Federal Court  Cour fédérale

Date: 20241002

Docket: T-2638-22

Citation: 2024 FC 1541

Ottawa, Ontario, October 2, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MATTHIEU RINELLA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Matthieu Rinella, the applicant, joined the Royal Canadian Mounted Police [RCMP] for basic training on June 4, 2018. Once basic training was completed at the RCMP Depot Training Academy, he started a probation period of two years on December 4, 2018. In view of a number of incidents which took place during the probation period, Mr. Rinella's discharge was confirmed by a RCMP Appeals Process Adjudicator on February 14, 2022. The Adjudicator's decision is made the subject of a judicial review application pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] I wish to stress at the outset that Mr. Rinella and his counsel did not object to the judgment and reasons in this case being provided in English. The Court raised the issue at the hearing of this judicial review application because Mr. Rinella authored the Notice of Application in this case in English, yet the memorandum of argument presented by the counsel then retained was in French and counsel addressed the Court in French. That was in spite of the Notice of Application requesting that the hearing be held in the English language.

[3] On the other hand, the record of decision relating to employment requirements for probationary members was produced in English, as was the decision under review by an adjudicator from the Recourse Review and Appeal Branch. Indeed, a confidentiality Order in this matter was produced by Associate Judge Tabib on March 1, 2023, in English. In the circumstances, it was resolved that the Court would provide its reasons in English with, of course, a French translation to follow.

[4] The judicial review application of the Adjudicator's decision challenges it as contravening principles of procedural fairness, as being tainted by an error of law and as being "clearly" unreasonable. Although Rule 301 of the *Federal Courts Rules*, SOR/98-106, calls for "a complete and concise statement of the grounds intended to be argued", the Notice of Application of December 15, 2022, was quite rudimentary. Nevertheless, there was no challenge launched and, at any rate, the memoranda of fact and law were precise in the development of the arguments.

I. The Notice of Application

[5] The Notice of Application, although it is ostensibly with respect to the decision of the Adjudicator, gave way before the Court to an attack on the decision of the RCMP Administration and Personnel Officer, Superintendent Michel Gallant. The Notice of Application identifies the decision under review as "[i]n the decision the Adjudicator determined that his review of the Respondent's decision does not identify reviewable errors that would warrant my intervention, in that I find his decision was not reached in contravention of the applicable principles of procedural fairness, is not tainted by an error of law, and is not clearly unreasonable" (para 2). We understand that the "Respondent" referred to by the Adjudicator is Superintendent Gallant. Mr. Rinella disagrees that the decision did not suffer from these issues: procedural fairness, error of law, clearly unreasonable.

[6] The problem, however, is that Mr. Rinella goes on to argue as his first ground for his judicial review application that it is the Adjudicator, whom he identifies as the "Final Authority" (Nicolas Gagné) as being guilty of the alleged sins of Mr. Gallant:

> **The grounds for the application are:**
>
> 1. pursuant to sections 17, 18.1(4)(a), (b), (c), (d) and (f) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 the Final Authority failed to observe a principle of natural justice, procedural fairness or other procedure that he was required by law to observe, or otherwise act upon, fettered or refused to exercise his jurisdiction or discretion in failing to find that the Applicant's probationary discharge from the Royal Canadian Mounted Police contravened principles of procedural fairness, natural justice, involved errors of law, and was clearly unreasonable.

[7] The applicant goes on to allege grounds faulting the Gagné decision for having "erred in law in failing to consider relevant evidence before him" (para 3) and for the Gagné decision to be "so unreasonable having regard to the evidence properly before the Final Authority (Mr. Gagné) as to amount to an error of law" (para 4). The confusion between the decision under review (Mr. Gagné) and the decision which is the subject of an appeal (Mr. Gallant) made the examination of this matter rather unwieldly. The reality is that the Adjudicator (Mr. Gagné) reviewed the decision made by the Respondent (Mr. Gallant), on the three grounds that are allowed: procedural fairness, question of law and clearly unreasonable decision. Indeed, counsel for Mr. Rinella spent most of his presentation before the Court discussing Mr. Gallant's decision, presumably in the hope that he could demonstrate that the Adjudicator erred in his conclusion that the Gallant decision was not to be impugned.

II. The legal framework applicable to the probationary discharge of an RCM policeman

[8] The *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*], provides specifically for the probation of a person appointed as a member for a period established by the rules of the Commissioner.

