> [116] I am acutely aware that granting a stay of proceedings will prevent the merit of these very serious allegations from being heard in an open hearing and the inherent public interest in seeing that done; however, I cannot uphold a decision which is clearly unreasonable. To do so would bring the administration of the RCMP conduct process into disrepute.
>
> [117] Given that the [*sic*] I have found the DGWRB's decision to be unreasonable, the extension of time was not properly granted. Therefore, the Respondent failed to initiate the conduct hearing within the prescribed limitation period pursuant to subsection 41(2) of the *RCMP Act*.
>
> [118] As a result, I hereby grant the Applicant's motion and order a stay of proceedings on all allegations.

[37] The Appellant received the Board's decision on September 26, 2019 (Appeal, p 6).

THE APPEAL

[38] On October 8, 2019, the Appellant, through his representative, presented Form 6437 – *Statement of Appeal* to the OCGA (Appeal, pp 6-7).

[39] The Appellant claims that the Board's decision was reached in a manner that contravened the principles of procedural fairness, was based on an error of law, and is clearly unreasonable (Appeal, p 6). He notes that his appeal will be "outlined in the submissions" (Appeal, p 6).

[40] As redress, he requests that the conduct hearing proceed (Appeal, p 7).

Appellant's submission on the merits

[41] The Appellant, through his representative, filed his appeal submissions on July 20, 2020 (Appeal, pp 173-180).

[42] In addition, he provided summaries of various cases in support of his position (Appeal, pp 181-672).

[43] The Appellant explains that he was the conduct authority who initiated proceedings against the Respondent on March 22, 2019 (Appeal, p 174).

[44] The Appellant outlines the applicable standards of review. Turning to the grounds of appeal, the Appellant submits that the decision of the DGWRB was not subject to the Board's review (Appeal, p 175). In his view, the Board's authority did not include "the authority to assess the reasonableness of the DGWRB's extension decision" (Appeal, p 175). He argues that the "directions" which a conduct board may issue, "relative to the proceedings", "are distinguishable from issuing order on a motion related to the reasonableness of a decision made by the Commissioner or the Commissioner's delegate" (Appeal, p 176).

[45] In addition, the Appellant, citing *Solesme*, argues that the Board's review of the extension decision was "contrary to the intent to have conduct proceedings dealt with expeditiously" (Appeal, p 177). In the Appellant's view, the Board did not have the "express or implied authority" to review the reasonableness of the DGWRB decision. He explains that by doing so, the Board committed "a manifest error in engaging in a review of the extension decision and in interpreting the legislative framework to expand its authority beyond what it was granted under the *RCMP Act*" (Appeal, p 177).

[46] Moreover, the Appellant argues that the conduct allegations against the Respondent "raised serious issues of sexual misconduct in the workplace." In the Appellant's view, "the public interest called for a thorough examination of the events forming the four allegations of misconduct" (Appeal, p 177). On this basis, he argues that the Board's decision "was not only

contrary to the public interest, but brought the administration of the RCMP conduct process into disrepute" (Appeal, p 177).

[47] In addition, the Appellant argues that the Board had "erred" by "identifying the wrong standard of review in relying on *Kalkat*", as the decision in that case was concerned with the "interpretation" of subsection 33(1) of the *CSO (Grievances and Appeals)*, which "was not relevant to the [Board] analysis" (Appeal, p 178). He points out that the Board "failed to apply the required level of deference" to the DGWRB decision.

[48] In his view, the Board had erred by finding "that there was an absence of rationale for the granting of an extension to pursue a conduct hearing" (Appeal, p 178). He argues that the reasons for granting an extension were "adequate since they are based on a record comprised of several documents and provide an intelligible and clear justification for the decision" (Appeal, p 179). The Appellant adds that "the courts have recognized that the reasons do not have to be perfect or comprehensive" (Appeal, p 179). He submits that the DGWRB decision did not contain any "fatal flaws", and argues that both the conclusion that an extension was justified pursuant to subsection 47.4(1) of the *RCMP Act*, as well as the outcome of "a four-month extension of the prescription period", were reasonable (Appeal, p 180).

[49] The Appellant explains that certain conduct proceedings could not "be initiated without obtaining the authorization from the Alberta Serious Investigation Response Team (ASIRT), which did not occur until after the expiry of the prescription period on December 6, 2018" (Appeal, p 179).

