Federal Court  Cour fédérale

Date: 20201014

Docket: T-2061-19

Citation: 2020 FC 962

Toronto, Ontario, October 14, 2020

PRESENT: Mr. Justice A.D. Little

BETWEEN:

CORPORAL PATRICK G. WASYLYNUK

Applicant

and

COMMANDING OFFICER "K" DIVISION
ROYAL CANADIAN MOUNTED POLICE
AND
ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] The applicant is a Corporal with the Royal Canadian Mounted Police. He seeks an order for *mandamus* and an injunction pending his judicial review application, under ss. 18.2 and 44 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] The applicant has been on medical leave from his job at the RCMP since June 2003. At that time, he had accumulated over 22 years of service with the Force. He and the RCMP are in a long-running dispute arising from the RCMP's attempt to discharge him from the Force for medical reasons.

[3] The Commissioner of the RCMP has quashed the applicant's medical discharge because he was not afforded procedural fairness. The applicant has applied for judicial review of that decision, because the Commissioner did not exercise her discretion to address certain additional issues he raised.

[4] In August 2020, the RCMP sent the applicant a memorandum requiring him to take steps that would enable or force him to return to work, or to assess its ability to accommodate his disabling medical condition. He resists those steps.

[5] On this motion, the applicant relies on a stay provision in s. 26 of the *RCMP Regulations 1988,* SOR/88-361 (the "*RCMP Regulations 1988*"), now repealed, to stop that process. He contends that the s. 26 stay requires the RCMP not to make him take any steps that would force (or enable) him to return to work until the final disposition of his application to this Court for judicial review, including any appeals.

[6] The applicant and respondents take very different views of the motion and of the present circumstances as between them. On one hand, the applicant is pursuing justice, as he sees it – an explanation, transparency and accountability for what happened to him many years ago. He wants

a complete standstill until all aspects of his grievance against the RCMP have been finally determined on the merits. He also does not want to get into another discharge and grievance process before the first grievance is resolved to his satisfaction.

[7] On the other hand, the respondents say that the RCMP has the right to manage its employees and must be able to take steps to get this officer back on the job. Cpl. Wasylynuk has not worked actively for the RCMP for over 15 years and has received his pay and benefits throughout. As the decision to discharge him on medical grounds has been quashed by the Commissioner of the RCMP and the Force has formally withdrawn the documents that led to his discharge, the respondents assert that there is nothing left to argue about. Cpl. Wasylynuk must start the process of returning to work. Viewed through this lens, the circumstances leading to the applicant's current motion is a self-made crisis.

[8] The Court's role on this motion is not to resolve this broader debate. It is to resolve the parties' current dispute, on the basis of the applicable legal principles and the evidence adduced on this motion.

[9] On that basis, I have concluded that the applicant's motion must be dismissed.

I. **Events Leading to this Motion**

[10] The present dispute arises from events in August 2020, but has its roots over 15 years ago. I will sketch the key events.

[11] The applicant has been a member of the RCMP since 1980. He is 66 years old. In June 2003, he was placed on medical leave as a result of developing depression and Post Traumatic Stress Disorder.

[12] In June 2005, Cpl. Wasylynuk was assigned a medical profile "O6-Permanent". That designation was based in part on information provided to the RCMP by Cpl. Wasylynuk's psychiatrist. The designation meant that he was permanently precluded from employment with the RCMP in any capacity.

[13] In 2008, the RCMP began the process to medically discharge the applicant. It served Cpl. Wasylynuk with a Notice of Intention to Discharge under the *RCMP Regulations 1988*.

[14] In 2010, the RCMP served him with a Notice of Discharge under subs. 20(9) of the *RCMP Regulations 1988*.

The Applicant's Grievance

[15] Cpl. Wasylynuk filed a grievance dated October 15, 2010. The decision, act or omission he grieved was "[t]he medical discharge process that led to and the Notice of Discharge pursuant to s. 20(9) of the Royal Canadian Mounted Police [Regulations] 1988 served on me on October 6, 2010". He stated that the prejudice to him was "[t]he medical discharge process failed to follow the statutory requirements and process require that led to the Notice of Discharge … causing me the loss of my employment" with the RCMP.

[16] As corrective action, Cpl. Wasylynuk specified three requests: the "withdrawal or stay of the 'Medical Discharge'" (i.e. the Notice of Discharge); the "withdrawal of the Notice of Intention to Medical Discharge"; and the "withdrawal of the medical profile of O6-permanent".

[17] Grievances at the RCMP go through as many as two levels. A Level I Adjudicator issued a decision on January 22, 2019. She allowed Cpl. Wasylynuk's grievance. She concluded that the Notice of Discharge was invalid and quashed the decision to discharge him on medical grounds. She concluded that Cpl. Wasylynuk's right to procedural fairness – specifically his right to know the case against him – had been breached. Setting aside the decision to discharge, the Level I Adjudicator remitted the case, with directions, to a different Commanding Officer for the process to start anew. However, because the matter would be considered fresh, she declined to make decisions on other issues, including whether to change Cpl. Wasylynuk's medical profile designation from O6 to something else.

[18] Cpl. Wasylynuk was not satisfied. He took his grievance to Level II. The Level II decision-maker is the Commissioner of the RCMP.

[19] During the Level II grievance process, the parties exchanged written submissions on the merits, which were provided to a committee (the "External Review Committee" or "ERC") whose mandate is to make recommendations to the Commissioner concerning the grievance. In written submissions in April 2019, the representative of the respondent in the grievance noted that the grievor requested that the "discharge of October 4, 2010, notice of intention to discharge of June 9, 2008 and the medical profile (O6-Permanent) of November 2005, be withdrawn".

[20] Through the written submission, the RCMP advised that it was agreeable to voluntarily withdrawing all three documents and that Cpl. Wasylynuk should consider them "formally withdrawn". Noting that Cpl. Wasylynuk had been off work for some period of time, the submission advised that "it will be necessary to take all reasonable steps to return him to work", including having a new medical assessment and profile, taking steps to accommodate any medical conditions and possibly facilitating a graduated return to work. The submission took the position that there remained "no appealable issues in this grievance as the Respondent has executed the relief sought by the Grievor" and there were other proceedings in the Alberta Court of Queen's Bench to address the rest of Cpl. Wasylynuk's complaints.

[21] The applicant's position was and is that the RCMP "purported" to make those withdrawals, "unilaterally and without the consent of Wasylynuk". He maintains that only a grievor can withdraw a grievance. He continued to pursue the grievance to Commissioner, as the Level II decision-maker.

The RCMP's 2019 Attempts to Return Cpl. Wasylynuk to Work

[22] After it (purportedly) withdrew those three matters, the RCMP sent Cpl. Wasylynuk four communications between April and August 2019. They are dated April 15, 2019, May 7, 2019, May 28, 2019 and August 22, 2019. All concerned his return to work. Cpl. Wasylynuk took the position that the communications were orders and were unlawful. His then-counsel advised that the grievance continued and "any action on the matter" was stayed due to the *RCMP Regulations 1988.*

[23] The RCMP initially took the position that steps should be taken to facilitate Cpl. Wasylynuk's eventual return to work while his appeal to the Commissioner was pending. Cpl. Wasylynuk responded to email communications, under protest, given the perceived "threat of a Code of Conduct", i.e. that the communications were orders that he must obey or face an allegation of a breach of the RCMP Code of Conduct. But he seemed to advise that he would cooperate with the proposed steps.

[24] Weeks passed. After a series of back-and-forth communications with respect to Cpl. Wasylynuk having a medical examination and obtaining security clearance, the RCMP sent him a memorandum dated August 22, 2019, attaching many documents for his attention and completion that related to his return to work. The tone of that memorandum was direct concerning the requirement to complete the return-to-work steps. The contents of that memorandum are substantially the same as the memorandum dated August 13, 2020 that has led to this motion.

[25] It is not clear from the record what happened immediately after the memorandum dated August 22, 2019, but on October 4, 2019, Cpl. Wasylynuk filed a Notice of Application with this Court for judicial review of the four communications. He served a Motion Record seeking an injunction to restrain the RCMP from taking steps towards his return to work.

[26] The RCMP seems to have relented, at least temporarily, in pursuing a resumption of active work by Cpl. Wasylynuk. His written representations on this motion advised that his injunction motion was never filed and neither his then-motion, nor his application, has been heard by the

Court. While the application remains extant, the served injunction motion apparently lapsed for failure to file it.

[27] While these communications between the parties were occurring, the ERC did its work and provided a report to the Commissioner prior to her grievance Level II decision.

The Commissioner's Level II Decision

[28] At the Level II stage, Cpl. Wasylynuk again succeeded. The Commissioner's Level II decision dated November 17, 2019, allowed his grievance and quashed his medical discharge for a second time. The Commissioner concluded that Cpl. Wasylynuk's right to procedural fairness had been breached. He was not afforded the opportunity to access documents and records on which the Notice of Intention to Discharge was based, did not receive a copy of a Medical Board Report and was discharged despite the fact that the discharge was not one of the recommendations contained in the Medical Board Report.

[29] The Commissioner concluded, however, that no live controversy remained with respect to certain issues raised by Cpl. Wasylynuk related to how the O6-permanent medical profile came into existence, including alleged privacy breaches. Applying the principles in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, the Commissioner decided not to exercise her discretion to address the moot issues.

Application for Judicial Review

[30] Despite his success before the Level II decision-maker, Cpl. Wasylynuk was again not satisfied. He has filed an application for judicial review of the Level II decision in this Court, by Notice of Application which is now amended and dated February 24, 2020. The judicial review application has not yet been heard or decided.

[31] The Amended Notice of Application seeks an order quashing the decision of the Commissioner and remitting it back to her for reconsideration and redetermination "on the specified issues". The Commissioner, as noted, decided to quash Cpl. Wasylynuk's discharge, but found other issues moot and exercised her discretion not to making findings about those other "collateral" issues. I use the word "collateral" to describe these issues as the applicant's counsel did at the hearing of this motion.

[32] In over 18 pages and 75 very detailed paragraphs (some with extended subparagraphs), the Amended Notice of Application contains a chronology of events leading to the application and describes alleged errors made by the Commissioner. It does not expressly define the "specified issues" that the applicant seeks to be redetermined. At paragraphs 66-83, it alleges that the Level II decision maker made numerous errors of law, or law and fact. There are many, many issues raised in the pleading.

[33] As I understand it, however, the focus of the applicant's position now is that the RCMP arbitrarily and improperly assigned Cpl. Wasylynuk the medical profile of 06-Permanent in

November 2005 without proper assessment and in doing so, committed certain wrongful acts. The alleged wrongful acts include improper use of his medical information (which is alleged to be, among other things, a breach of the *Privacy Act*, RSC 1985, c P-12**)**, a failure to conduct the medical assessment in accordance with an applicable manual, and various procedural fairness issues concerning his right to participate in the medical profile assignment process (i.e., to receive information and make submissions). The applicant's position is also that the assignment of the medical profile was done in bad faith and was a contrived process, predetermined to end with his discharge from the Force. Collectively, these are the "collateral" issues already mentioned.

[34] The applicant alleges that the Commissioner's decision failed to find that the assignment of the medical profile was the first step in the medical discharge of the applicant and thus a part of the grievance he launched in 2010. Paragraph 70 of the Amended Notice of Application expounds the details of his allegations about the assignment of the medical profile at length, in subparagraphs (a) to (dd).

[35] While these issues relate to the assignment of the medical profile in November 2005, they were elsewhere entwined in the pleading with events and issues that arose later during the grievance process. The applicant raised new issues as the grievance process evolved, including after the Level I decision (as did the respondent RCMP at that time). The Amended Notice of Application also mentions alleged breaches of human rights legislation and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The applicant further maintains, in his amendments made after the Commissioner's decision on certain other allegations he made against individuals involved in the

return-to-work communications described above, that the Commissioner has exhibited bias or a reasonable apprehension of bias and should have recused herself from the Level II decision.

[36] I observe that for the judicial review of the Level II decision, there are issues for substantive review under the principles set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and at least one issue related to procedural fairness in the Level II process.

