**ROYAL CANADIAN MOUNTED POLICE**

IN THE MATTER OF
an appeal of a conduct board's decision pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (as amended) and Part 2 of the *Commissioner's Standing Orders (Grievance and Appeals)*, SOR/2014-289

Between:

**Sergeant Sukhjit Dhillon**
Regimental Number 47909
HRMIS 00085249

(Appellant)

and

**Commanding Officer, "E" Division**
Royal Canadian Mounted Police

(Respondent)

(the Parties)

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**CONDUCT APPEAL DECISION**

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**ADJUDICATOR**: Nicolas Gagné
**DATE**: April 28, 2023

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**SYNOPSIS**

The Appellant faced two allegations under section 7.1 of the RCMP *Code of Conduct*, one for applying unwanted physical force and non-consensual sexual acts on a partner, and one for uttering threats to kill or cause serious bodily harm to his wife.

The Appellant contested both allegations. A Conduct Board found the allegations established and directed that the Appellant be dismissed from the Force. The Appellant appealed this decision.

On appeal, the Appellant argues that the particulars of the Notice of Conduct Hearing were insufficiently detailed, preventing him from making full answer and defence; that the Conduct Board erred in its determination of witness credibility and reliability; that the Conduct Board erred in its application of the principles related to alibi defence; and that the Conduct Board reversed the onus of proof. Accordingly, the Appellant sought the Conduct Board's findings and imposed conduct measures to be overturned.

The appeal was referred to the RCMP External Review Committee (ERC) for review. The ERC recommended that the appeal be dismissed, finding that the Appellant was precluded from raising on appeal the alleged procedural issue with the Notice of Conduct Hearing; that the Appellant did not demonstrate that the Conduct Board erred in its credibility assessment; and that the Conduct Board did not place a reverse onus on the Appellant, but that the latter bore an evidential burden to support his position.

An adjudicator concurred with the ERC's analysis and findings, and concluded that the Conduct Board's decision was supported by the record and not clearly unreasonable, was not tainted by an error of law nor reached in contravention of the applicable principles of procedural fairness. The appeal was dismissed.

**INTRODUCTION**

[1] Sergeant (Sgt.) Sukhjit Dhillon, Regimental Number 47909 (Appellant), appeals the decision of an RCMP Conduct Board (Board) finding two allegations raised against him established, both for failing to behave in a manner that is not likely to discredit the Force, contrary to section 7.1 of the RCMP *Code of Conduct*, a schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 (*RCMP Regulations*). One allegation pertained to the application of unwanted physical force and non-consensual sexual acts on a partner, and the other one for uttering threats to kill or cause serious bodily harm to his wife. In the result, the Board directed that the Appellant be dismissed from the Force.

[2] The Appellant contends that the decision was reached in contravention of the principles of procedural fairness, is based on an error of law and is otherwise clearly unreasonable. More specifically, he argues that the particulars of the Notice of Conduct Hearing were insufficiently detailed, preventing him from making full answer and defence; that the Board erred in its determination of witness credibility and reliability; that the Board erred in its application of the principles related to alibi defence; and that the Board reversed the onus of proof. Accordingly, the Appellant seeks the Board's findings and imposed conduct measures to be overturned.

[3] In accordance with subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (*RCMP Act*), the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report issued on February 7, 2023 (ERC C-2020-016 (C-066)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

[4] With regard to the referral to the ERC, I note that subsection 45.16(8) of the *RCMP Act* requires that I provide reasons when diverging from their findings and recommendations.

[5] The Commissioner has the authority, under subsection 45.16(11) of the *RCMP Act*, to delegate his power to make final and binding decisions in conduct appeals and I have received such a delegation. I am therefore in a position to render a final and binding decision on this appeal.

[6] 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 1863-page appeal

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

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

**BACKGROUND**

[8] The ERC summarized as follows the factual background leading to the conduct hearing (Report, paragraphs 5-7):

> [5] The Appellant and the Complainant were colleagues at an RCMP detachment and began an extramarital relationship sometime in 2008. At the hearing, the duration of the relationship was contentious because the Complainant indicated that it ended in 2013 and recommenced in February 2016; while the Appellant indicated that he only had intercourse with the Complainant four times between 2008 and 2009.
>
> [6] On August 7, 2016, the Appellant's wife contacted the Complainant, informing her that they were not divorced and invited her to their residence as the Appellant was absent. The Complainant went to the house and after talking with the Appellant's wife for some time, the Appellant arrived at the residence. Seeing his wife with the Complainant, the Appellant allegedly became enraged, was shouting and left the residence. While providing a statement in a statutory investigation regarding allegations of assault implicating the Appellant and his wife for events that occurred later that evening, the Complainant indicated that she had been in a relationship with the Appellant where he also assaulted and sexually assaulted her.1 In March 2017, the Complainant reported the following incidents:
>
> 1) In early 2010, while at her residence, the Appellant uttered the words about how one bullet would solve all his problems. The Complainant thought he may be suicidal, but he clarified that the bullet was for his wife. He then grabbed her by the throat and squeezed. She tried to kick at him, but he used his other hand to grab her legs. She tried to tell him to stop, but he just squeezed harder and started laughing at her.
> 2) In late 2012, during what started as consensual intercourse, the Appellant got on top of the Complainant and forced her legs apart with his hands so wide that she thought her hips would "pop". She was in pain and crying. She told him to stop several times, but he pressed his forearm on her throat and turned her head to the side. He then had intercourse with her.
> 3) In April 2016, upon rekindling the relationship, while engaging in sexual activity, the Appellant began sucking and biting the Complainant's right nipple. This caused her pain and she told him to

> stop several times and tried to pull away. He switched to her left breast and did it with more force. It hurt so much that the Complainant thought she had "blacked out" for a second. She rolled over on her back and he had intercourse with her while "she just laid there".
>
> [7] A statutory investigation and a *Code of Conduct* process began to run simultaneously regarding these allegations. Several witnesses were interviewed. The statutory investigation was assigned to a municipal Police Department. The Complainant provided three verbal statements and two written statements. The Appellant provided a general statement within the criminal investigation where he indicated that the Complainant was not credible and that he did not assault her. The *Code of Conduct* investigation report was provided on January 9, 2018.