[50] In his view, the Board had erred by "narrowly focusing on the presence of flaws" in the extension request, dated December 20, 2018, and by omitting "to consider the decision as a whole in assessing whether the extension decision was reasonable" (Appeal, p 179). He argues that the Board had "engaged in a review which amounted to a line-by-line search for errors which was incompatible with the deference it owed the DGWRB" (Appeal, p 179), and that the Board's failure to accord deference to the DGWRB was a manifest error (Appeal, p 180).

[51] The Appellant requests that the motion granted for a stay of proceedings "be quashed" and that the matter be remitted to a conduct board "to be heard on its merits" (Appeal, p 180).

Respondent's submission on the merits

[52] The Respondent, through his representative, filed his submission on August 24, 2020, after being granted an extension (Appeal, pp 725-736). In addition, the Respondent provided various authorities in support of his position (Appeal, pp 737-966).

[53] The Respondent argues that the Board had the power to grant a motion for a stay of proceedings by reviewing the decision to extend the time limitation (Appeal, p 728). He notes that this power "has been confirmed by the Federal Court, and is consistent with the power conferred upon a Conduct Board by the *RCMP Act* and *CSO (Conduct)*" (Appeal, p 728).

[54] The Respondent requests that the appeal be dismissed and that the Board's decision be confirmed.

[55] With respect to the question of whether the Board was "clearly unreasonable" by finding that it had the authority to stay the proceedings, the Respondent explains that the "clearly unreasonable" standard of review applies (Appeal, p 730).

[56] In addition, with respect to the Board's authority, the Respondent cites the Federal Court decision in *Calandrini*, and specifically, the finding that "the conduct board can determine whether the extension should have been granted" (Appeal, p 731). In the Respondent's view, the Board did not err by simply "following the same reasoning as the Federal Court in *Calandrini*" (Appeal, p 731).

[57] Further, with respect to the Appellant's argument that the Respondent could have requested a review of the DGWRB decision under section 45.11 of the *RCMP Act*, the Respondent argues that this issue was not put before the Board and that the Appellant should not be allowed to raise it for the first time on appeal (Appeal, p 732).

[58] The Respondent notes that an appeal with respect to a decision to extend a prescription period is not permitted by section 45.11, but rather, falls "within the residual power of a Conduct Board provided for in s. 13(4) of the *CSO* (*Conduct*)" (Appeal, p 733).

[59] In the Respondent's view, the Board's decision was "consistent with the Federal Court's decision in *Calandrini*" (Appeal, p 733).

[60] The Respondent argues that the Board applied the principle that a "decision is unreasonable if it simply lists relevant factors" and provides a conclusion "without any reasoning leading to that conclusion" (Appeal, p 735). In the Respondent's view, the DGWRB had simply reached conclusions "without explaining why or how" (Appeal, p 735). Specifically, the Respondent argues that the DGWRB had "provided no reasons for concluding that there was a continuing intention to pursue a conduct hearing" (Appeal, p 736).

[61] The Respondent argues that the Board "acted reasonably in the way it reviewed the DGWRB's decision, and also reasonably concluded that the DGWRB's decision lacked justification, transparency, and intelligibility" (Appeal, p 736).

Appellant's rebuttal

[62] The Appellant, through his representative, filed his rebuttal along with supporting documentation consisting of two authorities, on September 28, 2020, after being granted an extension (Appeal, pp 973-1032).

[63] According to the Appellant, an incorrect file was provided in support of the appeal submissions on July 20, 2020. He explains that the correct decision "being referred to" is attached to his rebuttal (Appeal, p 976). Based on the Record, I note that the Parties would later have opportunities to provide supplemental submissions on the correct decision filed by the Appellant (Appeal, pp 1034-1113).

[64] The Appellant "disagrees" with the Respondent's submission that he had provided "new" information which should not be considered at the appeal stage. He explains that he "has the ability to raise issues regarding the extension granted by the DGWRB" (Appeal, p 976).

[65] In addition, the Appellant "disagrees" with the Respondent's "interpretation" of the Federal Court's decision in *Calandrini* (Appeal, p 976). In his view, "[w]hat the court conclusively settled was that the application was premature and the internal administrative process should be permitted to run its course" (Appeal, p 977). He adds that *Calandrini*, overall, "is not concerned" with the authority to review a DGWRB decision, "nor does it confirm such authority" (Appeal, p 977).