[37] Returning to what I understand is the essence of the applicant's current position: neither the Level I nor the Level II decision-maker addressed his "collateral" issues related to the assignment of the O6-Permanent medical profile, which became the premise of the Notice of Intention to Discharge and the later Notice of Discharge. The applicant wants those issues addressed on their merits. He therefore seeks judicial review of the Level II decision.

[38] I also reiterate that the Commissioner decided to quash the applicant's discharge. Her conclusion on the "collateral" issues was that they are moot and that she would not exercise her discretion to determine them anyway.

The So-Called "Long Order" Memorandum dated August 13, 2020

[39] We now arrive at the event that led the applicant to commence the present motion. On August 13, 2020, the RCMP sent Cpl. Wasylynuk a memorandum. It has been described by the applicant in this motion as the "Long Order" – not for its length but because it was authored by Inspector Long, of the RCMP's "K" Division in Edmonton. He is Cpl. Wasylynuk's immediate superior officer. The Commanding Officer of "K" Division is a respondent on this motion.

[40] The memorandum dated August 13, 2020 concerned Cpl. Wasylynuk's return to work. It bore the heading **"Accommodation, Medical Profile, Security Clearance and Employment Requirements – FIFTH REQUEST"** (original bolding). Its introductory paragraph stated as follows:

> The purpose of this memo is to follow up on the previous letter dated April 15, 2019, and our subsequent messages dated May 7, 2019, May 28, 2019 and August 22, 2019 respectively, seeking to facilitate your return to work and address your accommodation needs, medical profile, security clearance and your employment requirements as a member of the RCMP. You have failed to comply with all reasonable deadlines provided to you. Accordingly, this is the last opportunity being provided to you to cooperate with the process so that the RCMP can properly facilitate any needed accommodations and re-establish the employer employee relationship. Failure to provide a meaningful response will result in administrative action which could include a stoppage of your pay and allowances and to your discharge from the RCMP.

[41] The memorandum set out some "Background" (at least from the writer's perspective) and addressed certain steps for action by August 27, 2020, including completing documents to obtain security clearance required under the Commissioner's *Standing Orders (Employment*

Requirements), SOR/2014-292, and the completion of documents for a Periodic Health Assessment ("PHA").

[42] In a section of the memorandum on requirements to fill out security documents, it stated: "You must complete and return the security documents provided to you. Failure to do so will result in a review of your circumstances under the RCMP Employment Requirements policy, which could result in the stoppage of your pay and allowances, and possibly your discharge from the RCMP." It stated the following with respect to medical requirements: "The medical information provided as part of your PHA and/or IME [Independent Medical Evaluation] is necessary for the purpose of establishing your ability to perform your duties, any need to accommodate, and/or to justify an authorized medical leave of absence. Without this information, you may be considered to be absent without authorization."

[43] The memorandum also had a section entitled "Failure to Comply" which included the following: "I refer you to the administration manual, which states that a member must cooperate fully during attempts to address any deficiencies or challenges that may impede his/her ability to meet employment requirements". In addition, it stated:

> The RCMP is committed to demonstrating accountability and responsibility in addressing situations where a member no longer possesses the basic requirements for carrying out of a member's duties, is absent from duty without authorization …
>
> Should you no longer possess a basic requirement of a member or have been determined to be absent from duty without authorization, your pay and allowances may be stopped until you are able to demonstrate your ability to obtain and retain a security clearance, and or demonstrate your medical requirements for authorized sick leave. If you are not able to demonstrate the above, your circumstances will be examined under the RCMP

> Employment Requirements policy, which could result in your discharge from the RCMP.

[44] Inspector Long signed the memorandum dated August 13, 2020. It precipitated this motion, which was heard on September 10, 2020 by videoconference.

The Present Motion

[45] The applicant's Notice of Motion requests an order for *mandamus* and an injunction, specifically:

> [an] interim and interlocutory order of *mandamus*, and injunctive relief on the principle of *quia timet*, or in the alternative, interim and interlocutory declaratory relief, stopping, enjoining or prohibiting the Royal Canadian Mounted Police ("RCMP") and the Respondents from:
>
> i. directing, ordering, forcing or compelling the Applicant to attend for a periodic health assessment or a medical profile evaluation or take any steps or complete any documents regarding any such process;
>
> ii. directing, ordering, forcing or compelling the Applicant to take any steps or complete any documents to update the Applicant's security clearance with the RCMP;
>
> iii. directing, ordering, forcing or compelling the Applicant to take any steps or complete any documents to prove current and continuing qualification for active duty in the RCMP;
>
> iv. terminating or suspending the pay, benefits and allowances of Corporal Patrick Wasylynuk;
>
> v. terminating, discharging or having the Applicant brought up, investigated or sanctioned on any code of conduct violations with the RCMP;

> vi. complying with any other demand or request as expressed, directly or indirectly, in the Long Order; and,
>
> vii. in engaging in any other conduct or activity, directly or indirectly, that would serve to undermine, diminish, restrict or breach the s. 26 stay imposed pursuant to *RCMP Regulations 1988*
>
> pending the outcome of the Amended Notice of Application as filed herein, being an application for judicial review in respect of the November 17, 2019 decision of the Commissioner (received November 22, 2019) ("Decision") in the Matter of a Grievance Presented at Level II by Corporal Patrick Wasylynuk, Regimental Number 36606, of a decision by the commanding officer, "K" Division, to medically discharge Corporal Patrick Wasylynuk and any lawful appeal of that decision, until there has been effected a final disposition of the grievance process in accordance with law, and compelling the Respondents, and each of them to comply with the statutory stay set out in s. 26 of the *RCMP Regulations 1988* …

[46] Thus in paragraphs i, ii, iii and vi above, the applicant requests an Order directed at matters expressly discussed in Inspector Long's memorandum dated August 13, 2020. (I assume that item vi is misworded and in fact seeks to excuse the applicant from complying with any other matter in Inspector Long's memorandum.) Items iv and v seek to restrain a possible effect if Cpl. Wasylynuk does not comply with the requirements of the memorandum. Item vi is a catch-all request for a broad enforcement of the stay in the applicable *RCMP Regulations 1988*.

[47] The "statutory stay" in s. 26 of the *RCMP Regulations 1988*, mentioned in the Notice of Motion, provides as follows:

> 26. A decision by an appropriate officer to discharge a member or to recommend the discharge of an officer is stayed until after the expiration of the time limit within which a grievance or appeal may be filed in accordance with the provisions of the Act or these Regulations, or, where a grievance or appeal has been filed, until after the final disposition of the grievance or appeal.

As is apparent, this provision applies to a decision to discharge a member, or recommend a discharge. If a "grievance or appeal" has been filed, the stay lasts until after the "final disposition of the grievance or appeal".

[48] The scope and effect of the stay in s. 26 is central to the applicant's position on this motion. Through his request for *mandamus* and for an injunction, Cpl. Wasylynuk wants the RCMP to abide by that stay, as he submitted that it applies to prevent any action against him, including the steps set out in Inspector Long's August 13, 2020 memorandum, until the final disposition of the judicial review proceeding he has commenced before this Court (including any appeals).

[49] The position of Cpl. Wasylynuk on this motion also rested on what he seeks from the grievance process. He put the argument as follows:

> a critical cornerstone in advancing a grievance presentation is to contest conduct or treatment (in the form of a decision, act or omission) that the grievor asserts is unfair and/or unreasonable, thereby causing the grievor to suffer prejudice. The grievor seeks redress, so as to not only put the grievor back into the position he or she was before the challenged decision, act or omission, but to also address the nature and extent of the improper conduct and processes that the grievor was subjected to – because the conduct of the Respondent has served to essentially destroy the career of Wasylynuk, including by extending the grievance process unnecessarily, and by the Respondents' very serious and substantive procedural and statutory breaches that have been incumbent throughout, including the medical discharge process.
>
> [Emphasis added.]

[50] The applicant submitted that failure to obey a lawful order (the so-called Long Order) is a disciplinary offence, contrary to paragraph 37(*c*) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 ("*RCMP Act*"), and ss. 3.3 and 4.2 of the Code of Conduct, which is a schedule to

the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, ss. 18 and 23(1). He noted that the Long Order states that his "[f]ailure to provide a meaningful response will result in administrative action which could include a stoppage of your pay and allowances and your discharge from the RCMP" [underlining added]. Accordingly, he asserted that it is a "certainty that administrative action will occur". In his submission, such administrative action could include:

- an investigation being initiated under subs. 40(1) of the *RCMP Act*,
- the laying of charges against Cpl. Wasylynuk,
- the initiating of a formal hearing under subs. 41(1) of the *RCMP Act*, and
- an appearance before a formally appointed conduct board established pursuant to s. 43 of the *RCMP Act* to determine if there has been a contravention of the Code of Conduct.

[51] If a contravention is found, Cpl. Wasylynuk submitted that conduct measures may be imposed under subs. 45(4) of the *RCMP Act*, including dismissal from the Force. He argued that he faces "serious potential jeopardy, including not only stoppage of his pay and allowances, but the stigma, embarrassment and humiliation of having to face and answer to serious Code of Conduct contraventions, including dismissal".

[52] Cpl. Wasylynuk seeks to prevent all of this from happening, by way of an interlocutory Order of *mandamus* from this Court, or alternatively an interlocutory injunction. From a process perspective, Cpl. Wasylynuk commenced this motion within his application for judicial review of the Commissioner's Level II decision. That judicial review does not challenge the "Long Order", nor did he propose amendments to it to do so. He also did not commence a separate Notice of Application to challenge the "Long Order".

[53] The evidence before the Court comes from an affidavit sworn by Cpl. Wasylynuk and the documents attached to it. The respondents cross-examined him. They did not file affidavit evidence in response to his on this motion.

II. **Preliminary Motion to Amend the Notice of Motion**

[54] Shortly after filing his motion record, the applicant moved informally to amend his Notice of Motion and his written submissions on this motion, and provided a short affidavit from Cpl. Wasylynuk to explain the situation.

[55] In brief, the applicant's counsel discovered while preparing for this motion that certain pages were missing from, or not properly reproduced in, the Certified Tribunal Record ("CTR"). The applicant referred to some pages that were before the External Review Committee but maybe not before the Commissioner. This raised a concern about whether all of the proper documentation was before the Commissioner before she delivered her Level II decision. The alleged absence of pages led to the allegation that the Commissioner may not have considered all of the relevant material that she was required to consider before making her decision which, to the applicant, raised an issue of procedural fairness for the judicial review pending in this Court.

[56] The respondents' position was that the absence of certain pages was simply a reproduction error; the missing pages were mistakenly not photocopied for the CTR. They produced an affidavit confirming that the allegedly missing pages were in fact before the Commissioner when she made her decision. The respondents also noted the contents of certain "missing" pages were mentioned in the Commissioner's Level II decision. The respondents observed that the applicant has had the

CTR since January 2020 and had not brought a formal Notice of Motion to amend under Rule 75 of the *Federal Courts Rules*, SOR/98-106. They complained that the motion for *mandamus* and an injunction was a moving target.

[57] The attempt to amend the applicant's motion materials was an unfortunate distraction for both parties in the days leading up to this larger motion. On its merits, I may have considered the argument raised by the applicant, if it were necessary to do so. At the hearing of the motion, there was enough uncertainty about some, though not all, of the "missing" pages to make the point not completely unarguable. Given my conclusions on irreparable harm, however, I have not found it necessary to consider the strength of the merits of the applicant's judicial review application at the first stage of the injunction test.

[58] For clarity, while I grant the applicant's informal motion to amend his Notice of Motion and written submissions on this motion under Rule 75 of the *Federal Courts Rules*, my conclusion should not be interpreted as encouraging an argument about the point at the judicial review application. It is natural to expect that the parties will be able to sort out, between them and before the hearing of the judicial review, whether in fact there is any issue as to what was before the Commissioner when she made her Level II decision and what should be in the CTR. The parties will be aware of Rules 317-318 of the *Federal Courts Rules*. If there is an issue, the applicant will have to decide, outside of the usual fog of an impending injunction motion, whether further amendments to his Amended Notice of Application dated February 24, 2020 are required, or whether he is satisfied that the judicial review application can proceed as is.