**Notice of Conduct Hearing - Allegations**

[9] On June 6, 2018, based on the investigation, the Commanding Officer of "E" Division issued a Notice of Conduct Hearing containing two allegations that the Appellant had breached the *Code of Conduct* (Allegations) (Material, pp 934-936). The Allegations and their particulars are itemized as follows, as reproduced by the ERC:

> *Allegation 1*
>
> *Between on or about May 1st, 2009 and on or about April 30th, 2016, at or near Coquitlam, British Columbia, [the Appellant] behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.*
>
> *Particulars:*
>
> *1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") posted to "E" Division, British Columbia.*
>
> *2. You were engaged in a personal relationship with [the Complainant] involving consensual and non-consensual sexual activities at her residence.*
>
> *3. [The Complainant] provided statements about her relationship with you and your conduct towards her on December 7, 2016; March 27, 2017; and April 17, 2017.*
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> *4. The relationship ended in 2013, but continued in February 2016 after you initiated contact via emails with [the Complainant].*
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> *5. Those sexual encounters were rough in nature and on one or more occasions you applied unwanted physical force on [the Complainant].*
>
> *6. One evening, between November 1st, 2009 and February 28th, 2010, after attending a party where you had consumed alcohol, you attended [the Complainant]'s residence. She was sitting on the steps inside her residence.*

*You told her that you could take her right there, implying that you could have sex with her. You grabbed her by the throat squeezing hard. She asked you to stop and you kept squeezing for approximately another five seconds. You left her in shock and wondering if she should call the police.*

*7. In November or December 2012, during sexual intercourse, you kept forcing [the Complainant]'s legs apart despite her complaints that you were hurting her.*

*8. [The Complainant] had her mouth by your ear asking you to stop, however, you ignored her request and positioned your arm forcing her head sideways.*

*9. In April 2016, while engaging in sexual activity with [the Complainant], you were sucking and biting one of her nipples, while grabbing onto her other breast.*

*10. [The Complainant] asked you to stop a few times, however, you ignored her request. Your actions caused unwanted bruising and pain to [the Complainant].*

*11. Your actions amount to discreditable conduct.*

*Allegation 2*

*Between on or about November 1st, 2009 and on or about February 28th, 2010, at or near Coquitlam, British Columbia, [the Appellant] behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.*

*Particulars:*

*1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") posted to "E" Division, British Columbia.*

*2. You were engaged in a personal relationship with [the Complainant] involving consensual and non-consensual sexual activity at her residence.*

*3. One evening, after attending a party where you had consumed alcohol, you drove to [the Complainant]'s residence and had a conversation with her in the lobby of her residence.*

*4. During your conversation, you said something along the lines of "one bullet would solve all your problems". [The Complainant] believed it sounded like you wanted to end your own life, but you told her "no […], I mean one bullet will solve my problems in (sic) [D.]", who was your wife at the time.*

*5. Your comments were inappropriate and amount to discreditable conduct*

**Pre-hearing conferences and Motion for stay of proceedings**

[10] On October 23, 2018, during a pre-hearing conference, the Appellant brought a preliminary motion seeking a stay of proceedings based on an abuse of process due to delays in initiating the conduct hearing, beyond the time limitation established at subsection 41(2) of the *RCMP Act*. The Appellant sought a *Direction for Further Information*, in accordance with subsection 15(5) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], in order to substantiate the motion. On November 2, 2019, the Board issued the *Direction for Further Information*, which was fulfilled on November 29, 2018.

[11] On December 6, 2018, another pre-hearing conference took place in order to discuss concerns raised by the Appellant with regard to the sufficiency of the disclosure provided in response to the *Direction for Further Information*. As a result, the Board issued another direction.

[12] On December 18, 2018, another pre-hearing conference was held, where the Board indicated that it appeared as though the conduct hearing had been initiated within the prescribed one-year time limitation period. The Appellant advanced that an investigator with the Professional Standards Unit (PSU) was a conduct authority who had been aware of the matter before the purported knowledge date of the Appellant's line officer appearing on the record. The Parties provided submissions on this motion.

[13] On April 1, 2019, the Board ruled on the motion, denying it on the basis that the PSU investigator was not a conduct authority in respect of the Appellant, as the latter was not under the command of the former. Relying on *Theriault v Royal Canadian Mounted Police*, 2006 FCA 61, the Board held that "it is the knowledge of the **applicable** conduct authority that causes the limitation period to run" and that "[i]t is not the knowledge of 'persons responsible for investigating and reporting on allegations of misconduct' that triggers the limitation period." Based on the fact that Superintendent ML, the conduct authority in respect of the Appellant, learned of the Allegations from the PSU investigator on March 27, 2017, the Board concluded that the conduct hearing was initiated within the one-year limitation period prescribed by subsection 41(2) of the *RCMP Act*.

**CONDUCT BOARD HEARING**

[14] The Board held a four-day conduct hearing from April 9 to 11, 2019, and on May 9, 2019. The only witnesses heard by the Board were the Complainant and the Appellant. The Board then heard submissions from the Parties and eventually rendered an oral decision on May 23, 2019, where it found both Allegations established. On May 30 and 31, 2019, the Board heard submissions on the conduct measures to be imposed; the Appellant did not testify during this phase of the hearing. The Board then delivered oral reasons for its decision on conduct measures, ultimately directing that the Appellant be dismissed from the RCMP.