[66] In addition, the Appellant "disagrees" with what he describes as the Respondent's "narrow interpretation" of section 45.11 of the RCMP Act (Appeal, p 977). The Appellant argues that the Commissioner "has applied a more liberal interpretation of this provision", citing the case of *Brown* (2017) ACMT 2016335707 (Appeal, p 977).

[67] With respect to the Respondent's argument that "[t]he Appellant also attempts to rely upon the DGWRB's own statement that its decision is subject to an appeal", the Appellant explains that the DGWRB's "understanding of the procedural issues arising from his decision" under section 47.4 "is a relevant consideration" (Appeal, pp 977-978).

[68] Once the OCGA had prepared the appeal package, the Parties were provided a copy for review.

[69] On November 30, 2020, the OCGA confirmed that a correction to the Record, requested by the Appellant's representative, had been made (Appeal, p 1121).

[70] The OCGA also exchanged emails with the Respondent's representative, who confirmed, on December 14, 2020, that no further submissions would be made (Appeal, p 1147).

MANDATE

[71] Subsection 33(1) of the *CSO (Grievances and Appeals)* requires me to consider whether the decision under appeal:

- contravenes the principles of procedural fairness,

- was based on an error of law, or
- is clearly unreasonable.

Applicable standard of review

[72] The Supreme Court of Canada re-examined the standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), in which the Court confirmed that legislated standards of review should be respected (paras 34-35). Accordingly, I am prepared to review any breach of procedural fairness on the standard of correctness, and no deference will be given. I also note that when an error of law has been found, the appropriate legal test may be applied to the factual findings (see *Housen v Nikolaisen*, [2002] 2 SCR 235; and, *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339).

[73] In contrast, the question of whether a decision is clearly unreasonable as a result of an alleged error of fact (or mixed fact and law) requires significant deference be accorded to the original decision maker.

[74] In *Kalkat*, the Federal Court considered the term "clearly unreasonable" as it is set out in subsection 33(1) of the *CSO (Grievances and Appeals)*:

> [62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term [*manifestement déraisonnable*], I conclude that the Delegate did not err. Interpreting the "clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding (*British Columbia Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25).

[75] In *Smith v Canada (Attorney General)*, 2019 FC 770, a similar finding was considered and adopted:

> [38] The Adjudicator undertook an extensive analysis in order to arrive at the conclusion that the standard of patent unreasonableness applies to the Conduct Authority Decision. This analysis included a review of relevant

> case law, the meaning of the word "clearly", and the French text of subsection 33(1). The Adjudicator's conclusion that the applicable standard of review was patent unreasonableness is justifiable, transparent, and intelligible. The Court agrees that this was a reasonable conclusion.

[76] The Federal Court of Appeal recently dismissed the appeal of the *Smith* judicial review decision, 2021 FCA 73, stating, *inter alia*:

> [43] First, I find it interesting that the appellant and the intervener failed to properly address the French version of subsection 33(1) and why the [appeal] Decision is unreasonable in light of it. The French text uses the terms "manifestement déraisonnable" which translate to "patently unreasonable", and have been interpreted as such in the Supreme Court jurisprudence. Based on the modern approach to statutory interpretation, the conduct adjudicator's analysis demonstrates that subsection 33(1) was reasonably interpreted to require patent unreasonableness.

[77] In *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at para 57, the SCC explained that a decision is patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", in other words, it is "openly, evidently, clearly" wrong. Later, the SCC stated in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at para 52, that a patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand."

[78] As a result, questions of fact or mixed fact and law are entitled to significant deference, and only the presence of a manifest and determinative error would lead to a conclusion that a decision is clearly unreasonable.

ANALYSIS

[79] The Appellant argues the Board erred by finding that there was no basis for the granting of an extension of time to the limitation period, to facilitate a conduct hearing. In the Appellant's view, the Board's decision was "contrary to the public interest" and "brought the administration of the RCMP conduct process into disrepute" (Appeal, p 177). He challenges the impugned decision on the basis that it contravened the applicable principles of procedural fairness, was based on an error of law, and is clearly unreasonable.

[80] I will examine the Appellant's arguments in relation to each ground of appeal.

1. Was the Board's decision procedurally unfair?

[81] In his Statement of Appeal, the Appellant indicated that the Board's decision contravened the principles of procedural fairness. However, he did not elaborate.