[59] I move now to consider the jurisdiction of the court on the main motion, and then the merits of the applicant's motion seeking an interlocutory order of *mandamus* and an injunction pending the final disposition of the application for judicial review.

III. **Jurisdiction of this Court on this Motion**

[60] The applicant referred to two provisions of the *Federal Courts Act* as the sources of the Court's authority to grant the relief he requests. Section 18.2 provides that the Court may make interim orders pending an application for judicial review:

> 18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

[61] The applicant connected s. 18.2 to subs. 18(1), which provides that the Federal Court has "exclusive original jurisdiction (*a*) to grant an injunction, … writ of *mandamus* … against any federal board, commission or other tribunal." It was not disputed that the RCMP falls within the definition of a "federal board, commission or other tribunal" in subs. 2(1) of the *Federal Courts Act*.

[62] The applicant's second source for the Court's authority to grant *mandamus* and an injunction was s. 44 of the *Federal Courts Act*, which provides as follows:

> 44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.

[63] The Supreme Court analyzed this provision in *Canada (HRC) v Canadian Liberty Net*, [1998] 1 SCR 626. Justice Gascon also did so in *Letnes v Canada (Attorney General)*, 2020 FC 636, a case involving an RCMP officer with a "O6-Permanent" medical profile seeking interim relief against the RCMP. Section 44 provides the Court with "free-standing" jurisdiction to grant an injunction, on suitable evidence, when the merits of the underlying proceeding will be heard by another decision-maker who cannot issue injunctions: see *Letnes*, at para 20.

[64] The applicant also referred to Rule 373 of the *Federal Courts Rules*, SOR/98-106, which provides that on motion, a judge may grant an interlocutory injunction.

[65] I am satisfied that the Court has jurisdiction to issue an injunction on a motion such as this one, under either s. 18.2 or s. 44 of the *Federal Courts Act*. The respondents did not submit otherwise. The same framework from *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, applies to applications for interlocutory injunctions under both provisions. As a result of what I have decided below, I do not need to distinguish between the two sources of the Court's jurisdiction.

IV. **The Applicant's Request for a *Mandamus* Order**

Seeking *Mandamus* on an Interlocutory Motion

[66] The respondents challenged the applicant's ability to seek *mandamus* on this interlocutory motion. They also argued that this motion is premature, as no administrative proceeding has yet begun and to make an order of *mandamus* (or an injunction) at this time would interfere with that

process. It is convenient to deal with the *mandamus* point now, and address prematurity issues later.

[67] To support their submission, the respondents pointed to subs. 18(3) of the *Federal Courts Act*, which provides that the remedies provided for in subs. 18(1) may be obtained "only on an application for judicial review made under s. 18.1". They also rely on *Kellapatha v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 739, at paras 17 and 20, in which Justice Fothergill held that a writ of *mandamus* is not available as a form of interim injunctive relief because it would constitute an interim declaration of rights. According to the respondents, while the Court has statutory jurisdiction to grant *mandamus*, it cannot do so on a motion, or as a form of interim injunctive relief.

[68] The applicant's position was that there is no limitation on the kind of interim order that may be granted under s. 18.2 of the *Federal Courts Act*. He also referred to subs. 18.4(1), which contemplates that an application to this Court under any of ss. 18.1 to 18.3 be heard and determined without delay and in a summary way. However, the applicant did not refer to any cases to support the proposition that *mandamus* could be ordered on an interlocutory motion. He maintained that there is no way to enforce s. 26 as an interlocutory stay in a regulation except by interlocutory motion, which must be for a *mandamus* order.

[69] Like Justice Fothergill in *Kellapatha*, I am inclined to conclude that *mandamus* involves a determination of rights and should not be granted on an interlocutory basis. A similar approach is taken to declaratory relief on an interlocutory motion: see *Sawridge Band v Canada*, 2003 FCT

347, [2003] 4 FC 748 (Hugessen, J.) at para 6, aff'd 2004 FCA 16, [2004] FCR 274. This does not imply that a party who seeks an order requiring a respondent to take some positive action is without a remedy. That party can seek an interim or interlocutory mandatory order: *R v Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 SCR 196 ("*CBC*").

[70] In addition, I agree with the respondents that a *mandamus* application under Rule 18 of the *Federal Courts Act* is to be commenced by Notice of Application rather than by Notice of Motion. In the present dispute, in response to the RCMP's first four communications to him in 2019, Cpl. Wasylynuk did file a separate Notice of Application seeking virtually identical relief in relation to the four communications in 2019 as he claims in the present Notice of Motion. He served an interlocutory motion for an injunction to the same end. That procedure was not followed here, perhaps owing to the pressure of the August 27, 2020 diary date for Cpl. Wasylynuk to take action in response to Inspector Long's memorandum. In addition, neither the event that triggered this motion (the delivery of Inspector Long's memorandum dated August 13, 2020) nor the broadly-defined conduct that the applicant requests to be restrained in his Notice of Motion is mentioned in the Amended Notice of Application dated February 24, 2020. The applicant has not proposed any additional amendments to this pleading.

[71] Having said that, and while (as the respondents argued) my conclusion on this point of law would be dispositive of the motion for *mandamus*, I do not rest this decision solely on this point decided in *Kellapatha*, or on the formalities of which (originating) document should have been filed to get this matter promptly before the Court. It is also not necessary to decide whether, in the

right circumstances, an order of *mandamus* could be ordered on an interlocutory basis in some rare cases involving a public duty whose nature is inherently ‘interlocutory’.

[72] Accordingly, I turn to the merits of the request for *mandamus*.

The Legal Requirements for a *Mandamus* Order

[73] The criteria for an order of *mandamus* are found in the reasons of Robertson JA in *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742 (CA), at para 55, aff’d [1994] 3 SCR 1100. These criteria have been confirmed recently by the Federal Court of Appeal in *Hong v Canada (Attorney General)*, 2019 FCA 241 (Woods, JA), at para 10; *Canada (Health) v The Winning Combination Inc.*, 2017 FCA 101, at para 60 (Rennie, JA); and *Lukacs v Canada (Transportation Agency)*, 2016 FCA 202, at para 29 (AF Scott, JA). They are:

(1) there must be a legal duty to act;

(2) the duty must be owed to the applicant;

(3) there must be a clear right to performance of that duty;

(4) where the duty sought to be enforced is discretionary, certain additional principles apply;

(5) no other adequate remedy is available to the applicant;

(6) the order sought will have some practical value or effect;

(7) the Court finds no equitable bar to the relief sought; and

(8) on a balance of convenience an order of *mandamus* should (or should not) be issued.

In Robertson JA's decision in *Apotex*, criteria 3 and 4 involved several subsidiary considerations that need not be detailed here: see *Canadian Horse Defence Coalition v Canada (Food Inspection Agency),* 2019 FC 1559, at para 42 (Boswell, J).

[74] The *Apotex* criteria have also been applied recently and regularly by this Court, including in *Iris Technologies v Minister of National Revenue*, 2020 FC 532, at para 53 (Heneghan, J), aff'd 2020 FCA 117 (Rennie, JA). See also *Express Gold Refining Ltd v Canada (National Revenue),* 2020 FC 614, at paras 20 and 79 (Pentney, J); *Canadian Horse Defence Coalition*, at para 42; and *Albatal v Royal Canadian Mounted Police,* 2016 FC 371, at para 15 (Gleeson, J).

[75] The focus of the submissions on this motion was whether, and how, the stay in s. 26 of the *RCMP Regulations 1988*, met the criteria in *Apotex* and in particular, the first three. To analyze these issues, it is necessary to understand the legal nature of the public duty that the applicant proposed to be enforced by *mandamus*, and to interpret the scope and effect of the stay in s. 26.

[76] *Mandamus* is an order that compels the performance of a public legal duty. The duty is typically set out in a statute or regulation. An order of *mandamus* is the Court's response to a public decision-maker that fails to carry out a duty, on successful application by an applicant to whom the duty is owed and who is currently entitled to the performance of it. The test for *mandamus* thus requires careful consideration of the statutory, regulatory or other public obligation at issue, to determine whether the decision-maker has an obligation to act in a particular manner as proposed by an applicant and whether the factual circumstances have triggered performance of the obligation in favour of the applicant.

[77] These principles are subsumed in the first three *Apotex* criteria and are closely related to the fourth criterion in the *Apotex* decision concerning the performance of discretionary duties performed by public officials. As Justice Gleeson stated in *Albatal*, at para 15, "*mandamus* will not be used to compel the exercise of an unfettered discretion or to compel the exercise of a fettered discretion in a particular way".

[78] An example or two will assist. A classic situation occurs when a statute or regulation specifies that a public official will so something, such as process an application or issue a licence or permit, upon the completion of certain preconditions. The public duty relied upon in *Iris Technologies* was the following provision in the *Excise Tax Act*, RSC 1985, c E-15:

229 (1) Where a net tax refund payable to a person is claimed in a return filed under this Division by the person, the Minister shall pay the refund to the person with all due dispatch after the return is filed.	229 (1) Le ministre verse avec diligence le remboursement de taxe nette payable à la personne qui le demande dans sa déclaration produite en application de la présente section.

[79] In that case, Justice Rennie concluded at paragraph 39 that there was "no doubt" that subs. 229(1) of the *Excise Tax Act* established a public duty on the Minister to assess, and to pay a refund when a refund is found to be payable. The text of the provision was "clear and unambiguous" in both English and French. The issue before the Federal Court of Appeal was whether the scope of the duty to pay "with all due dispatch" required that the Minster pay a refund before an assessment is completed. The Federal Court of Appeal agreed with this Court that it did not. The applicant had "no right, at this time, to compel the performance of the Minister's duty under subsection 229(1)": at para 48.

[80] Similarly, the Federal Court has concluded that subs. 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, requires the Minister to process an applicant's permanent resident application. In *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 757, Justice de Montigny held that Citizenship and Immigration Canada had a public legal duty to do so and to grant status if the relevant statutory requirements were met. That duty could be enforced by *mandamus*, and he ordered the applicant's application to be processed within 90 days: at paras 50 and 54.

[81] A court must be cautious in deciding whether the grant *mandamus*, particularly if the decision-maker has to exercise discretion. An example of a discretionary decision is a decision to approve a product and ensure that it is safe or efficacious: see Justice Rennie's discussion in *The Winning Combination Inc.*, at paras 58-59.

The Parties' Positions on *Mandamus*

[82] The applicant's position on this motion was that the stay in s. 26 of the *RCMP Regulations 1988*, creates a public legal duty for *mandamus* purposes that is non-discretionary and for his benefit as a grievor. The applicant contended that the duty is to act "in compliance with the legal duty" of the stay in s. 26, meaning that the RCMP "is prohibited from engaging in any conduct that would serve or cause to disregard, ignore of breach the purpose and intent" of s. 26.

[83] The applicant submitted that the stay of the discharge decision in s. 26 covers the entire grievance presentation made by the grievor, not just certain portions of it, and that it applies

throughout the grievance process, including all appeals, until the grievance has reached its final disposition. The applicant claimed that the stay "trumps all collateral attacks", including the current attempts by the RCMP to require him to obtain security clearance and to fill out health assessment forms, until that final disposition.

[84] In effect, the applicant's position was that the s. 26 stay is intended to, and does, maintain the *status quo* that existed when Cpl. Wasylynuk filed his grievance on October 15, 2010 and protects him from any conduct by the RCMP that might change his situation until his grievance, and all appeals including judicial reviews, are finally completed. The applicant submitted that the RCMP cooperated with the stay at one time, but has recently decided not to cooperate due to a "stratagem" to force him to return to work.

[85] In practical terms, the applicant's submission was that he is currently medically discharged, and that discharge is stayed by operation of s. 26. Similarly, Cpl. Wasylynuk's grievance remains outstanding because only he, as the grievor, can withdraw it; the RCMP cannot unilaterally withdraw it or force its withdrawal. Cpl. Wasylynuk took a risk in pursuing his grievance at Level II – as was his right, in the applicant's submission – because the Commissioner's *de novo* decision could reverse the Level I Adjudicator's decision. The applicant further took the view that the decision of the Commissioner at Level II, which quashed the applicant's medical discharge, was also effectively stayed by s. 26.