**Hearing on the Allegations**

[15] The ERC summarized the relevant portions of the witnesses' testimony as follows (Report, paragraphs 13-14):

> [13] […] The Complainant related her side of the story by describing her relationship with the Appellant between 2008 and 2013, when the Appellant ended the relationship by "falling off the face of the earth". She testified that her relationship with the Appellant started out positively, but declined over time when the Appellant became cold, distant and made her feel "like a doormat". The Complainant described the incidents forming the allegations described above. On cross-examination, she explained that although they may not have seen each other for a few months, it was her understanding that she was in a committed relationship with the Appellant because they were not seeing other people. However, she had no pictures nor any other souvenir from her relationship with the Appellant. Moreover, although she had twice written to the Appellant in 2016 that she had not seen him in six years, she was adamant that she meant six months and that she was just going along with what the Appellant was telling her. The Complainant also referred to an email where she had indicated that "a lot had happened since 2013". The MR pointed out to the Complainant that she was not able to determine when the incidents occurred; her statements sometimes referred to 2008, some to 2010 and some to 2011. The MR brought up inconsistencies in the Complainant's statements to the investigators and her testimony regarding the duration of the relationship, as well as the timeline of the incidents.
>
> [14] In his testimony, the Appellant maintained that he and the Complainant were only friends that had been intimate four times between 2008 and 2009. He was adamant that he did not see the Complainant after 2009. Although there were messages, some of a sexually charged nature, in spring 2016 indicating that they were excited to see each other, the Appellant testified that they never did. He denied having assaulted and sexually assaulted the

> Complainant. He explained that the breast incident on April 15, 2016 could not have happened because he was with his daughter and had dinner at a restaurant with his brother on that day. On cross-examination, the CAR put to the Appellant and he agreed, that he had been not truthful to the investigators nor to the Complainant on a number issues. For example, he told the Complainant that he didn't know who had given her name to the investigators, when in fact it was him; he told the investigators that he had briefly spoken to the Complainant since the day he found the Complainant at his residence with his wife, when in fact the record indicated that they had spoken significantly since then. The CAR also emphasized that the Appellant had been very insistent regarding the Complainant providing him a copy of her written statement to investigators.

**Conduct Board decision**

[16] The Board's findings and decisions on the allegations and conduct measure are summarized as follows by the ERC (Report, paragraphs 16-19):

> [16] […] The Board first indicated that, although the particulars were set out with respect to each alleged contravention of the Code of Conduct, the CAR was not obliged to prove each specific particular because some were in place to give context to the allegations. He was only obliged to prove, on the balance of probabilities, that the Appellant's conduct with respect to each allegation was discreditable or likely to bring discredit on the Force.
>
> [17] The Board then addressed the nature of the relationship between the Appellant and the Complainant. After reviewing the contradictory accounts of both witnesses, the Board found that the relationship between the Appellant and the Complainant was an abusive one, controlled by the Appellant. After reviewing the principles applicable when establishing a witness's credibility and reliability, the Board found that the abusive nature of the relationship provided some explanation for inconsistencies between the Complainant's statements and testimony. It also explained why the Complainant provided two statements to the investigators, the first more favourable to the Appellant. The Board also had to determine what impact those inconsistencies had on the totality of the evidence. Conversely, the Board found that the Appellant provided information and "alibi evidence" during his testimony that could and should have been provided with his section 15(3) response or at the first opportunity. Therefore, according to case law, the Board stated that it was permitted to draw a negative inference from the late disclosure. In the end, the Board found the Complainant more credible than the Appellant, with some reliability issues surrounding the timing of the events.
>
> [18] The Board acknowledged that the evidence regarding the choking and threat incident pointed to a misalignment of more or less 3 months in the date range provided in the Notice of Hearing. However, the Board found that this

> discrepancy did not prejudice the Appellant. This was because the Appellant had access to the same evidence the Board had and was in a better position to know when he was on leave from his detachment, when the incident occurred. The Board further found the "leg spreading" incident, which would have occurred in November or December 2012, established based on the Complainant's testimony. Lastly, the Board found the "breast grabbing" established as well, based on the evidentiary record and the Complainant's testimony. The Board concluded that the Appellant's actions amounted to discreditable conduct and found both allegations established.
>
> [19] After hearing submissions on appropriate conduct measures, the Board rendered its oral decision. It first reiterated the applicable legal test to determine the appropriate measure. Turning to the Conduct Measures Guide, the Board found that the conduct measures range was from one day's forfeiture of pay to dismissal for both allegations. After canvassing the aggravating and mitigating factors, the Board found the aggravating factors far outweighed the mitigating factors and ordered the Appellant's dismissal.

**APPEAL**

**Grounds of appeal**

[17] The Appellant submitted his Statement of Appeal to the OCGA on September 25, 2019 (Appeal, pp 4, 8, 83). He indicated his belief that the Board's decision was reached in a manner that contravened the applicable principles of procedural fairness, that it is based on an error of law and that it is otherwise clearly unreasonable. In an appendix to the Statement of Appeal, the Appellant framed his grounds of appeal as follows, without expanding on them (Appeal, pp 12-13):

> 1. The Conduct Board erred in law in its interpretation of subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 and *Conduct Board Guideline*.
> 2. The Conduct Board erred in law and/or violated the principles of procedural fairness in placing a reverse onus on the [Appellant] to establish his defence with fulsome documentary evidence.
> 3. Alternatively, the Conduct Board violated the principles of procedural fairness and/or acted patently unreasonable in its interpretation and treatment of the [Appellant]'s written response to the allegations.
> 4. The Conduct Board erred in law in applying criminal law evidentiary principles and, in particular, the principles relating to alibi evidence.

5. The Conduct Board erred in law and/or gave a reasonable apprehension of bias in framing the final issue as being whether the [Appellant] was "guilty or innocent in this case".

6. The Conduct Board erred in law and/or gave a reasonable apprehension of bias in drawing a negative inference against the [Appellant] for failing to disclose "alibi evidence".