[82] Procedural fairness is made up of two broad rights, as explained by the RCMP External Review Committee (ERC) in G-568, which the former Commissioner endorsed on January 20, 2015:

> Procedural fairness is a common law principle that has come to be seen as the "bedrock of administrative law". It comprises two broad rights: the right to be heard and the right to an impartial decision-maker [see David J. Mullan. *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) 4, 232]. Where procedural fairness is found to have been denied, a decision will be deemed invalid unless the substance of a claim "would otherwise be hopeless" [see *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643; *Kinsey v. Canada (Attorney General)*, 2007 FC 543; *Mobil Oil Canada v. Canada Newfoundland Offshore Petroleum Board* [1994] 1 S.C.R. 202; and *Stenhouse v. Canada (Attorney General)* [2004] FC 375].

[83] Breaches of procedural fairness will normally render a decision invalid; the usual remedy is to order new proceedings, with the exception where the circumstances will inevitably lead to the same outcome (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at paras 51-54; *Renaud v Canada (Attorney General)*, 2013 FCA 266, at para 5).

[84] Even in his appeal submission, the Appellant does not provide any arguments on how his right to be heard and right to an impartial decision maker were not respected. From my review, I am satisfied that nothing in the Record suggests a reasonable apprehension of bias, and moreover, the Appellant was provided ample opportunity to argue against the motion to stay the proceedings.

[85] I will say nothing further with respect to procedural fairness.

2. Was the Board's decision based on an error of law?

[86] An error of law is generally described as the application of an incorrect legal requirement or a failure to consider a requisite element of a legal test (see, for example, *Housen v Nikolaisen*, [2002] 2 SCR 235, at para 36). Stated another way, "[a] question which seeks to determine the proper interpretation of a legal requirement [or statutory provision] rather than the manner in which the requirement is applied to the particular facts is a question of law" (Robert Macaulay & James Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf (Toronto: Thompson Reuters, 2017), vol 3, at 28-336, n 236).

[87] The Appellant makes two arguments that seemingly fall under the guise of an error of law. First, the Board did not have the jurisdiction to review the DGWRB decision, and second, essentially in the alternative, the Board erred by "identifying the wrong standard of review in relying on *Kalkat*." With respect to the latter, the Appellant states that the decision in *Kalkat* was concerned with the "interpretation" of subsection 33(1) of the *CSO (Grievances and Appeals)*, and that this "was not relevant to the [Board's] analysis" (Appeal, p 178).

[88] Prior to *Vavilov*, questions of jurisdiction were examined under the standard of correctness (see, for example, *Dunsmuir*, at para 59). Now, that does not seem to be case (*Vavilov*, at para 67):

> [67] In *CHRC* [*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31], the majority, while noting this inherent difficulty - and the negative impact on litigants of the resulting uncertainty in the law - nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category - in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority - can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their

> lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[89] As I will briefly explain, I am satisfied that conduct boards have the authority to consider motions by subject members challenging extension decisions rendered under subsection 47.4(1) of the *RCMP Act*.

Did the Board have the authority to review the DGWRB extension decision?

[90] The Appellant insists that the Board did not have the authority to review the reasonableness of the DGWRB decision. The Respondent disagrees, explaining that the Board's power to so "has been confirmed by the Federal Court, and is consistent with the power conferred upon a Conduct Board by the *RCMP Act* and *CSO (Conduct)*" (Appeal, p 728).

[91] In the Respondent's view, "the issue is not whether the Conduct Board erred – the issue is whether the Conduct Board was "clearly unreasonable" in concluding that it had the authority to stay this proceeding" (Appeal, p 730).

[92] The Board considered his jurisdiction to review the DGWRB decision and concluded that he had the authority, as well as an "obligation", to hear the motion. I agree. A conduct board has been granted generous powers by Parliament in the *RCMP Act* (see, for example, subsection 45(2)), as well as, by the Commissioner in the *CSO (Conduct)*, including subsection 13(4):

> (4) If any matter arises in the proceedings that is not otherwise provided for in the Act, the Regulations or these Standing Orders, the conduct board may give any direction that it considers appropriate.

[93] The Board also relied on the Federal Court's decision in *Calandrini*. In that case, the applicant, a civilian member of the RCMP, sought judicial review of the decision to initiate a conduct board hearing against him, as well as the decision to grant an extension of time, pursuant to subsection 47.4(1) of the *RCMP Act*, for the initiation of the conduct hearing. In determining that the application was premature, the Federal Court referred to the authority of the conduct board to consider "the procedures that were followed or the merits of the alleged contraventions" (para 61).