[86] To the applicant, the entire process fits together to enable a grievor to continue the entire grievance (including all the so-called collateral issues in it) to its final disposition, continuously

protected by the stay in s. 26. That final disposition includes the judicial review commenced in this Court, and any appeals.

[87] The respondents disagree. Their position was that the applicant's interpretation of s. 26 is incorrect. It does not impose a continuing duty on the RCMP. In the respondents' submission, the applicant's interpretation leads to an absurd result evident in this matter, which is that the grievor could continue to grieve and appeal matters even when a discharge is overturned at a lower level. From the respondent's perspective, s. 26 is designed to protect members of the Force from the effects only of the medical discharge, while they appeal – not to prevent anything from happening until an applicant terminates the proceedings.

[88] Further, the respondents contended that the s. 26 stay applies to the decision to discharge a member of the Force, not against any other duties the member may have (e.g. to complete security and health-related documents) and not when the decision to discharge has already been quashed (in this case, twice). The respondents noted that the RCMP has other duties than the one allegedly contained in s. 26, including a duty to accommodate its employees who may have medical or other issues and a duty to ensure RCMP members have met their basic employment requirements (including security clearance and health). There is no duty, however, not to take steps to return an employee whose discharge has been set aside, back to work.

[89] The merits of the *mandamus* argument can be addressed under two headings, both of which generally concern whether there is in s. 26 a clear public duty to act for the benefit of the applicant

at the present time. I will first consider whether s. 26 is a clear public duty to act, for the purposes of a possible *mandamus* order. I will then turn to the scope and effect of the stay language in s. 26.

A Clear Public Duty to Act? The Nature of the Alleged "Duty" in s. 26

[90] The applicant submitted that the stay in s. 26 of the *RCMP Regulations 1988* imposes on the respondents a "clear legal duty to act", for the benefit of the applicant. The alleged clear legal duty was, in essence, a duty to refrain from engaging in conduct that would violate the s. 26 stay.

[91] I do not agree. In my view, the stay in s. 26 of the *RCMP Regulations 1988* is not a clear public duty to act that can be the subject of a *mandamus* order. The "duty" in s. 26 of the *RCMP Regulations 1988* does not impose on the RCMP a sufficiently precise and mandatory obligation to do something that can be the subject of a *mandamus* order.

[92] First, the precise wording in the statute or regulation that forms the alleged public duty matters. The statutes in the cases above required that the Minister do specific things, in *Iris Technologies* using the mandatory word "shall". Here, the respondents are not required by s. 26, explicitly or implicitly, to do anything. Instead, the stay in s. 26 operates against something: an appropriate officer's decision to discharge a member of the RCMP while a grievance or appeal is pending.

[93] Second, the obligation alleged by the applicant on this motion in relation to s. 26 is tantamount to an obligation to "comply with the law" – here, to comply with a regulation.

Rhetorically speaking, it is easy to argue that a respondent must obey the law. Of course they should; everyone must. The rhetorical point is even more forceful against a law enforcement agency such as the RCMP. But a general obligation to "comply with the law" is too inchoate to be the subject of *mandamus,* as one can see from the case law examples set out above. The applicant's submission that there is a public duty to act "in compliance with the legal duty" in a specific regulation is barely more restricted. The applicant's argument that under s. 26 the RCMP "is prohibited from engaging in any conduct that would serve or cause to disregard, ignore of breach the purpose and intent" of s. 26 not only does not prescribe any positive action by the respondent, it is just as broad and similarly too uncertain to be the subject of a *mandamus* order. It is essentially asking the Court to order that the respondents "obey s. 26" which, as noted, does not impose a positive obligation on the respondents to act for *mandamus* purposes.

[94] A test will show the problem. A court speaks through its formal orders and judgments. Could the public duty proposed by the applicant be made into a sufficiently coherent, unambiguous and certain term of a court order that requires specific acts to be carried out by the respondent? On the applicant's theory in this case, the order would read: "This Court orders that the respondent act in compliance with the legal duty in s. 26 of the *RCMP Regulations 1988*". This is not the implementation of a clearly defined and mandatory public duty owed to the applicant. It is at most an order to obey a regulation. As is clear from this motion, the content of the alleged public legal duty in s. 26, as the applicant seeks to read it, is far from clearly prescribed. Without much more to understand what the respondent must do or not do in the content of the source obligation, it could not be the subject of a *mandamus* order.

[95] Now consider an alternative formulation that mirrors the wording of s. 26: “This Court orders that the respondent do the following: a decision by an appropriate officer to discharge a member or to recommend the discharge of an officer is stayed until after the expiration of the time limit within which a grievance or appeal may be filed in accordance with the provisions of the Act or these Regulation, or, where a grievance or appeal has been filed, until after the final disposition of the grievance or appeal.” This example brings into sharp relief the reality that s. 26 does not actually require the respondents to do anything; it may require them not to do certain things, but restraining a respondent is the work of an injunction, not *mandamus*.

[96] Consistent with this point, as the respondents’ counsel pointed out in oral argument, the wording of the relief requested by the applicant in his Notice of Motion does not track or reflect the words of s. 26 of the *RCMP Regulations 1988.*

[97] I therefore conclude that the s. 26 stay is not a clear public duty to act that is owed to the applicant. It cannot be the subject of a *mandamus* order.

[98] The respondents have raised a number of other issues to resist the *mandamus* motion. For example, the respondents submit that, as a matter of “basic employment law”, the applicant has another alternative remedy: to commence a grievance process if he wishes to challenge the Long Order or if disciplinary action is taken against him with which he disagrees. Given my conclusion above, I need not address those additional arguments.

[99] The applicant's next argument, and the core of his legal argument and overall position, concerned the scope and effect of the s. 26 stay. I turn now to that issue.

A Public Legal Duty to Act Owed to the Applicant? The Scope and Effect of the s. 26 Stay

[100] The applicant submitted that, properly interpreted, the stay in s. 26 of the *RCMP Regulations 1988* imposed on the respondents a clear legal duty to the applicant to act for his benefit. The applicant contended that the language in s. 26 is broad enough to prevent any action against him, including the steps set out in Inspector Long's August 13, 2020 memorandum, until the "final disposition" of the judicial review proceeding he has commenced before this Court (including any appeals). The applicant made extensive legal and factual arguments concerning why his interpretation of s. 26 makes it apply to his circumstances in the present circumstances.

[101] I am unable to agree with the applicant's submissions about the broad scope and effect of s. 26 in this case. In my opinion, the language of s. 26 does not apply to his circumstances at the present time.

[102] At the outset, in my view there are two practical impediments to the applicant's position. First, the stay in s. 26 on its face applies to a "decision" by an appropriate officer to discharge a member, or recommend a discharge. In this case, the RCMP sent Cpl. Wasylynuk a Notice of Discharge. Cpl. Wasylynuk presented a grievance which succeeded with respect to the medical discharge at both Level I and Level II. In both cases, the outcome was to quash the decision to discharge him. The effect of the Commissioner's Level II decision to quash is that the decision of

the appropriate officer to discharge is no more. It is annulled and invalid. It is difficult to see how the "decision … to discharge" language in s. 26 operates to stay a decision to discharge that has already been quashed, or to stay the decision to quash the decision to discharge. Further, there is nothing in the regulations or the *RCMP Act* to suggest that a Level II decision does not come into force immediately, or that its operation or effect is somehow delayed.

[103] Second, the decision to which the stay applies under s. 26 is the decision to "discharge", made by an appropriate officer. In my view, it is a something of a stretch to interpret a decision to "discharge" under s. 26 so broadly as to "stay" all of the activities the applicant seeks to prevent in his Notice of Motion (set out above) – and specifically, to prevent the RCMP from requesting that Cpl. Wasylynuk complete security and health paperwork and begin the process of returning to work, as set out in Inspector Long's memorandum dated August 13, 2020. As with the *mandamus* argument above, in my view, an attempt to restrain the conduct set out in the Notice of Motion is not the ken of a stay on an expanded reading of the scope of s. 26, but is instead the role of an injunction or mandatory order related to the impugned conduct on an interlocutory basis.

[104] I now turn to the core of the applicant's legal submissions on the interpretation and scope of s. 26, which he maintained contains a clear public legal duty owed by the respondents to him.

[105] A central issue in the applicant's grievance was the decision to discharge him. The question then is whether s. 26 continues to apply for Cpl. Wasylynuk's benefit because the stay continues to apply during the entirety of the grievance process, including the judicial review he has filed to challenge the Level II decision. This question requires a consideration of language in and around

the stay in s. 26 of the *RCMP Regulations 1988* and the language governing grievances in Part III of the *RCMP Act*.

[106] The applicant's written submissions contended that the grievance process continues until the "final disposition of any appeal for judicial review" and that the "only time that a grievance … can be appealed is by way of Judicial Review" under subs. 32(1) of the *RCMP Act* "and not otherwise" (original italics). According to those submissions, certain words in s. 26 ("… stayed until after the expiration of the time limit within which a grievance or appeal may be filed in accordance with the provisions of the Act…") can only be interpreted as applying to an "appeal by way of Judicial Review as permitted under" Part III, subs. 32(1) of the *RCMP Act.* I profess that I cannot see how the excerpted words in this submission particularly assist the applicant, who in fact filed a grievance.

[107] In my view, the focus should be on the latter part of s. 26, which contemplates that if a grievance or appeal has been filed in accordance with the provisions of the *RCMP Act* or the regulations, the decision to discharge is stayed until the final disposition of the grievance or appeal.

[108] To analyze that argument, we must first address terminology. On its face, s. 26 refers to the final disposition of the "grievance or appeal", but makes no express reference to judicial review. The applicant's written submissions referred to an "appeal to the Federal Court by way of Judicial Review". That unfortunate phrase shoehorns two different legal processes into one. An application for judicial review is, of course, not an appeal. It is a different type of proceeding, in which (broadly speaking) an administrative decision is reviewed for compliance with the rule of

law, rather than on the merits of the issues. It is legally and practically a new proceeding commenced by Notice of Application in the Federal Court. An application for judicial review is subject to distinct procedures and a different standard of review by the court (generally speaking, *Vavilov* reasonableness, except for procedural fairness) than an appeal (which applies the *Housen* standard): see *Vavilov,* at paras 17, 33, 36-37, 44 and 51. While they may in some cases seek the same outcome in practical terms, an appeal and an application for judicial review are quite different beasts.

[109] The key task before me is to interpret the language in s. 26. To understand the phrase "final disposition of the grievance or appeal" in s. 26, we must consider its own words, other related provisions in the *RCMP Regulations 1988* and the applicable provisions in the *RCMP Act* and the likely purpose of the stay. The applicant made passing mention in his written submissions of statutory interpretation principles in *Rizzo & Rizzo Shoes Ltd., Re,* [1998] 1 SCR 27. Neither party made any submissions or pointed to any evidence of Parliament's or the Governor in Council's stated intentions or purposes, or about the mischief that was intended to be addressed by s. 26, made at the time of enacting any of the provisions discussed below. They did describe the likely objectives of s. 26 as they saw them. I also note that the applicant submitted that the applicable versions of the *RCMP Act* and its regulations are those that applied prior to November 2014. The respondents did not contest that position and therefore I have applied them for present purposes.

[110] The applicant's interpretation of "final disposition of the grievance or appeal" in s. 26 placed considerable emphasis on the phrase "final disposition", which is one that implies a final end point, after all appeals (or here, judicial review and all appeals) are complete. In my view,

however, the "final disposition" in s. 26 only has substantive meaning when considered with what is finally being disposed. The words "final disposition" in s. 26 should therefore be analyzed with the phrases "of the grievance" and "of the … appeal".

[111] I will analyze each in turn, starting with the "final disposition of the … appeal", both within the regulations and then in the context of Part III of the *RCMP Act*.