7. The Conduct Board violated the [Appellant]'s right to a fair and impartial decision in giving rise to a reasonable apprehension of bias.

8. The Conduct Board erred in law and/or violated the principles of procedural fairness in permitting and considering highly prejudicial evidence related to and against the [Appellant], despite the evidence having no probative value.

9. The Conduct Board erred in law and/or violated the principles of procedural fairness in relying extensively on inadmissible evidence to make findings of credibility, to identify mitigating and aggravating factors, and to determine the appropriate sanction.

10. The Conduct Board erred in law and/or violated the principles of procedural fairness in overlooking and explaining discrepancies in the Complainant's evidence and timelines.

11. The Conduct Board erred in law in its assessment of the credibility of the witnesses.

12. The Conduct Board acted patently unreasonable in expecting the [Appellant] to provide detailed defences to each allegation, despite the fact that:

    a. the [Appellant] clearly stated that these incidents did not occur; and

    b. the [Appellant] was not provided with exact dates or accurate ranges of dates on which the incidents were alleged to have occurred.

13. The Conduct Board acted patently unreasonable in finding that the [Appellant] and Complainant were in a committed relationship for a period of four years, despite there being no independent or physical evidence to support this finding.

14. The Conduct Board erred in law and/or acted patently unreasonable in its treatment of numerous discrepancies and inconsistencies in the statements and testimony of the Complainant.

15. The Conduct Board erred in law, acted patently unreasonable and/or violated the principles of procedural fairness in the conduct measures imposed on the [Appellant].

[18] On March 26, 2020, the Appellant provided the OCGA with his appeal submissions, supported by several annexed documents (Appeal, pp 120-928). He provided submissions on the following condensed grounds of appeal:

i. Failure to provide sufficient particulars in the Notice of Conduct Hearing;

ii. Errors in assessing credibility and reliability by:

(a) Failing to properly assess the evidence, and;

(b) Improperly assessing credibility;

iii. Placing a reverse onus on the Appellant;

**Timeliness of the appeal**

[19] The Board issued its Record of Decision (RoD) on September 3, 2019 (Appeal, p 15), and the Appellant indicates he was served with the RoD on September 13, 2019 (Appeal, p 10), which is uncontested. The Appellant's appeal was received at the OCGA on September 25, 2019 (Appeal, pp 4, 8). As such, I conclude that his appeal was filed within the 14-day statutory time limitation period established at section 22 of the *CSO (Grievances and Appeals)*.

**Considerations on appeal**

[20] The appeal process in conduct matters is not one where the appellant has the opportunity to have their case reassessed *de novo* in front of a new decision maker. Rather, it is an opportunity to challenge a decision already made. When considering an appeal of a decision rendered on a conduct matter, the adjudicator's role is governed by subsection 33(1) of *the CSO (Grievances and Appeals)*, which stipulates:

> 33 (1) The Commissioner, 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.

[21] The adjudicator's role will be confined to determining if the appealed decision was reached in violation of the applicable principles of procedural fairness, is tainted by an error of law, or is clearly unreasonable.

[22] When it comes to an appeal of conduct measures, subsection 45.16(3) of the *RCMP Act* provides the potential outcomes:

> (3) The Commissioner may dispose of an appeal in respect of a conduct measure imposed by a conduct board or a conduct authority by
>
> (a) dismissing the appeal and confirming the conduct measure; or
>
> (b) allowing the appeal and either rescinding the conduct measure or, subject to subsection (4) or (5), imposing another conduct measure.

[23] In accordance with the *Administration Manual* (AM), chapter II.3 "Grievances and Appeals" (AM II.3) (version in effect at the time of filing of the appeal), section 5.6.2, when fulfilling this role, the adjudicator must consider the following documents in their decision-making:

> 5. 6. 2. The adjudicator will consider the appeal form, the written decision being appealed, material relied upon and provided by the decision maker, submissions or other information submitted by the parties, and in those instances where an appeal was referred to the [ERC], the [ERC]'s report regarding the appeal.

[24] The Appellant indicated on his Statement of Appeal that he is of the opinion that the Board's decision was reached in violation of the applicable principles of procedural fairness, is based on an error of law, and is clearly unreasonable. I will now examine the parameters associated with each of these considerations, including the applicable standards of review.

*Procedural fairness*

[25] On appeal, procedural fairness is assessed on the strict standard of review of correctness, as illustrated by the Federal Court of Canada in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: see *Canadian Pacific Railway Company v Canada Attorney*

> *General)*, 2018 FCA 69, [2019] 1 FCR 121 (Rennie, JA) ("CPR"), esp. at paragraphs 49, 54 and 56; *Baker*, at paragraph 28. In *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).

[26] When the Appellant claims that the Board's decision does not respect the applicable principles of procedural fairness, he must demonstrate that the Board did not follow an adequate procedure in reaching its decision, establishing that at least one the following rights have been breached:

- The right to know what matter will be decided and the right to be given a fair opportunity to state his case on this matter;
- The right to a decision from an unbiased decision maker;
- The right to a decision from the person who hears the case;
- The right to reasons for the decision.

[27] The principal argument raised by the Appellant in that regard is that the Notice of Conduct Hearing was faulty and lacked precision and, consequently, he was unable to mount an appropriate defence. He is therefore essentially contending that he was not given fair notice and a fair opportunity to be heard. I will examine this ground in greater detail further on.

*Error of law*

[28] An error of law can occur with respect to the application or interpretation of the law applicable to a case. It is generally described as the application of an incorrect legal requirement or a failure to consider a requisite element of a legal test. 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 and James Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 3, Toronto, Thomson Reuters, 2017, No 236, p 28-336).

[29] Here, the Appellant advances that the Board erred in law when it purportedly reversed the Respondent's onus to prove the Allegations by "requiring the Appellant to prove that the conduct did not occur" (Appeal, p 130).