[94] In short, I am satisfied that the Board had the authority to consider the motion.

Did the Board apply the appropriate standard when reviewing the DGWRB extension decision?

[95] The Appellant contends that the Board erred by relying on the standard of review confirmed in *Kalkat* and stating that "I cannot substitute my own decision unless I find [the extension] decision "clearly unreasonable"" (Appeal, p 178). The Appellant is correct to point out that *Kalkat* concerned the interpretation of subsection 33(1) of the *CSO (Grievances and Appeals)* and involved a conduct appeal under section 45.11 of the *RCMP Act*. I accept that a motion challenging an extension decision raised before a conduct board is not an appeal under section 45.11.

[96] Just the same, the Appellant insists that extension decisions "are entitled a broad margin of deference on review" and the appropriate standard is reasonableness (Appeal, p 178). The reality is that since the Federal Court of Appeal recently reached the same conclusion as the Federal Court originally did in *Kalkat* and subsequently in *Smith* – clearly unreasonable is to be treated as the traditional term patently unreasonable (see, *Smith v Canada (AG)*, 2021 FCA 73, at para 43, and *Zak v Canada (AG)*, 2021 FCA 80, at para 2) – there is no doubt that the standard purportedly applied by the Board provided a higher level of deference than the reasonableness standard the Appellant now advances.

[97] The Respondent agrees with the Appellant that the Board erred by applying the more deferential clearly unreasonable standard, but points out that nothing turns on this since "a decision that is "clearly" unreasonable must also be unreasonable" (Appeal, p 730).

[98] The power to grant an extension to the prescription periods set out in subsections 41(2) and 42(2) of the *RCMP Act* is found in subsection 47.4(1). The process for a conduct authority (or subject member) to seek the extension is set out in RCMP conduct policy, Administration Manual (AM), chapter XII.19 – *Requests for an Extension of Time Limitations*. AM XII.19 is silent on recourse presumably because Part IV of the *RCMP Act* and the *CSO (Conduct)* govern and form a unified regime.

[99] With four express exceptions, decisions made during the course of the conduct process are intended to be challenged by appeal at the conclusion of the proceedings under Part IV of the *RCMP Act*, and not, for example, by way of a grievance under Part III. Those four prescribed exceptions are set out in section 32 of the *CSO (Conduct)*: temporary reassignment; suspension; stoppage of pay and allowances; and denial or discontinuation of representation. In those instances, the member has the right to appeal the decision under Part 3 of the *CSO (Grievances and Appeals)*, but the filing of an appeal does not stay the execution of the impugned decision (subsection 32(3)) or the ongoing conduct proceedings.

[100] Clearly, a conduct board that receives a motion from a member attempting to challenge one of those four types of decisions must reject the motion because an adjudicator designated under section 36 of the *CSO (Grievances and Appeals)* **and** seized with an appeal duly filed under Part 3 has the sole authority to decide the matter. I emphasize the "and" because I recognize that persons assigned to conduct boards have been designated as adjudicators under section 36, but when they decide those appeals, they are exercising their designated authority under Part 3 of the *CSO (Grievances and Appeals)* and not their authority as a conduct board under Part IV of the *RCMP Act*.

[101] Moreover, a member who is facing a conduct meeting after the presiding conduct authority has sought and obtained an extension of the prescription period in subsection 42(2) could challenge the granting of the extension in written submissions and orally at the conduct meeting, however, given that the conduct authority is the very person who sought the extension, the likelihood of success is, in common parlance, slim to none. While strenuously arguing the issue before the conduct authority would likely amount to an exercise in futility, where a member believes there are valid arguments to explain why the extension decision should not stand, they would be wise to include a statement in their written submissions to that effect in order to preserve their right to raise the issue on appeal if necessary. That said, I note that subsection 45.11(4) states, "An appeal lies to the Commissioner on any ground of appeal", so even in the absence of raising the extension decision before the conduct authority, in my view, if raised on appeal, the issue should be considered by the adjudicator. After all, the submissions presented by the conduct authority and the member to the DGWRB, and the resulting decision, would rightly

be included in the appeal record so the original submissions of the Parties would be before the adjudicator and no one would be taken by surprise.