[112] There is an appeal process within the *RCMP Regulations 1988.* As the applicant submitted, paragraph 20(9)(*a*) contemplates that an "appropriate officer" may discharge or recommend the discharge of a member. It was under this provision that the Notice of Discharge was sent to Cpl. Wasylynuk. Section 25 of the *RCMP Regulations 1988* provides that a member who is discharged may appeal a decision made under subs. 20(9) to the Commissioner. Subsection 25(5) provides that the Commissioner may dispose of an appeal in certain specified ways. Accordingly, the "final disposition of the appeal" in s. 26 finds its meaning, in part, through these provisions in the regulations and in particular, must include an appeal to the Commissioner under s. 25 of a decision to discharge under subs. 20(9).

[113] I move next to the applicant's submission that the scope of "final disposition of the grievance or appeal" language of s. 26 should be considered in the context of the grievance process found in Part III, ss. 31-32, of the *RCMP Act.* These are the provisions under which Cpl. Wasylynuk presented his grievance. The decision of the appropriate officer under subs. 20(9) is subject to a grievance under Part III of the *RCMP Act* where the ground for discharge is one specified in paragraph 19(*a*) of the regulation (i.e., for "physical or mental disability"). Paragraph

22(*a*) of the regulations provides that the discharged member be advised that the discharge is subject to the grievance process in Part III of the *RCMP Act*.

[114] Subsection 31(1) provides that if a member is aggrieved by "any decision, act or omission in the administration of the affairs" of the Force under certain stated conditions, the member is "entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part". As the applicant submitted, s. 31 permits a broad range of matters to be grieved and establishes more than one level of grievance. The applicant also submitted that an appeal from the Level I decision-maker to the Level II decision-maker (the Commissioner) attracts the stay in s. 26 as an "appeal in accordance with the provisions of the Act …"

[115] By s. 32, the Commissioner "constitutes the final level in the grievance process and the Commissioner's decision in respect of any grievance is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or review by any court". Section 32 therefore does three important things for present purposes: (i) it expressly distinguishes between an appeal and judicial review; (ii) it provides for no appeal; and (iii) it contemplates that a grievor may commence an application for judicial review under the *Federal Courts Act* of a decision made by the Commissioner.

[116] Given the distinction between an appeal and a judicial review, and the text of ss. 31-32, I do not agree with the applicant's submission that a judicial review is included in the word "appeal" in s. 26. In my view, the phrase "…final disposition of the … appeal" in s. 26 does not include an

application for judicial review of a Commissioner's Level II decision in the grievance process. Once a decision is issued by the Commissioner at the final level of the grievance process, there is no further "appeal" for the purposes of s. 26 that would trigger the application of the stay.

[117] The next question is whether the Commissioner's Level II decision constitutes the "… final disposition of the grievance…" under s. 26. The applicant submitted that because judicial review is expressly contemplated by s. 32, it is part of the grievance process. That is, there is no final disposition of the grievance until any judicial review is complete.

[118] In my view, the express provisions in Part III of the *RCMP Act* answer that submission. As I will explain, the final decision of the Commissioner is the end of the grievance and the stay in s. 26 ceases at that point.

[119] First, s. 31 provides that a grievor is entitled to present the grievance at each of the levels, up to and including the final level, "in the grievance process provided for by this Part". Section 32 then provides that the Commissioner "constitutes the final level in the grievance process". By the terms of these sections, the grievance process ends with the decision of the Commissioner at Level II, the final level.

[120] Second, after subs. 31(1) refers to the "grievance process provided for by this Part", paragraphs 31(2)(*a*) and (*b*) establish timing requirements to present a grievance, respectively, at "the initial level in the grievance process" and "the second and any succeeding level in the grievance process". The underlined phrase is consistent with the applicant's submission that a

judicial review is part of the grievance process. However, later in that same section, subs. 31(6) provides in part that "[a]s soon as possible after the presentation and consideration of a grievance at any level in the grievance process, the member constituting the level shall render a decision as to the disposition of the grievance …" The underlined parts imply more than one, and possibly several levels of grievance, but also that the levels in the grievance process are made up of a "member". Under the *RCMP Act*, subs. 2(1), the Commissioner is a "member" – she or he is a member of the Force. A judge on a judicial review, however, is obviously not a "member" of the RCMP. That strongly suggests that a judicial review is not part of the grievance process.

[121] Third, s. 32 is a privative clause that makes the Commissioner's decision final and binding, subject only to judicial review. On its express wording, however, it appears to determine both the end of the grievance process (the Commissioner "constitutes the final level in the grievance process") and the limited nature of any additional proceedings to challenge the Commissioner's decision at that final level (only by judicial review).

[122] In my view, therefore, the better reading of these provisions in the *RCMP Act* is to treat the Commissioner's level as the legislation reads on its face: as the final level in the grievance process. On the applicant's submission about s. 26 of the regulations, that conclusion implies that the Level II decision by the Commissioner is also the "final disposition of the grievance" for the purposes of the stay in s. 26 of the *RCMP Regulations 1988.*

[123] These textual interpretations of s. 26 are supported by the likely purpose of the stay and are consistent with other provisions in the *RCMP Act*. With respect to the objective of s. 26, a

grievance process is designed to be a way to resolve disputes within an organization, including but not limited to grievances related to decisions to discharge an employee. During the grievance process, the employee who has been discharged is protected by the stay from the implementation of the discharge decision until a final decision on the grievance about that discharge is made. The final decision in the *RCMP Act* rests with the Commissioner. If the Commissioner's decision is to quash a decision to discharge a member, the member is no longer discharged and there is no reason for a stay to protect the member from that decision to discharge. An employee in those circumstances is protected by the stay while the decision to discharge is extant but under internal review. When the decision has been set aside or quashed at the final level, the protection of the s. 26 stay is no longer needed. The member's employment status is protected until the Commissioner makes the final decision in the internal grievance process.

[124] This analysis of the s. 26 stay does not imply that a party is without access to a stay pending judicial review of that decision by the Court. The availability of a potential interim and interlocutory stay under the *Federal Courts Act*, s. 18.2, pending judicial review in this Court, sits harmoniously with this interpretation of s. 26 and ss. 31-32 of the *RCMP Act*. An applicant whose internal grievance is complete and who is seeking judicial review by the Court is not left without a possible application for a stay of a Level II grievance decision – that applicant just does not enjoy a continued automatic stay under s. 26.

[125] The textual interpretations of s. 26, above, are also consistent with two other provisions in the *RCMP Act* (as it read at the applicable time) involving appeals of initial disciplinary decisions to the Commissioner. In brief, appeals to the Commissioner on other issues involving members'

conduct and its impact on their standing in the Force were contemplated by ss. 45.14 and 45.24 of the pre-November 2014 *RCMP Act*. Those two provisions were respectively the subject of privative clauses in subs. 45.16(7) and 45.26(6) that made the Commissioner's decision "final and binding and, except for judicial review" under the *Federal Courts Act,* and "not subject to appeal to or review by any court". In both cases, the *RCMP Act* provided for automatic stays of the initial decisions pending internal appeals to the Commissioner, if such an appeal is taken, until after the appeal is disposed of: see *RCMP Act* (up to 2014), subs. 45.17(1) and (2) and subs. 45.27(1) and (2). As with the stay in s. 26 of the *RCMP Regulations 1988*, the application of the statutory stay appeared to be limited to the internal appeal.

[126] In sum therefore, reading the phrase "final disposition of the grievance" in s. 26 of the *RCMP Regulations 1988* with ss. 31-32 of the *RCMP Act,* and considering the nature of a judicial review proceeding by a court and the availability of a stay from the Court pending judicial review under s. 18.2 of the *Federal Courts Act*, I conclude that the stay in s. 26 does not apply after the Commissioner has issued a final, Level II decision in a grievance even if the grievor has applied to the Federal Court for judicial review of that decision. Specifically, as it applies to this case, the s. 26 stay does not apply because the RCMP's decision to discharge Cpl. Wasylynuk has been quashed by the final, Level II decision of the Commissioner, there is no extant appeal nor any ability to appeal from that decision and, for the purposes of the stay in s. 26, the grievance process in Part III of the *RCMP Act* has been completed despite the application for judicial review of the Commissioner's decision.

[127] In addition, in this case, the RCMP advised during the Level II submissions that it has withdrawn not only the Notice of Discharge but also the Notice of Intention to Discharge and the O6-Permanent medical profile. Counsel on this motion did not resile from that position. And that is, of course, what Cpl. Wasylynuk asked for as a remedy in his grievance dated October 15, 2010. In a practical sense, therefore, what remains between the parties and what is really at stake in the judicial review to this Court is not the decision to discharge. From Cpl. Wasylynuk's perspective, it is how the original O6-Permanent medical profile came to be in the first place, and whether there was wrongful conduct at the time. From a legal perspective it is whether the Commissioner's decisions (i) that the remaining, "collateral" issues the applicant has raised were moot and (ii) not to exercise her discretion to decide on those issues despite their mootness, were reasonable on the legal standard in *Vavilov*. While his counsel noted that the grievance related to the "medical discharge process that led to and the Notice of Discharge …" [emphasis added] and that the current Notice of Application seeks to set aside the Commissioner's Level II decision in its entirety, the applicant has achieved the remedies he originally requested when he started his grievance. I find the present circumstances very hard to fit within the likely objective of a provision to stay a decision to discharge an employee.

[128] For all the reasons above related to the stay of the "decision" to "discharge" until the "final disposition of the grievance or appeal", I reach the overall conclusion that the scope and effect of the stay in s. 26 does not afford the applicant the protection he requests in this motion.

[129] Accordingly, even if the s. 26 stay were a public legal duty that could be the subject of an (interlocutory) *mandamus* order, it is not a duty that is owed to the applicant at this time. An order for *mandamus* cannot be issued on this motion.

[130] Having concluded on several bases that the applicant's motion for an interlocutory order of *mandamus* should be dismissed, I turn to the applicant's request for an injunction.

V. **The Request for an Interlocutory Injunction**

[131] The Supreme Court of Canada has established a three-stage framework to guide a court in exercising its discretion on an interlocutory injunction application and determining whether is it just and equitable to issue the injunction. The court considers whether: (i) on a preliminary assessment of the merits of the applicant's case, there is a serious issue to be tried (in the sense that the applicant's claim is not frivolous or vexatious); (ii) the applicant would suffer irreparable harm if the injunction is not granted; and (iii) the balance of convenience favours granting or denying the injunction, based on an assessment of which party would suffer greater harm from the granting or refusal of the injunction, pending a decision on the merits. The fundamental question is always whether it is "just and equitable in all the circumstances" to grant the injunction: see *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 824, at para 25; *RJR-MacDonald*, at p. 334; *CBC*, at para 15; *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 (Mactavish, JA), at para 13-14.

[132] The Supreme Court held in *CBC* that the same three-stage analysis applies to applications for interlocutory mandatory orders, albeit with a different standard for assessing the merits of the applicant's case at the first stage: see *CBC*, at paras 15 and following; *Air Passengers Rights v. Canada (Transportation Agency)*, at para 19.

[133] The *RJR-MacDonald* framework also applies to stays: *Arctic Cat Inc. v Bombardier Recreational Products Inc.*, 2020 FCA 116 (Rivoalen JA), at para 10; *Newbould v Canada (Attorney General)*, 2017 FCA 106, [2018] 1 FCR 590 (Pelletier JA), at paras 14 and 20; *Toronto*

Real Estate Board v Commissioner of Competition, 2016 FCA 204 (Gleason, JA), at para 11; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 (Layden-Stevenson JA), at para 4; *Unilin Beheer B.V. v Triforest Inc.*, 2017 FC 76 (Gascon, J), at para 101.

[134] The case law in applications for interlocutory injunctions, mandatory orders and stays therefore cross-fertilizes, particularly on the requirements for irreparable harm.