[30] As for the applicable standard of review, the Supreme Court established, in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], that there is a presumption that reasonableness is the applicable standard of review of administrative decisions (*Vavilov*, paragraphs 16-17, 23-32). The Supreme Court confirmed, however, that this presumption can be rebutted, and a different standard of review applied, in two types of instances.

[31] Firstly, the presumption can be rebutted and a standard of review other than reasonableness can be applied when the legislator has indicated that such a different standard of review should apply (*Vavilov*, paragraphs 33-52). In this case, subsection 33(1) of the *CSO (Grievances and Appeals)* does not specify a standard of review to apply to errors of law. Thus, the common law standard of review prevails as the presumption is not rebutted.

[32] Secondly, the Supreme Court established that the presumption that reasonableness is the applicable standard of review will be rebutted when the matter pertains to certain types of questions of law, in which case the standard of review of correctness is to be applied: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between two or more administrative bodies (*Vavilov*, paragraph 53). None of these questions are being raised through the Appellant's ground of appeal, and as such these exceptions to the presumption of reasonableness as the standard of review do not find application in this instance.

[33] As such, I will apply a standard of review of reasonableness to questions of law.

[34] I will now examine what constitutes a reasonable decision. In *Canada (Attorney General) v Zimmerman*, 2015 FC 208 [*Zimmerman*], at paragraph 45, Justice McVeigh of the Federal Court postulates that "[r]easonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12)."

[35] While considering the Supreme Court decision in *Vavilov*, Justice Norris of the Federal Court, in *Bell Canada v Hussey*, 2020 FC 795, examined the concept of a reasonable decision, underlining the following at paragraph 30:

> Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The decision maker's reasons should be read in light of the record and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-95). When considering whether a decision is reasonable, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[36] Put simply, I must determine whether the Respondent's decision is justifiable, transparent, and intelligible. The Appellant bears the burden of satisfying me "that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at paragraph 100, cited with approval in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paragraph 33).

*Clearly unreasonable*

[37] The Appellant raises the spectre of errors on the Board's part when assessing the evidence before it and the credibility of the witnesses. I find that errors in determining the facts of a matter and the credibility of witnesses are questions of facts, or questions of mixed facts and law when applying legal principles to the evidence at hand. Subsection 33(1) of the *CSO (Grievances and Appeals)* establishes that such questions must be examined under the consideration of clearly unreasonable.

[38] I have already examined what constitutes a reasonable decision. What exactly is the "clearly unreasonable" standard? The Federal Court, in *Kalkat v Attorney General of Canada*, 2017 FC 794, and the Federal Court of Appeal, in *Smith v Attorney General of Canada*, 2021 FCA 73, both accepted that the term "clearly unreasonable" used in the *CSO (Grievances and Appeals)* is effectively the same as the "patently unreasonable" standard, which has long been recognized in jurisprudence.

[39] There is a distinction to make between an "unreasonable" decision and one that is "clearly unreasonable", the latter being the threshold applicable to appeals under the *CSO (Grievances and*

*Appeals)*. In *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, the Supreme Court of Canada commented as follows on the difference:

> [56] I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
>
> [57] The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem […] But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

[40] The Supreme Court stated in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paragraph 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."

[41] As a result, questions of facts or mixed facts and law in this appeal are entitled to significant deference and only the presence of a manifest and determinative error would lead to a conclusion that the decision made by the Board is clearly unreasonable. I must therefore refrain from intervening in the decision unless the Appellant establishes that the Board's decision is tainted by

a clear, manifest, and determinative error, thereby demonstrating that the decision is clearly unreasonable. It is not enough to merely demonstrate that the reasons provided are *insufficient*. The Appellant must prove that the Board has not only committed an error, but also that the error is such that I have no other choice but to quash the decision. Such is the standard imposed by the *CSO (Grievances and Appeals)*. Accordingly, I must give a high degree of deference to the Board's decision.

**MERITS OF THE APPEAL**

[42] I will now turn to the Appellant's grounds of appeal, in light of the above-mentioned considerations.

**Failure to provide sufficient particulars in the Notice of Conduct Hearing**

[43] With regard to the failure to provide sufficient particulars in the Notice of Conduct Hearing, the ERC summarized as follows the Appellant's submissions (Report, paragraph 29):

> [29] The Appellant argues that the Notice of Hearing provided to him was deficient as it condensed four allegations of misconduct into only two statements, contained insufficient particulars and provided too broad of a date range for each alleged act. He asserts that since the Board acknowledged that it would have been preferable that all incidents form part of their own allegation, the Board should have requested that the [Conduct Authority Representative (CAR)] amend the Notice of Hearing. These deficiencies prevented him from properly responding to the allegations, breaching sections 43(3)(a) and (4) of the *RCMP Act* and his right to procedural fairness.

[44] For instance, the Appellant submits he only learned of a specific date for the "breast incident" at the hearing, which neutralized any opportunity for him to gather and submit ahead of time evidence of his alibi defence. He insists that the same situation applies to the other allegations, in that only a broad range of dates was provided to him. All of this, the Appellant advances, prevented him from mounting a detailed defence.

[45] The Respondent offers the following on this topic, as summarized by the ERC (Report, paragraph 30):

> [30] The Respondent concedes that the particulars contained in the Notice of Hearing could have been structured more effectively. However, based on [*Gill v Canada (Attorney General)*, 2006 FC 1106 (*Gill*)], they contained sufficient information to comply with the duty to fairness. Moreover, the Respondent argues that the Appellant was served with a copy of all the evidence which enabled him to prepare full answer and defence. The Respondent further points out that there were several pre-hearing conferences and the Appellant never raised an issue with the Notice of Hearing.

[46] In his rebuttal, the Appellant refutes the Respondent's assertion that the time frame set for the "Throat/Bullet" incident is sufficiently defined to permit a full defence. He highlights that while the Board found a discrepancy in the time frame set for one of the allegations, it erred in downplaying this inaccuracy, in contradiction with the principles set by the Federal Court of Appeal's in *Gill*.