[102] Likewise, where a motion presented to a conduct board challenging an extension decision is unsuccessful, that ruling can later form part of the member's grounds of appeal should the need arise.

[103] Part 2 (Conduct), subsection 33(1), and Part 3 (Other Appeals), subsection 47(3), of the *CSO (Grievances and Appeals)* share essentially the same wording with respect to the obligation of the adjudicator:

> […] when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[104] The Supreme Court of Canada has long recognized that where the standard of review is prescribed by legislation, the choice must be respected (see, for example, *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, at para 20; and, *Vavilov*, at para 17).

[105] I have detailed all this to emphasize that the clearly unreasonable standard applies to the adjudication of appeals (and for completeness, final level grievances, see subsection 18(2) of the *CSO (Grievances and Appeals)*), and in the absence of legislative direction in other situations, the application of the common law standard of reasonableness necessarily follows.

[106] Consequently, I agree with the Parties that by purportedly applying the clearly unreasonable standard, the Board erred. Even so, I agree with the Respondent, that nothing turns on this since finding the extension decision clearly unreasonable implies that the Board would have found the decision to be unreasonable and the result would have been the same.

[107] The question then, now turns to whether the Board made a manifest and determinative error in reaching the conclusion he did resulting in a "clearly irrational" decision that is "so flawed that no amount of curial deference can justify letting it stand" (*Ryan*, at para 52). For reasons I will explain, I find he did not.

3. Is the Board's decision clearly unreasonable?

[108] The Appellant argues that the Board's decision was clearly unreasonable and his arguments can be summarized as follows:

a. The Board erred by "narrowly focusing on the presence of flaws" in the extension request, dated December 20, 2018 (Appeal, p 179); and,

b. The Board erred by engaging in a "line-by-line search for errors", and that by doing so, the Board failed to give deference to the DGWRB decision and omitted "to consider the decision as a whole in assessing whether the extension decision was reasonable" (Appeal, p 179).

[109] In considering whether a conduct board's decision is clearly unreasonable, I note that it is insufficient for an appellant to identify a mistake in the impugned decision or simply disagree with opinions or the interpretation of the facts. An appellant is required to demonstrate that the outcome of the decision would not be possible if the mistake had not been made. A decision will not be considered clearly unreasonable if, after mistakes are taken into account, the outcome of the decision is still plausible.

[110] In the present matter, the Board found that the DGWRB decision was not "justified, transparent and intelligible", nor did it fall "within a range of possible acceptable outcomes which are defensible in respect of facts and law" (Appeal, p 27). I have carefully considered the Board's decision. The Board recognized and noted the importance of giving deference to the original decision maker. He also acknowledged the seriousness of the conduct allegations concerning the Respondent. Despite this, the Board explained that he had considered the contents of the request for the extension of the time limitation for a conduct hearing as well as the DGWRB decision that granted it (Appeal, p 28). The Board found that neither document contained any rationale for a conduct hearing.

Did the Board err by "narrowly focusing on the presence of flaws" in the request for an extension, dated December 20, 2018, to the time limitation?

[111] The Appellant insists that the Board erred by focusing on flaws in the request for an extension.

[112] I note that throughout the Board's decision, the request for an extension is referred to as "the Amended Request."

[113] The Board found that the Amended Request was filed after the expiration of the December 6, 2018, time limitation, as it "did not just cure a typographical or editing error", but rather, "changed a fundamental component of the request" (Appeal, p 15). Despite this, the Board also found that "the DGWRB had the legal authority to issue the contested extension" (Appeal, p 15).

[114] With respect to the absence of any explanation for the difference between the Original Request and the Amended Request, the Board found that "it was improper to place any reliance on the contents of documents" that have been "amended" (Appeal, p 19). The Board explained that although this was not "a fatal error", "given the similarity of the documents", it was "worth noting so that this practice can be corrected" (Appeal, p 19). In the Board's view, "it would have been quite helpful to both the Applicant and the DGWRB if the Amended Notice and the Amended Request had contained some wording to explain the amendment" (Appeal, p 20).

[115] The Board found that the only other difference between the Original Request and the Amended Request was the addition of the following line in the latter (Appeal, p 25):

> To date, we do not have authorization to release current investigative materials; nor the full investigative materials from ASIRT;

[116] The Board noted that the DGWRB had applied the test established in the case of *Canada (Attorney General) v Pentney*, 2008 FC 96, in his consideration of whether an extension should be granted.