[135] The three stages in the *RJR-MacDonald* framework are conjunctive, meaning that an applicant must satisfy all elements in order to be entitled to relief: *Air Passengers Rights v. Canada (Transportation Agency)*, at para 15. They are also flexible and interrelated. They are not watertight compartments. Each one relates to the others and each focuses the court on factors that inform its overall exercise of the court's discretion in a particular case. As an example, demonstrated strength on the merits at stage one may affect the court's consideration of irreparable harm and the balance of (in)convenience: see *RJR-MacDonald*, at p. 339; *Attorney General of British Columbia v Attorney General of Alberta*, 2019 FC 1195 (Grammond, J), at paras 97 and 173-179; *Livent Inc. v Deloitte & Touche*, 2016 ONCA 395 (Strathy CJO), at para 5; *Unilin Beheer B.V.*, at para 102 and the cases cited there; *British Columbia (Attorney General) v Wale* (1986), 9 BCLR (2d) 333 (CA), *per* McLachlin, JA, at pp. 346-47, aff'd [1991] 1 SCR 62.

[136] In this case, the applicant submits that his application is for a *quia timet* injunction order – because the events that will cause the harm he alleges have not yet occurred, and he has not yet suffered the alleged harm itself. The applicant submits that courts have adopted a cautious approach to applications for a *quia timet* injunctions, and have incorporated two requirements: a

high probability that the apprehended harm will occur, and a temporal dimension that the alleged harm will occur imminently or in the near future: *Letnes*, at para 55; see also *Attorney General of British Columbia v Attorney General of Alberta*, at para 154; *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573, at pp. 579*b*-c and 588*a*-*b*; *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441 at pp. 457*j*-458*g*. Having such considerations when an injunction is requested *quia timet* is also not new: see e.g. *Fletcher v. Bealey* (1885), 28 Ch. D. 688, at p. 698; *Matthew v. Guardian Assurance Co.* (1918), 58 SCR 47 (Anglin, J.), at p. 61.

[137] fCpl. Wasylynuk submits that the respondents have a "deliberate expressed intention" to engage in the apprehended harmful conduct, which conduct is imminent or in the near future and will cause "very substantial if not irreparable" damage to him. He contends that his position is supported by facts and evidence that are "cogent, precise or material, and clear, convincing and non-speculative, as opposed to being a simple inconvenience".

Stage One: Serious Issue to be Tried

[138] The first stage of the *RJR-MacDonald* framework involves a preliminary assessment of the strength of the merits of the applicant's claims. At least three different standards have evolved to assess the strength of the merits, which are applied in different circumstances. Typically, the standard is low – it requires a serious issue to be tried, meaning that the claim must not be frivolous or vexatious: *RJR-MacDonald*, at p. 337. The Supreme Court in *RJR-MacDonald* recognized exceptions to the usual standard, including if a decision on the interlocutory injunction would, in

effect, amount to a final determination of the underlying proceeding in which the injunction application is commenced: at pp. 338-39.

[139] A different standard applies to a request for a mandatory order. The applicant must show a strong *prima facie* case: *CBC*, at paras 13-15.

[140] In addition, the jurisprudence of the Federal Courts applies a differently-described elevated standard in some circumstances: see e.g. *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 (Nadon, JA), at paras 66-67; *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682 (TD) (Pelletier, J) at para 11; *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 (Gascon, J), at paras 66, 79-80).

[141] In this case, the usual standard applies and the focus is on preliminary assessment of the strength of the merits of Cpl. Wasylynuk's application for judicial review of the Commissioner's Level II decision, filed by the applicant by amended Notice of Application dated February 24, 2020. Is there a serious issue to be tried or an arguable case, so that it is not frivolous or vexatious?

[142] The applicant made few submissions on this issue, including (as the respondents pointed out) none in his written materials. The respondents contended generally that the judicial review application does not clear the low bar of a "serious issue" to be determined, but really just returned the favour to the applicant, arguing not about the strength of the merits but instead submitting that the motion is a collateral attack on the RCMP's internal administrative process and challenges the so-called Long Order instead of the Commissioner's Level II decision. On that submission, the

respondents contend that the injunction requested does not seek to maintain the *status quo* pending the decision in the judicial review application because Cpl. Wasylynuk is in no danger of being discharged as a result of the outcome of the judicial review (given the outcome before the Commissioner and the respondents' position during the grievance, which extends to today).

[143] Given the parties' lack of submissions on the merits and my conclusion on irreparable harm below, I will not (and do not need to) assess the strength of the merits of the applicant's position on the judicial review of the Level II decision.

[144] The respondents also raised issues that permeate their submissions about the administrative process and the prematurity of the applicant's motion. They submit that the present motion for an injunction is an attempt to pre-empt an administrative process that has not yet even begun and an attempt to divert the RCMP from its legitimate attempts to return the applicant to active duty. The applicant points to the Federal Court of Appeal's decision in *CB Powell Ltd. c Canada (Agence des services frontaliers)*, 2010 FCA 61 (Stratas JA), and the discussion of that case in *Letnes*, at paras 90-93. In my view, while these points may be addressed at stage one when there is an existing process (see *Newbould*, at paras 22-24), they are better addressed on the facts in this case at the third stage of the *RJR-MacDonald* framework.

Stage Two: Irreparable Harm

[145] Many applications for interlocutory injunctions turn on whether the party seeking the injunction has demonstrated irreparable harm at the second stage of the analysis. Proof of

irreparable harm is critical to success on an application for injunctive relief at an interlocutory stage. As the Supreme Court held in *Google*, there is "no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm": at para 41. On this issue, the applicant must "convince the court": *CBC*, at para 12.

[146] It is the nature or quality of the harm – not its magnitude – that must be "irreparable" in the second stage of the analysis. "Irreparable" harm is harm that cannot be compensated or remediated by money damages, or otherwise cured, for example because one party cannot collect damages from the other: *RJR-MacDonald*, at p. 341. As Justice Gascon remarked at paragraph 49 of *Letnes*, the "irreparability of the harm is not measured by the pound".

[147] The requirement to show irreparable harm has attracted considerable attention and emphasis from the Federal Court of Appeal. Expectations are high. The applicant must adduce "clear and non-speculative" evidence of irreparable harm: see, for example, *Air Passengers Rights v. Canada (Transportation Agency)*, at para 28. In *Janssen Inc. v Abbvie Corporation*, 2014 FCA 112, Stratas JA stated at para 24 that "… the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later." He repeated the same phrase in *Canada (Attorney General) v Oshkosh Defense Canada Inc.*, 2018 FCA 102, at para 25 and it was endorsed by Nadon JA in *Western Oilfield Equipment Rentals Ltd. v M-I LLC*, 2020 FCA 3, at paras 11-12. See also *Tearlab Corporation v I-Med Pharma Inc.*, 2017 FCA 8, at para 4 (A.F. Scott, JA); *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126, at paras 14-16 (Stratas, JA); *Glooscap Heritage*

Society v Canada (National Revenue), 2012 FCA 255, at para 31 (Stratas, JA); and generally, *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at para 45.

[148] There is also Federal Court of Appeal authority that an applicant must show that the alleged irreparable harm will be suffered – not that it may occur or even, in some decisions, that it is "likely" to occur: *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200, at para 7 (Layden-Stevenson, JA); *Glooscap*, at para 31; *Arctic Cat*, at para 20.

[149] Because of the requirement for clear and compelling evidence of irreparable harm, it usually cannot be inferred: *Ahul-Bayt Centre, Ottawa v Minister of National Revenue*, 2018 FCA 61 (Laskin, JA), at para 15; *Cedar Chabad v Minister of National Revenue*, 2013 FCA 196 (Mainville, JA), at para 26. However, in some circumstances irreparable harm, even prospective harm, may be inferred: see *Newbould*, at paras 29-30 (harm to reputation may be inferred from the whole of the surrounding circumstances); *Laurentian Pilotage Authority c. Corporation des pilotes du Saint-Laurent central inc.*, 2015 FCA 296 (Noël, CJ), at paras 11-13; *Nissan Canada Inc. v BMW Canada Inc.*, 2007 FCA 119 (Sexton, JA), at para 9; *Ciba-Geigy Canada Ltd. v Novopharm Ltd.* (1994), 56 CPR (3d) 289 (Rothstein, J) at pp. 325-26 (FCTD).

[150] In *Newbould*, at para 29, Justice Pelletier made the following distinction concerning the proof of different kinds of irreparable harm:

> In my view, the presence of two lines of cases such as these shows that the quality of the evidence – "clear and compelling" or something less – is a function of the nature of the irreparable harm being alleged. Where the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence such as that set out at

> paragraph 17 of *Gateway City Church*. In the case of harm to social interests such as reputation or dignity, as in *Douglas [v. Canada (Attorney General)*, 2014 FC 1115], the occurrence of irreparable harm can be satisfied by inference from the whole of the surrounding circumstances.

[151] Accordingly, a court considering evidence of allegedly irreparable harm must be sensitive to the nature of the harm, and the nature of the evidence, that is before it.

[152] Irreparable harm is also unavoidable harm: see *Janssen*, at para 24; *Western Oilfield Equipment Rentals*, at paras 11-12; *Gateway City Church*, at para 16; *Glooscap*, at para 31. In *Janssen*, at para 24, Justice Stratas noted that "it would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief." The harm alleged in *Janssen* was not irreparable because it was something Janssen itself brought about by its earlier successful motion to bifurcate the proceeding.

[153] Similarly, in *Arctic Cat*, Justice Rivoalen concluded at paragraph 33 that much of the alleged irreparable harm was "self-inflicted and avoidable" because the applicants were aware of the risk that they might lose a proceeding in the Federal Court, and had more than two years to prepare a contingency plan to avoid the harm. The applicants took a "calculated risk" that they would succeed, but did not.

[154] In *British Columbia Civil Liberties Association v Canada (Citizenship and Immigration)*, 2016 FC 1223, at paras 20-24, Justice Zinn also concluded that alleged harm could be avoided by taking action. In that case, by filing an application to this Court for leave and judicial review of a Notice of Intent to revoke citizenship, an affected person would be granted an automatic stay under

a case management order to preserve their position as a citizen. A concern was raised that some people who received such a notice might, "through ignorance or lack of resources," fail to apply and take advantage of the stay. Justice Zinn concluded that the "failure of a person, for whatever reason, to take advantage of the *de facto* stay available, does not change the fact that it is available to them and that it will avoid the harm".

[155] In *Beaver Rock Roastery Inc. v Saso*, 2017 ONSC 740, Charney, J., set aside an injunction issued *ex parte*, on the basis of non-disclosure. The plaintiff company and an individual shareholder had obtained the injunction to enjoin lenders from calling in a loan and enforcing the terms of a general security agreement. On the injunction application, the court had concluded that the "irreparable harm in this case if the loan is called in is that the plaintiffs will be put out of business: as the plaintiff notes it would effectively force the company into bankruptcy." On the motion to set aside the injunction, Justice Charney concluded that the plaintiffs had not disclosed to the court several pages of the loan agreement entered by the company and its shareholders with the lenders (who in fact were also shareholders). The deliberately-omitted pages contained terms that required the plaintiff company to provide additional security for the loan, in part by issuing additional shares to the lenders. Justice Charney held that irreparable harm could have been avoided. He stated at paragraph 48:

> … knowing the terms of the additional security clause in the September 1, 2016 loan agreement leads me to conclude that the plaintiff [company] will not suffer irreparable harm if the injunction is not granted. If the BRR is forced into bankruptcy it is because the [individual] plaintiff has refused to honour the terms of a loan agreement that he made three months before bringing the motion. He could have avoided the alleged irreparable harm on which the injunction had been obtained by simply signing a new shareholder agreement and providing the lender with additional security as a loan agreement required. The evidence indicates that

> he was the sole holdout among the shareholders (another material point that was not disclosed in his motion material). Interlocutory injunctions should not be used to simply release borrowers from meeting their contractual or financial obligations.
>
> [Emphasis added.]