[47] Furthermore, the Appellant submits that, contrary to the Board and the Respondent's assertion, the particulars of the allegations were not ascertainable from the investigation report provided to him, and that it is not up to him "to discern the allegations made against him", citing in support the case of *Commanding Officer, "H" Division v Constable Devin Pulsifer, Regimental Number 56030,* 2019 RCAD 9.

*Findings*

[48] I concur with the ERC's analysis on this ground. The Appellant had a responsibility to raise any procedural issue at the first opportunity (*Zündel v. Canada (Human Rights Commission)*, [2000] FCJ No 1838, at paragraphs 4, 8). This principle has been exposed in many decisions, including in *Chrétien v Canada (Attorney General)*, 2005 FC 925 (at paragraph 44), where the Federal Court stated that the party who has experienced a procedural issue must raise it immediately before the tribunal "and must not remain silent, relying on such grounds only if the outcome turns out badly". Similarly, the Federal Court in *Kamara v Canada (Citizenship and Immigration)*, 2007 FC 448 (at paragraph 26), held that:

> [26] […] The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. *See Restrepo Benitez et al v M.C.I.* 2006 FC

> 461 at paras. 220-221, 232 & 236, and *Shimokawa v M.C.I.*, 2006 FC 445 at paras. 31-32 citing *Geza v M.C.I.* 2006 FCA 124 at para. 66.

[49] As underlined by the ERC (Report, paragraph 32):

> [32] The Appellant was served with the Notice of Hearing, including all investigation materials, on July 25, 2018. From October 2018 to April 1st, 2019, the Board held four pre-hearing conferences with the parties to determine several preliminary issues. The record further contains several emails between the parties and the Board. Not once did the Appellant raise the issue of the sufficiency of the allegations and their particulars. Moreover, this was not an issue raised by the Appellant at the beginning of the hearing. Even after hearing the Complainant's evidence, the Appellant did not address the sufficiency of the particulars in his final oral submissions. Having received the Notice of Hearing and the material to be relied upon at the hearing in July 2018, the Appellant possessed the necessary amount of information to raise objection if he felt it necessary. This issue should have been raised at the first opportunity; for example, during one of the pre-hearing conferences. Having failed to do so, I find that the Appellant waived his right to challenge the Notice of Hearing and is precluded from raising this issue on appeal.

[50] The Appellant had representation from a Member Representative (MR) throughout all of the proceedings described by the ERC. The Appellant and his MR did not raise as an issue the alleged lack of precision of the Notice of Conduct Hearing. The Appellant participated in the pre-hearing conferences and the hearing without objecting. He also made submissions and mounted a defence, again without objecting.

[51] But even more to the point, at the very onset of the hearing, the Board asked the Appellant to confirm whether he had "received proper notice", to which the MR acquiesced; furthermore, the MR expressly waived the reading of the particulars when the Board read the allegations to the Appellant as is required under paragraph 20(1) of the *CSO (Conduct)* (Material, p 2093).

[52] I agree with the ERC that the Appellant waived his right to the alleged breach of procedural fairness with respect to the particularization of the Notice of Conduct Hearing. The Appellant participated in the pre-hearing conferences, the hearing, cross-examined the Complainant, testified himself, and provided submissions, all without raising this issue. The Appellant cannot now allege

a contravention of procedural fairness when he did not raise the issue before the Board and is now unsatisfied with the result of the hearing.

[53] This ground of appeal is dismissed.

**Errors in assessing credibility and reliability**

[54] The Appellant contends that the Board failed to properly assess the evidence and committed errors in assessing witness credibility. These grounds are closely intertwined, and I concur with the ERC's approach to treat them together. They are in fact presented under the same category in the Appellant's written submissions.

[55] The ERC summarizes as follows the Appellant's arguments (Report, paragraphs 33-34):

> [33] The Appellant first argues that the Board made factual findings on, for example, the nature of the relationship between the Appellant and the Complainant prior to assessing the credibility of both witnesses. As the duration and nature of the relationship were highly contested facts, the Appellant submits that the Board erred in its assessment of the evidence because it was unreliable. The Appellant states that his version of events was never considered by the Board, despite the fact that there was no evidence corroborating the Complainant's version. Similarly, the Appellant indicates that the Board accepted numerous statements made by the Complainant without first analyzing her credibility or the reliability of such statements.
>
> [34] Second, notwithstanding that the Appellant argues that the Board erred in not assessing witness credibility, he argues that the Board erred in its assessment of such credibility. Specifically, the Appellant submits that the Board made findings on credibility and reliability without engaging in the appropriate legal analysis. According to the Appellant, the Board should have examined factors discussed in [*Bradshaw v Stenner*, 2010 BCSC 1398], such as: the witness's ability and opportunity to observe events, the firmness of the witness's memory, the witness's ability to resist influence, whether the witness's evidence harmonizes with other accepted evidence, among other factors. Instead, the Board relied predominantly upon the Complainant's demeanour. Although the Board acknowledged inconsistencies in her evidence, the Board erroneously found that these inconsistencies were plausible. The Appellant observes that the Board, in contrast, had found him not credible on the basis of his failure to produce corroborative evidence in support of his defence.

[56] As for the Respondent's submissions, the ERC summarizes them as follows (Report, paragraph 35):

> [35] The Respondent submits that since the amended *RCMP Act* came into effect, conduct boards are seized from the onset with all the materials to be relied upon at the hearing. The Respondent acknowledges that the Board made some determinations prior to assessing the credibility of the witnesses. However, he notes that this assessment was part of the overall credibility assessment.

[57] In his rebuttal, the Appellant notes that both the Board and the Respondent failed to address the factors to be considered in assessing credibility. The Appellant also points to the fact that the Respondent provides substantive submissions on the concept of prior consistent statements, without due consideration to the words of the Supreme Court in *R v Stirling*, 2008 SCC 10, where it was stated that prior consistent statements should not form the basis of an assumption that a witness is likely to be telling the truth.