[117] The Board emphasized that apart from the addition of a reference to subsection 41(2) at the beginning of the Amended Request, there was "nothing to suggest that a conduct hearing was being contemplated" (Appeal, p 26).

[118] I disagree with the Appellant's argument that the Board erred by focusing on flaws in the request for an extension. In my view, the Board did the opposite. The Board focused on the request as a whole by carefully considering all aspects. While finding certain aspects "troubling", the Board recognized that they did not constitute fatal flaws.

[119] On this latter point, I too find certain aspects of the extension request package presented to the DGWRB problematic. Most striking is that the amendment and resubmission lacked the level of transparency that the situation required. In my view, not only did the Appellant have an obligation to ensure that the Respondent was informed about the addition of "*subsection 41(2) and*" in the opening line of the amended request and what it meant (that is, the Appellant was now contemplating pursuing dismissal), but the corresponding reference should have been revised in the section entitled, "Several factors are a play which lends to the request for extension of the Allegations". Instead, the relevant assertion remained unchanged with no mention of a conduct hearing:

> The current timeline will not allow for the Conduct Authority to take the matter to a meeting, impose measures and/or complete the Record of Decision within the one-year time limit;

[120] While perhaps an isolated occurrence, conduct authorities and personnel entrusted with assisting and advising them must do better than this.

> *Did the Board err by engaging in a "line-by-line search for errors", failing to give deference to the DGWRB's decision, and failing to consider the decision as a whole?*

[121] The Appellant argues that the Board erred by searching for errors in the DGWRB decision, failing to give deference to that decision, and failing to consider it as a whole.

[122] For ease of reference, here are the key references to the DGWRB decision made by the Board:

[97] Upon my review of the DGWRB's decision, I have noted several deficiencies, most notably the absence of any rationale for the granting of an extension to pursue a conduct hearing. However, this is not surprising as the Respondent did not provide any rationale for requesting it.

[…]

[106] In paragraph 29 of the DGWRB's decision, he correctly noted that the burden was on the Respondent to demonstrate that the extension was justified in the circumstances, which is consistent with the intent of subsection 47.4(1) of the *RCMP Act*, which states:

> **If the Commissioner is satisfied that the circumstances justify an extension**, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limited by any of subsections 31(2), 41(2), 42(2) and 44(1), for the doing of any act described in that subsection and specify terms and conditions in connection with the extension. [Emphasis added]

[107] As I remarked in paragraph 97, the Respondent did not provide any explanation as to why an extension was required for the initiation of a conduct hearing, so the DGWRB did not have any circumstances before him on which he could justify an extension. Hence, the DGWRB did not articulate any in his decision.

[…]

[110] While the Federal Court refers to insufficient evidence, it does not speak to the absence of evidence, as I have found in the instant matter. While one could reasonably see how the DGWRB arrived at the decision to grant an extension for the purpose of holding a conduct meeting, I find that there is no rationale on which a reasonable person could rely to support the decision to grant an extension for the initiation of a conduct hearing.

[…]

[112] After reviewing the Amended Request carefully, I cannot satisfy myself that the decision made by the DGWRB is justified, transparent and intelligible. Nor, do I find that it falls within a range of possible acceptable outcomes which are defensible in respect of facts and law.

[113] Therefore, I find that the DGWRB's decision to grant a time limitation extension pursuant to subsection 47.4(1) of the *RCMP Act* to permit the initiation of a conduct hearing clearly unreasonable.

[114] While I do have some concerns in relation to the sufficiency of the Amended Notice, I do not find that the deficiencies amount to a breach of the principles of procedural fairness.

> [115] However, given the absence of any rationale for a conduct hearing in both the request for the extension of the time limitation for a conduct hearing and in the DGWRB's decision that granted it, I find his decision to be clearly unreasonable.
>
> [116] I am acutely aware that granting a stay of proceedings will prevent the merit of these very serious allegations from being heard in an open hearing and the inherent public interest in seeing that done; however, I cannot uphold a decision which is clearly unreasonable. To do so would bring the administration of the RCMP conduct process into disrepute.
>
> [117] Given that the [*sic*] I have found the DGWRB's decision to be unreasonable, the extension of time was not properly granted. Therefore, the Respondent failed to initiate the conduct hearing within the prescribed limitation period pursuant to subsection 41(2) of the *RCMP Act*.
>
> [118] As a result, I hereby grant the Applicant's motion and order a stay of proceedings on all allegations.
>
> [Emphasis in original.]