The Applicant's Position on Irreparable Harm

[156] On this motion, Cpl. Wasylynuk's affidavit dated August 25, 2020 described the harm he believes he will suffer and why. First, Cpl. Wasylynuk testified that he is certain that if he does not comply with the so-called "Long Order" (Inspector Long's memorandum dated August 13, 2020), some form of administrative action will ensue: at paras 54-55. The applicant's counsel referred to his testimony during cross-examination, at pp. 269 and 295-97, and to the contents of the memorandum and previous communications in 2019, to support the argument that the RCMP will take action – particularly the August 22, 2019 memorandum that is so close in content to the August 13, 2020 memorandum. On the basis of the history between him and the RCMP, Cpl. Wasylynuk fears and believes that Inspector Long will "almost certainly" commence an investigation under the Code of Conduct regarding an alleged violation of a direct order.

[157] For present purposes, I agree that the RCMP has positioned itself to take action if necessary, and that there are considerable reasons to anticipate that if Cpl. Wasylynuk does not engage in any steps towards a return to work – if he disobeys the "Long Order" – the RCMP may in fact consider and commence disciplinary action of some sort.

[158] Second, Cpl. Wasylynuk testified that if that occurs, his reputation and career with the Force would be in grave jeopardy and will be irreparably damaged, in a manner not compensable in damages or costs. He described harm he will suffer to his health. He also fears that the Inspector will take administrative steps to stop his pay, allowances and benefits, which would have a prejudicial effect on his ability to sustain his livelihood. He fears he may be discharged from the Force.

[159] This evidence raises a critical issue: is the harm apprehended by Cpl. Wasylynuk *unavoidable* harm? I will address that issue before turning to each of the categories of harm in his affidavit.

Is the Harm Unavoidable?

[160] In my view, the harm apprehended by the applicant not unavoidable. That is a transcendent flaw in his position on irreparable harm on this motion.

[161] The harm relied upon by Cpl. Wasylynuk does not concern harm that will be immediately caused to him by the "Long Order", or by him taking the steps required by it. Instead, Cpl. Wasylynuk's affidavit describes the harm he anticipates from <u>not complying</u> with the Long Order and the ensuing investigation into a Code of Conduct violation, and possible future proceedings, a hearing and a finding of guilt based on that decision not to comply – including harm to his reputation amongst his peers, family and friends and harm to his health: see his affidavit, at paragraphs 53 ("If any form of administrative order is advanced against myself for failure to

comply with the Long Order …"), 54 ("I am certain that if I do not comply with the Long Order …"), 55, 56 ("If breach of Code of Conduct allegations are made or brought against me, or an investigation is ordered against me …", 58 ("Further, if I am ordered to attend before a Conduct Board for any alleged Code of Conduct violations …"), 59 ("The prospect of potentially having to endure the bringing of any Code of Conduct violations, any result investigation, as well as any potential hearing …"), 60, 61-62, and 68.

[162] The harm that flows from Cpl. Wasylynuk's decision not to comply with the Long Order is not unavoidable, but rather is premised on something within his own control. He is in a similar position to the applicants in the *Arctic Cat*, *British Columbia Civil Liberties Association* and *Beaver Rock Roastery* decisions. Cpl. Wasylynuk can avoid the harm he apprehends by taking steps, specifically by deciding to comply with the requirements in the Long Order and participate in the return-to-work process. It is within his own power to fill out the security forms, to fill out documents towards and then participate in a health assessment and to do other things that are necessary for him to be re-qualified for duty, properly assessed and (if necessary) accommodated in any limitations he may currently experience, and to return to work in a meaningful capacity. Neither party made any suggestion that the requirements in Inspector Long's memorandum were unusual or only applied to Cpl. Wasylynuk – they are standard requirements for a return to work that would apply to any member of the RCMP in his situation.

[163] I recognize that it may well feel very uncomfortable and unpleasant for Cpl. Wasylynuk to do these things. It may well feel very unjust to comply, based on how he believes he has been treated by the Force and on his interpretation of the s. 26 stay. Yet it is something he can do to

avoid the harm and, given my interpretation of the scope of the stay in s. 26, I am not aware of any legal impediment to him doing so. To be clear, I am not suggesting what he should or must do. This analysis concerns whether unavoidable harm is present on the evidence.

[164] Accordingly, in my view the harm Cpl. Wasylynuk expects to suffer if he disobeys the "Long Order" is avoidable harm which, as the case law indicates, is not irreparable harm for the purposes of an application for an interlocutory injunction.

[165] When asked about this issue at the hearing, counsel for the applicant submitted that if he followed the instructions in the August 13, 2020 memorandum, Cpl. Wasylynuk would be participating in an unlawful process due to the application of the stay in s. 26, discussed above, which Cpl. Wasylynuk cannot do without suffering irreparable harm. Counsel also referred to Cpl. Wasylynuk's belief, based on his experiences over the past decade or more, that he would inevitably be discharged from the Force and could not receive a fair process in any investigation or administrative action against him; to him, the outcome is "predetermined" if the s. 26 stay is not enforced until his grievance is finally determined. In that unfair process, Cpl. Wasylynuk's integrity and dignity would be compromised. Without the protection of the s. 26 stay and the requested injunction based on it, he submits that he would have to go through another long discharge and grievance process, on top of the one he has already endured.

[166] I am unable to accept this submission, on the evidence on this motion and given the inapplicability of the s. 26 stay to the present circumstances. In my view, this submission is also heavily based on Cpl. Wasylynuk's subjective prediction of what may happen in the future. Given

the number of contingencies involved and the fact that the process proposed in the August 13, 2020 memorandum will not inevitably lead to his dismissal, the harm is not unavoidable. I note also that this line of argument obviously does not comport with the principal thrust of his affidavit, which describes harm if he does not comply with the requirements in Inspector Long's memorandum.

[167] I conclude as well that the harm alleged by the applicant does not constitute satisfactory harm for a *quia timet* injunction. The only basis on which there might be a "high probability that the apprehended harm will occur" is that the applicant will not comply with the so-called Long Order.

[168] I will now consider the different kinds of alleged irreparable harm, to ensure Cpl. Wasylynuk's evidence and position is fully assessed and in case my conclusion on unavoidable harm is incorrect.

Analysis of the Categories of Alleged Irreparable Harm

[169] Cpl. Wasylynuk testified that any form of administrative action advanced against him for failure to comply with the requirements in Inspector Long's memorandum will have the following specific effects:

- it will cause him to no longer be a member in good standing with the RCMP (affidavit, para 53);
- it will cause him great mental distress, anxiety and humiliation among his friends, family and peers (paras 53, 56, 58);

- it will be a blemish on his service record and will "stain my entire service and career with the RCMP". He does not want to end his career with a stain or blemish caused by any false, contrived or unwarranted assertions of any breaches or failure to perform his duty (paras 53, 55, 57);

- it will prevent him from receiving or being entitled to receive the 40th year RCMP service bar, "which is a very significant milestone and achievement for any [RCMP] member" and an "affirmation of [his] self-identity as a life-long Mountie with an exemplary record". His inability to receive the service bar cannot be "cured" (para 51-54);

- it will "cast [him] as someone who has failed to live up to the high standards incumbent upon being a Mountie" (para 55); and

- it will be "especially traumatizing" (para 55) because he is "a very principled person and believe[s] in the rule of law, [and] verily believe[s] that the Long Order is unlawful" (para 56).

[170] I will consider Cpl. Wasylynuk's irreparable harm evidence, under the following general headings: harm to reputation; harm to health, including mental health and the applicant's integrity, dignity and self-worth; and financial harm.

[171] *Harm to Reputation*: As is apparent, a particular theme in Cpl. Wasylynuk's evidence is harm to his reputation. He testified, at para 56:

> If breach of Code of Conduct allegations are made or brought against me, and or an investigation is ordered against me, this will be very quickly and widely known throughout "K" Division in Edmonton. Issuing any form of allegations or bringing charges that I have contravened the Code of Conduct … against me for failing to comply with the Long Order, immediately costs myself as someone who has done something "very wrong" in connection with my service with the Force. This will have an immediate and irreparable effect on my reputation and character to my peers in the Force, as well as others who may learn to come to learn of the charges or claims. I will be very humiliated and suffered great embarrassment and mental anguish [if] such administrative action be commenced, which I strongly fear, especially since the Long Order has expressly stated that this is my "last opportunity".

[172] The Federal Court of Appeal considered the availability of irreparable harm to reputation in *Newbould*, concluding that harm to reputation can constitute irreparable harm in some circumstances. While neither party made direct reference to that case in their written submissions, the decision is binding on this Court and was noted by Justice Gascon in *Letnes*, to which both parties made considerable reference.

[173] In *Newbould*, the applicant was a judge. A decision was made to constitute a review panel into allegations about his conduct. He applied for judicial review of the decision and brought a motion for a stay, to prevent continuation of the investigation into his conduct until this Court decided his judicial review application. This Court dismissed the stay motion, and the judge appealed.

[174] The Federal Court of Appeal dismissed the appeal. Justice Pelletier, with whom Trudel and Rennie JJA concurred, made extensive and instructive comments about the possibility of irreparable harm to reputation in a setting with some similarity to the present case. I will set out Justice Pelletier's analysis in detail, starting at para 31:

> … the question is whether the appellant is able to show such damage to his reputation. The appellant says that the proceedings before the Inquiry Committee will irreparably harm the reputation he acquired in the course of his years on the bench. I am sensitive to this argument, but the difficulty I have is that the harm of which the appellant complains is inherent in the process in which he is engaged. If the appellant is likely to suffer irreparable harm solely from the fact that his conduct will be the subject of Inquiry Committee proceedings, then all judges who find themselves in the same position also suffer irreparable harm. I am not prepared to make such a finding.
>
> [32] This difficulty is compounded by the fact that, in this case, the appellant has already been exposed to a certain amount of public exposure resulting from the contemporary coverage of his

> involvement in the events giving rise to these proceedings as well as in the coverage of the proceedings themselves to date.
>
> [33] This is not to say that judicial conduct proceedings can never give rise to irreparable harm to a judge's reputation. But in order to do so, it appears to me that there must be some factor, some element in the surrounding circumstances that takes the case out of the normal run of such proceedings. The judge would have the burden of showing the presence of such a factor. Once the presence of such a factor was shown, the issue is whether it permits the inference of the likelihood of irreparable harm.
>
> [34] In the cases the appellant put to us as examples of proceedings stayed on the basis of irreparable harm, there were such factors. In *Douglas*, the issue was a privacy interest in relation to certain photos, whereas in *Bennett* [*Bennett v. British Columbia (Superintendent of Brokers)* (1993), 77 B.C.L.R. (2d) 145 (CA)] and *Malmo-Levine* [*Adriaanse v. Malmo-Levine*, (1998) 161 FTR 25], the issue was the risk of an adverse result by a tribunal which was alleged to be biased. These factors raise issues of reputational damage but, in my view, but it was the addition of another element which gave rise to the inference of irreparable harm.
>
> [35] Does an allegation of lack of jurisdiction permit an inference of irreparable harm? It could but I do not believe that it gives rise to that inference in every case. The threat of damage to reputation inherent in Inquiry Committee proceedings does not flow from the Committee's jurisdiction but from the evidence it hears. To the extent that the possibility of vindication at the end of the proceedings exists, any harm suffered in the course of proceedings could be remedied in whole or in part.
>
> [36] It is no doubt infuriating to be dragged into a process which one believes has no basis in law but that does not amount to irreparable damage to reputation. It may, in particular circumstances, give rise to some other kind of irreparable harm but, on this record, there is no reason to believe that we are in the presence of such circumstances.
>
> [Emphasis added.]

[175] In the present case, much if not all of the apprehended harm to the applicant's reputation is inherent in the process in which he believes he will soon be engaged. He is convinced that he

will suffer irreparable harm from the fact that his future conduct in disobeying the Long Order will be the subject of an investigation and Code of Conduct proceedings. However, the harm to his reputation is the same as what all RCMP members who find themselves in the same position also suffer. Like Justice Pelletier in *Newbould* and Justice Gascon J in *Letnes*, at para 71, I am not prepared to find that such harm is irreparable harm to the applicant's reputation for injunction purposes.

[176] In addition, as in *Newbould*, to the extent that one can even foresee the allegations and any future proceedings, it is not possible to know the outcome or to find with any confidence that there is no possibility of vindication at the end of the proceedings. As Justice Pelletier observed, that implies that any harm suffered in the course of such a future proceeding could be remedied in whole or in part.