*Findings*

[58] I agree with the analysis from the ERC.

[59] The Board did not turn a blind eye to the discrepancies or inaccuracies in the Complainant's evidence. The Board showed that it was alive to them, it recognized them and grappled with them. As for the Appellant's evidence, the Board did not rely solely on his testimony at the hearing, but also compared his evidence with the evidence in the record, such as emails exchange between him and the Complainant.

[60] The Board went through great lengths to explain its treatment of the witness evidence entered before it and the issue of credibility. Its reasoning is justified, transparent and intelligible. Ultimately, I find that its appreciation of the evidence and the conclusions drawn therefrom certainly fall within the spectrum of acceptable outcomes justifiable in law and in the facts.

[61] With regard to the Appellant's contention that the Board failed to engage in an appropriate legal analysis of credibility and to fully consider the factors raised by the Supreme Court of British Columbia in *Bradshaw v Stenner*, 2010 BCSC 1398 (at paragraph 186) (*Bradshaw*), I do not believe there is a steadfast method or set of rigid factors to be considered when determining

credibility. As stipulated by the Supreme Court in *White v The King*, [1947] SCR 268, at page 272, "[t]he issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law […]".

[62] Furthermore, I do not see *Bradshaw* as supporting the proposition that an evaluation of credibility must progress through all the different factors listed by the Court, as I find that, at paragraph 186, the Court merely goes through a list of potential factors that can be considered, in no way suggesting that the list is exhaustive or must be considered in its entirety. I find it reasonable that a decision-maker can achieve a finding on credibility without having to go through all of the listed factors.

[63] As held by the majority of the Supreme Court in *Housen v Nikolaisen*, [2002] 2 SCR 235, at paragraph 25, which I determine finds application with the necessary adaptation to the RCMP's conduct appeal process:

> Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact […]

[64] In conclusion, for the above-mentioned reasons and in concordance with the ERC's analysis, I reject these grounds of appeal.

**Placing a reverse onus on the Appellant and misapplying the principles of alibi defence**

[65] The Appellant argues that "the Board improperly placed a reverse onus on the Appellant to adduce evidence rebutting the allegations made against him" and egregiously "drew an adverse inference against the Appellant's credibility for failing to adduce corroborative evidence in support of his defence", the latter being mostly through "relying on the Appellant's silence, or absence of a detailed defence, as being in support of or in acceptance of the Complainant's position". Because the issues are also intertwined, I agree with the ERC's approach to treat them together.

[66] The ERC summarized the Appellant's arguments (Report, paragraphs 43-44):

> [43] The Appellant first addresses the reverse onus. He argues that the Board placed a reverse onus on him to rebut the allegations. This was done despite the Board's acknowledgement that the onus to prove the allegations on a balance of probabilities rests with the Respondent. The Appellant further submits that the Board, in reversing the onus, drew negative inferences against him for failing to provide corroborating evidence in support of his defence. The Board further erred by accepting the evidence in the Complainant's prior statements on the basis that the Appellant did not directly contest the evidence.
>
> [44] Secondly, the Appellant argues that the Board improperly applied the legal principles related to alibi evidence and drew a negative inference against his credibility. The Board should not have disregarded his defence since the Appellant could not produce evidence of his alibi at the time of his response to the allegations. The Appellant submits that he could not have produced his alibi in a timely manner since the Notice did not contain sufficient particulars as to the timing of the breast grabbing incident. He adds that a delayed disclosure by an accused may only weaken the alibi evidence, not exclude it overall. In his rebuttal, the Appellant indicates that the April 15 date was not ascertainable by the evidence provided beforehand, and that he could only have ascertained it when the date was later addressed in the Complainant's testimony. The Appellant indicates that he actually requested to produce further evidence on his whereabouts, and the request was denied. I note that in support of this assertion, the Appellant refers to the Respondent's submission at paragraph 18; however, nothing in that paragraph indicates that a request was made and denied. This paragraph in the Respondent's submission refers to sections 15(3) and 15(4) of the *CSO (Conduct)* which state that the Appellant must provide his/her evidence within 30 days of being served with the Notice of Hearing and that further investigation can be requested. The Respondent further indicates in this paragraph that the Appellant failed to request the opportunity to gather additional evidence and no adjournment was requested.

[67] In response, the Respondent submits the following, as summarized by the ERC (Report, paragraph 45):

> [45] The Respondent submits that the Appellant is confusing "reverse onus" with "adverse inference". The Respondent states that an unfavourable inference may be drawn when, in the absence of an explanation, a party fails to call a material witness who would have knowledge of the facts. He observes that the Board provided a thorough analysis of the principles of adverse inference. The Respondent further notes that it was not the lack of corroborating evidence that posed a problem with the Board, but that the Appellant chose to provide evidence in his testimony that could and should have been provided with his section 15(3) response. In proceeding in a such way, it was impossible to put some of the evidence to the Complainant (such as his severe allergy to cats) or further investigation of his claims (such as his whereabouts on April 15). Although the Appellant argues that he was made aware of the April 15 date only during the hearing, the Respondent counters that he was in receipt of all the investigation materials months prior to the hearing and could have ascertained the date from the materials.

[68] In rebuttal, the Appellant underlined that some of his evidence was unreasonably rejected as unsupported (e.g. allergy to cats, death of father-in-law), yet similar evidence from the Complainant was readily accepted.

*Findings*

[69] I accept the ERC's analysis.

[70] The issue here is not one of reversed onus, but one of evidential burden. As indicated by the ERC, "(1) the onus is on the party who asserts a proposition; and (2) where the subject matter of the assertion lies particularly within the knowledge of the party asserting it, that party may be required to prove it." The Appellant decided to advance a defence to contest the portrayal of the Respondent's case against him with regard to the nature or length of the relation he had with the Complainant, and the occurrence of certain event. Once he raised his defence, he bore the onus to establish it; he is the only one with access to potential evidence to establish his alibi and his categorization of the relationship he had with the Complainant.