[123] I have carefully considered the DGWRB extension decision in light of the Board's findings. I accept that the Appellant noted the statutory investigation by ASIRT and the nature of the allegations in the extension request, and the Respondent indicated in his response that he was suspended on December 8, 2017. RCMP conduct policy, AM XII.5.4 – *Suspension*, sets out the requirements in order to suspend a member under section 12 of the *RCMP Act*. While a suspension must be ordered once a decision to initiate a conduct hearing has been made (5.4.1.3), in other instances, the decision to suspend "may be taken in cases where the integrity or operations of the RCMP would be seriously jeopardized if the subject member was not suspended, taking into account the public interest" (5.4.1.2) pending the ongoing investigation. I raise this to acknowledge that from the facts, the DGWRB could have interpreted the significance of the suspension order as indicating that the outcome of the Code of Conduct investigation may have been, at least initially, viewed by the division as having the potential to eventually justify the initiation of a conduct hearing, and the addition of subsection 41(2) to the Amended Request would have reinforced this notion. However, RCMP policy also recognizes that Code of Conduct investigations are fluid and perceptions of allegations can change as further information is gathered. That is why suspension orders must be reassessed and justified every 90 days (5.4.2.3). What's more, from the Record, it is clear that ASIRT had provided the Appellant with copies of all the statements that had been obtained by November 14, 2018, and followed up

by delivering some supplemental statements on December 5 (Material, pp 906, 961), so there is no doubt that the Appellant fully understood the state of the evidence in the statutory case, such as it was, and what it meant in terms of the Code of Conduct proceedings, two weeks before the initial and five weeks before the Amended Request.

[124] As cited above, the Board found that there was no rationale for a conduct hearing in either the extension request for a conduct hearing or the DGWRB decision (Appeal, p 28). I agree that there is no explicit rationale, but as I have explained, someone like the DGWRB would be attuned to the implicit nuances of the request package. For completeness, I note that the DGWRB states in paragraph 25 of his decision without elaboration (Material, p 1004):

> In regard to the second factor referred to in *Pentney*, the Record provides sufficient information to justify the Applicant potentially exercising authorities provided to him under subsections 41(2) and 42(2) of the Act, and taking such action as the Applicant may deem appropriate under subsections 41(2) and 42(2) of the Act, therefore there is an arguable case for proceeding.

[125] Ultimately, though, I also accept that one is left guessing as to what information in the Record actually satisfied the DGWRB. This wanting is perhaps even more profound in paragraph 29 in the section titled "DECISION" (Material, p 1006):

> The burden is on the Applicant to demonstrate that this extension to the limitation period is justified in the circumstances. Having reviewed the Record and the applicable law, **I am satisfied there is a sound reason in the circumstances to justify granting the Application**. This decision meets the principles in *Grewal* [*Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (FCA)], and *Pentney*, and will provide the Respondent with an opportunity to provide submissions with regard to the allegations and conduct measures, if applicable.
>
> [Emphasis added.]

What that "sound reason" may be is never explained, but surely it is not the fact that by granting the extension the Respondent would have an opportunity to make submissions on the Code of Conduct allegations. After all, the Respondent had voluntarily provided a detailed pure version written statement as well as a cautioned recorded interview with ASIRT investigators in April 2018 (Material, pp 465-557).

[126] In *Vavilov*, the majority clarified what exactly a reasonableness review entails in this situation:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines* [*Delta Air Lines Inc v Lukács*, 2018 SCC 2], at paras. 26-28. **To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion**. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* [*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62] and *Alberta Teachers* [*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61] have been taken as suggesting otherwise, such a view is mistaken.
>
> [Emphasis added.]

[127] It therefore follows that the Board cannot be faulted for the approach he took based on his clearly articulated and grounded assessment of the DGWRB extension decision.

[128] In sum, the Appellant has not persuaded me that the Board made a manifest and determinative error by finding that the DGWRB extension decision was not justified, transparent and intelligible. Accordingly, given that the Board decision is not clearly unreasonable, I am not prepared to interfere.

DISPOSITION

[129] Pursuant to paragraph 45.16(1)(a) of the *RCMP Act*, I dismiss the appeal and confirm the Board's decision to grant the motion and order a stay of proceedings.

Steve Dunn, Adjudicator | Date