[177] Is there a factor or element that "takes the case out of the normal run" of proceedings? See *Newbould*, at para 33 and *Letnes*, at para 72.

[178] I do not believe so. First, in both *Bennett v British Columbia (Superintendent of Brokers)* and *Adriaanse v Malmo-Levine*, mentioned by Justice Pelletier at para 34 of *Newbould*, the respective applicants made an allegation of reasonable apprehension of bias on the part of one of the panellists sitting in the proceeding in which the applicants were already involved. In both cases, the courts granted a stay of the ongoing proceeding until the allegation could be resolved. By contrast, in Cpl. Wasylynuk's circumstances, there is no current proceeding against him; there can be no comparable allegation of a reasonable apprehension of bias because nothing has yet

happened to cause an investigation, proceeding or hearing into his conduct. In my view, it is not sufficient for irreparable harm purposes for the applicant to believe subjectively that a future investigation, proceeding or hearing that has not been commenced will be carried out by persons who are characterized by bias or a reasonable apprehension of bias.

[179] I am aware that the applicant has made several allegations of bias during the lengthy grievance process, including in relation to the events leading to the assignment of the O6-permanent medical profile and recently against the RCMP Commissioner. However, it is too speculative on this injunction motion to accept that such an allegation may be alleged against unspecified and unknown persons that may be involved in a possible future investigation, proceeding or hearing. In addition, I do not accept that an applicant's personal belief that an outcome (such as an eventual dismissal from the Force) is inevitable can be determinative of irreparable harm, or that there is no one available in the RCMP for a future process who is unbiased. The applicant's case is not akin to *Bennett* or *Malmo-Levine*. I refer also to Justice Mactavish's comments related to bias in *Air Passengers Rights v. Canada (Transportation Agency)*, at para 33, and the cases cited there.

[180] Second, in *Douglas*, the irreparable harm to the applicant would have been caused by disclosure of intimate photographs to her peers on the committee reviewing her conduct, which would have resulted in harm to her reputation and psychological state: at paras 43 and 45. The stay prevented disclosure until the Court concluded its judicial review of the committee's decision finding the photographs admissible. This present circumstances do not involve this kind of issue or evidence.

[181] Having considered all of Cpl. Wasylynuk's evidence as to potential harm to his reputation, I cannot identify another factor or element related to reputation that takes his current circumstances out of the normal run of return-to-work scenarios, or of possible future investigations of a potential Code of Conduct violation, based on the evidence adduced in this motion. I am not unsympathetic to the situation Cpl. Wasylynuk faces, and his perception of it. I am not, however persuaded that the apprehended harm to his reputation constitutes irreparable harm as the case law describes it.

[182] *Harm to Health*: In addition to the excerpts summarized in the bullet points above, Cpl. Wasylynuk also testified, at paras 55 and 59 of his affidavit, about the anticipated effect on his health, including his mental health. He testified about his "shame, upset and humiliation" if he is cast as someone who has failed to live up to the high standards incumbent on being a Mountie and how "especially traumatizing" it would be to him as he believes he has done nothing unlawful or improper. He also testified that the "prospect of potentially having to endure the bringing of any Code of Conduct violations, any resulting investigation, as well as any potential hearing, is something that causes me great anxiety and mental distress…"

[183] A person's employment has been described as "an essential component of [their] sense of identity, self-worth and emotional well-being": see Chief Justice Dickson's dissenting opinion (Wilson, J concurring) in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR. 313, at p. 368*a-c*. See also *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, at paras 7-8, 10 and 87-88. I accept Cpl. Wasylynuk's evidence that if an investigation for breach of the Code of Conduct or ultimately a hearing were to occur, it would have a negative impact on him, including on his sense of integrity, pride and self-identity as a Mountie. It is understandable that

Cpl. Wasylynuk does not want to be exposed to a Code of Conduct investigation or a disciplinary hearing – particularly as a law enforcement officer – let alone another grievance process.

[184] In his evidence on this motion, Cpl. Wasylynuk used strong language to describe the impacts he expects (distress, shame, humiliation, traumatizing) if things come to pass as he believes they will. He did not testify about his current mental health circumstances (whether related to his depression and PTSD in 2003, or otherwise) and how they may be affected by the events he is certain will occur in the near future. His evidence also does not directly address the difference between the usual anxiety and upset that must surely accompany any investigation or allegation against a member of the Force related to failing to obey an order, and any greater or enhanced effect due to his mental or physical health at the moment. Like the reputational harm above, I am unable to conclude that the impact on the applicant's integrity, pride and self-identity as a Mountie is different from what all RCMP members who find themselves in the same position would also suffer.

[185] It must be recognized that these apprehended effects are Cpl. Wasylynuk's own expectations of what will happen if certain events occur. The applicant did not file medical, psychological or any other independent supporting evidence about the potential impact of a future investigation, subsequent proceeding or adverse decision on his health, including his mental health. The Court is not in a position, for example, to assess on the basis of medical, psychological or other clinical evidence whether and how Cpl. Wasylynuk will be negatively affected, or if he is particularly susceptible or vulnerable to harm as a result of his current state of mental or physical health. As noted, Cpl. Wasylynuk did not testify as to his current state of mental or physical health

– and there is no obligation on him to do so. It does, however, have an impact on the Court's assessment of the harm he alleges.

[186] In the absence of any such evidence to assist in understanding the nature and extent of potential harm that might occur to his mental or physical health in the future, I am unable to find that the evidence related to the harm Cpl. Wasylynuk apprehends to his future health, including his mental health and his integrity, pride and self-identity, meets the strict test for irreparable harm.

[187] *Financial Harm*: Cpl. Wasylynuk described financial harm that would occur at para 61 of his affidavit. He testified that without the salary and allowances he receives from the RCMP, he and his family will be severely prejudiced as he is the principal breadwinner for his family. In addition, he testified that without his income he would not be able to defend himself adequately against allegations made against him given the legal costs involved. He was also concerned that he would lose specific amounts that would accrue to him triggered by the completion of 40 years of service, as well as a bonus entitlement of 12% of his basic salary.

[188] In my view, this evidence relates to amounts that are compensable in damages, or are too contingent on possible future events to meet the requirements for financial harm as set out in the case law, including in *Janssen* and in *Newbould*.

[189] For these reasons, Cpl. Wasylynuk has not met the stringent requirements to demonstrate irreparable harm on this motion. I underline that these reasons should not be interpreted as applying to the harm caused by any other circumstances, including any order or action that may be directed

at Cpl. Wasylynuk in the future. These reasons only concern the evidence of harm adduced on this motion at this time.

[190] While my conclusion on the critical issue of irreparable harm is sufficient to dismiss the application for an injunction, I will go on to consider briefly the balance of convenience, as those considerations apply to a potential *mandamus* order as well, and then the overall 'just and equitable' aspect of the test.

Stage Three: Balance of (In)convenience

[191] The third stage of the *RJR-MacDonald* framework is an assessment of which party would suffer greater harm from the granting or refusal of the injunction, pending a decision on the merits.

[192] Having already considered the harm alleged by the application, I proceed directly to the harm alleged by the respondents to the public interest. They refer to the public interest in the RCMP being able to manage its members as set out in the *RCMP Act*, something identified and accepted by Justice Gascon in *Letnes*, at paras 81-86. The respondents also noted that the requests in the Inspector Long's memorandum related to updated security and health information, both of which contribute to the public interest in having active RCMP officers who have complied with those security and health requirements when carrying out their law enforcement duties. The respondents further referred to the reasons of Mackay J. in *Dugonitsch v Canada (Minister of Employment and Immigration)*, [1992] FCJ No. 320 (FCTD), at para 15, that only in "exceptional cases" will an individual's interest in preventing irreparable harm outweigh the public interest.

[193] Cpl. Wasylynuk submits that RCMP is not being restricted in its ability to manage its members nor is he interfering in the RCMP's ongoing administrative process before it is completed. In his view, the RCMP are statutorily prohibited by the s. 26 stay from engaging at all in the administrative process that is premised by the Long Order. The applicant claims that the RCMP is "actively and deliberately interfering in the ongoing administrative grievance process that is currently in the context of an extant appeal, pursuant to s. 18" of the *Federal Courts Act*. To him, the "threatened conduct of the RCMP as expressed by the Long Order amounts to an attempt to pre-empt and circumvent the grievance process" and the stay in s. 26, prior to the final disposition of the applicant's grievance.

[194] This position is contingent on the applicant's interpretation of the stay provision in s. 26, with which I disagree. In accordance with my conclusion on s. 26 above, the so-called Long Order does not interfere in an ongoing grievance or apply pending the applicant's judicial review application to this Court.

[195] In my view, the balance of convenience favours the respondents. I agree that there is a public interest in the employment relationship between the RCMP and its members that is recognized in the statutory and regulatory regime that governs the Force. In *Letnes*, Justice Gascon stated at para 84:

> … In this case, the RCMP has the responsibility of ensuring that its members are medically fit to fulfill their duties to protect the public. The RCMP is a police force for Canada, and its members need to have the necessary physical qualities to be a member. No member has a right to remain in the RCMP if the individual no longer has the medical condition to do so, and no member has an entitlement to continue serving as a RCMP member. The discharge process exists in the context of the exercise of this responsibility

> given to the RCMP, and of its general mandate to protect the public and ensure that the RCMP members are properly qualified to do so.

[196] In my view, the same reasoning applies with respect to both the medical and security requirements set out in the Inspector Long's memorandum dated August 13, 2020 (recognizing the factual differences between this case and *Letnes* including the absence of a comparable "discharge process" here).

[197] I would also give weight at this stage to the principle of non-interference by a supervising court in administrative proceedings: see e.g., *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, at para 22; *The Winning Combination Inc. v Canada (Attorney General)*, 2019 FC 1014, at para 17; and D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, Judicial Review of Administrative Action in Canada (2019) (loose-leaf), vol. 1, at 3:4100. I find this principle even more applicable when a formal process or proceeding may not even occur. If one does, it may develop in a variety of ways and it is one that affords the applicant procedural protections and the ability to defend himself against any allegations made against him. In my view, this is a case in which the public has an interest in allowing the internal administrative processes of the RCMP to continue forward in a manner that is fair, sensitive and as expeditious as practicable.

[198] Accordingly, I find that the balance of convenience favours the respondents.

Just and Equitable in the Circumstances?

[199] Stepping back and considering all the circumstances, I conclude that it is just and equitable not to issue an injunction, based on the evidence and submissions on this motion. In my view, the circumstances, including the proper interpretation and application of s. 26 of the *RCMP Regulations 1988* and the evidence of harm to both parties, do not warrant the exercise of the Court's equitable discretion to prevent irreparable harm to the applicant.

[200] For all of these reasons, I will dismiss the applicant's motion for an interlocutory injunction.

VI. **Disposition**

[201] The applicant's informal motion to amend his Notice of Motion and written submissions is granted.

[202] The applicant's motion for an interlocutory order of *mandamus* and an injunction is dismissed.

[203] As the successful parties on the main motion, the respondents are entitled to costs. I fix costs in an all-inclusive lump-sum amount of $500.

ORDER in T-2061-19

THE COURT ORDERS AS FOLLOWS:

1. The applicant's requests to amend his Notice of Motion and his written submissions on this motion are granted.
2. The applicant's motion for an order of *mandamus* and an interlocutory injunction is dismissed.
3. The applicant shall pay costs to the respondents in an all-inclusive lump sum of $500.

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2061-19
STYLE OF CAUSE:	CORPORAL PATRICK G. WASYLYNUK v COMMANDING OFFICER "K" DIVISION ROYAL CANADIAN MOUNTED POLICE, ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 10, 2020
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APPEARANCES:

Richard Hajduk	FOR THE APPLICANT
Barry Benkendorf	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Richard Hajduk Hajduk Gibbs LLP, Barristers and Solicitors	FOR THE APPLICANT
Barry Benkendorf Attorney General of Canada	FOR THE RESPONDENTS