[71] Here, the Board indeed found that certain aspects of the Appellant's assertions advanced as part of his defence were within his knowledge or control, but that he failed to produce that

potential corroborating evidence to support it. The Board also examined the Appellant's *viva voce* evidence and concluded that it was not credible. Consequently, the Board could not rely on the Appellant's sole testimony to support the defence.

[72] As an example, the Appellant indicated in his testimony that he was severely allergic to cats and therefore could not have been in the Complainant's residence as she put forward, since she has one or several cats, according to him. The Board recognized that the Appellant did not provide medical evidence in support of this evidence, but more importantly noted that the Complainant was never confronted with this assertion in cross-examination. The Board indicated that "because this information was only disclosed after the Complainant had already testified, I do not even know if the Complainant had a cat during the relevant time period." As the author Peter Sankoff puts it (Peter Sankoff, *The Portable Guide to Witnesses*, Toronto, Thomson Carswell, 2006, p 139) (similarly, see *R v Paris*, 150 CCC (3d) 162, at paragraphs 22-24):

> Realistically, the whole matter should be seen as a tactical choice with potential consequences. Failing to cross-examine is a proper strategy, but the fact finder may give less credence to evidence that is introduced for the first time after the witness whose testimony is being questioned has finished testifying and who no longer has an opportunity to tell his or her side of the story. The trier of facts may well wonder why there was no cross-examination, and take that into account in determining what weight to give to the contradictory testimony. Still, this is not an automatic proposition, and automatically drawing an adverse inference against evidence that was not raised in cross-examination is an error of law.

[73] Here, the Board did not make an automatic adverse inference. It explained why it believed cross-examination would have been beneficial and on what aspect, and it pointed to material evidence in the form of emails that gave an air of reality to the Complainant's evidence, yet were rejected summarily without reason by the Appellant.

[74] I agree with the ERC that the Board's adverse inference in this instance has to do with the timing of the Appellant's evidence and not its corroboration. The Board underscored that the Appellant had ample previous opportunities to disclose his defence. I find that it was within the Board's discretion to make the adverse inference, and this discretion was reasonably exercised.

[75] I also agree with the ERC's treatment of the question of alibi defence. While it is a notion that most commonly finds application in criminal law, it is nevertheless a notion that derives from the law of evidence. I find that it was open to the Board, and reasonable, to draw an adverse inference from the late disclosure of the alibi by the Appellant, when he was testifying, to the effect that he could not have been present during one of the alleged incidents, when he had ample opportunities to present it before, and that the date of the alleged incident date was determinable from the evidence.

[76] ln *Huang v Canada (Citizenship and immigration)*, 2018 FC 940 *(Huang)*, the Federal Court of Canada revisited the principle that was canvassed *in Ferguson v Canada (Citizenship and immigration)*, 2008 FC 1067 (*Ferguson*), regarding the relationship between the weight, sufficiency, and credibility of evidence. At paragraph 42 of *Huang* the Federal Court stated:

> The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. Reliability of the evidence is one thing, but the evidence must also have sufficient probative value to meet the applicable standard of proof. A sufficiency assessment goes to the nature and quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to the evidence by the trier of fact, be it a court or an administrative decision-maker. The law of evidence operates a binary system in which only two possibilities exist; a fact either happened or it did not. If the trier of fact is left in doubt, the doubt is resolved by the rule that one party carries the burden of proof and must ensure that there is sufficient evidence of the existence or non-existence of the fact to satisfy the applicable standard of proof. In [*McDougall*], the Supreme Court established that there is only one civil standard of proof in Canada, the balance of probabilities: evidence "must be scrutinized with care by the trial judge" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".

[77] The standard by which I must assess whether the Board had a proper analysis to support its finding is illustrated by the Supreme Court of British Columbia in *Victoria Times Colonist v Communications, Energy and Papeworkers*, 2008 BCSC 109 (affirmed 2009 BCCA 229), at paragraph 65:

> [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in Ryan, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[78] I find that the discrepancies and issues highlighted by the Board regarding the Appellant's testimony clearly show a rational and tenable line of analysis to support a conclusion that the Appellant lacks credibility.

[79] The Board referred to the Supreme Court decision in *F.H. v McDougall*, 2008 SCC 53, and explicitly acknowledged that it was required to determine the truthfulness of witnesses and consider whether their evidence was reliable, on a balance of probabilities, in the context of the totality of the evidence.

[80] According to the Federal Court (*Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at paragraph 40, citing *R.K.L. v Canada (Minister of Citizenship and Immigration*), 2003 FCT 1 16, [2003] F.C.J. No. 162 (QL) at paragraphs 9-11):

> Normally, the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms" […]
>
> Furthermore, the Board is entitled to make reasonable findings based on implausibilities, common sense and rationality…. The Board may reject uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence […]

[81] In conclusion, I do not find that the Board committed a reviewable error. Its treatment of the alibi defence and the defence raised by the Appellant is well reasoned, justified, transparent

and intelligible, and falls within a range of acceptable outcomes in light of the facts and the applicable legal constraints. This ground of appeal is rejected.

**DISPOSITION**

[82] I find that that the Appellant failed to establish that the Board's decision was reached in contravention of the applicable principles of procedural fairness, that it is based on an error of law or that it is clearly unreasonable.

[83] Pursuant to paragraph 45.16(1)(a) of the *RCMP Act*, the appeal is dismissed and the conduct measure imposed by the Board is confirmed.

[84] Should the Appellant disagree with my decision, he may seek recourse with the Federal Court pursuant to subsection 18.1 of the *Federal Courts Act*.

April 28, 2023

_____ _____

Nicolas Gagné
Recourse Appeal and Review Adjudicator

Date