[9] During that probationary period, the officer under probation may be discharged. It is subsection 9.4(1) that applies:

Discharge	**Licenciement**
9.4 (1) While a member is on probation, the Commissioner may discharge the member by notifying the member that the member will be discharged at the end of the notice period established by rules of the Commissioner. The member ceases to be a member at the end of that notice period.	**9.4 (1)** À tout moment au cours de la période de stage, le commissaire peut licencier un membre en l'avisant qu'il sera licencié au terme du délai de préavis fixé par règle établie par le commissaire. Le membre perd sa qualité de membre au terme de ce délai.

These rules are known as the Commissioner's Standing Orders [CSO] (ss 2(2) of the *RCMP Act*).

[10] The *RCMP Act* delegates to the RCMP Commissioner the power to prescribe the probationary period (para 21(2)(a)) and the notice period referred to in ss 9.4(1). Parliament also confers on the Commissioner the power to make Standing Orders (rules) "respecting the decision to discharge a member under s 9.4 and the making of a complaint procedure in relation to the decision" (para 21(2)(b)).

[11] There are various CSOs. The CSO (Employment Requirements), at its Part 3, addresses the process to be followed for discharging a probationary member. The Commissioner may delegate to a "decision maker", who is a member of the RCMP (s 2), the power to discharge a member who is on probation (s 13). That person in this case is Superintendent Gallant. The probationary period is fixed at two years (s 14) and the length of the period of the notice to be given is 14 days (s 15).

[12] It is at section 16 that we find the test for the discharge of a member on probation. Given its importance to these proceedings, I reproduce it in its entirety:

16. (1) The Commissioner may designate an officer or a person who holds an equivalent managerial position to be responsible for recommending the discharge of a member on probation.	**16. (1)** Le commissaire peut désigner un officier, ou une personne occupant un poste de direction équivalent, à titre de responsable pour recommander le licenciement d'un stagiaire.
(2) If a member on probation has failed to demonstrate their suitability to continue to serve as a member, the designated officer or person must immediately recommend to the decision maker, in writing, that the member be discharged.	**(2)** Le responsable recommande immédiatement par écrit au décideur de licencier le stagiaire qui n'a pas réussi à démontrer son aptitude à continuer d'agir à titre de membre.
(3) The decision maker must cause a notice of intent to be served on a member on probation if they intend to discharge the member under subsection 9.4(1) of the Act.	**(3)** Le décideur qui a l'intention de licencier un stagiaire en vertu du paragraphe 9.4(1) de la Loi lui fait signifier un avis à cet effet.
(4) The notice of intent must set out	**(4)** L'avis d'intention précise :
(a) the grounds on which the decision maker intends to discharge the member; and	**a)** les motifs sur lesquels le décideur a l'intention de se fonder pour licencier le stagiaire;
(b) the member's rights under subsection (5).	**b)** les droits du stagiaire prévus au paragraphe (5).
(5) The member may, within 14 days after the day on which the notice of intent is served,	**(5)** Le stagiaire peut, dans les quatorze jours suivant la date de la signification de l'avis :
(a) provide a written response; or	**a)** soumettre une réponse écrite;
(b) request, in writing, an extension of time to provide	**b)** demander par écrit la prorogation du délai pour

a written response.	soumettre une réponse écrite.
(6) If, after the notice of intent is served but before the decision maker makes a decision under subsection 17(1), new information that may be relevant comes to the attention of the decision maker, the decision maker must cause the member to be served with a copy of that information. The member may, within seven days after the day on which the copy is served,	**(6)** Si de nouveaux renseignements pouvant être pertinents parviennent au décideur après la signification de l'avis d'intention, mais avant qu'une décision ne soit rendue en vertu du paragraphe 17(1), le décideur en fait signifier copie au stagiaire. Dans les sept jours suivant la date de la signification, le stagiaire peut :
(a) provide a written response; or	**a)** soumettre une réponse écrite;
(b) request, in writing, an extension of time to provide a written response.	**b)** demander par écrit la prorogation du délai pour soumettre une réponse écrite.

[my emphasis]

[13] Thus, there must be a recommendation made by a designated officer. As we shall see, there was such recommendation in our case by Inspector Sabourin. The test that is applied, the standard to be attained by a member on probation is that of suitability ("aptitude" in the French version) to continue to serve as a member. The CSO makes it an obligation of the designated officer to make immediately the recommendation to the decision maker for the discharge of the member on probation who has failed to demonstrate their suitability to continue as a member. Clearly there is no need to wait for the whole two-year probation period to be concluded before recommending the discharge.

[14] Following from the recommendation is the notice of intent to discharge the member. It is to be issued under the authority of a decision maker. The Decision Maker is Superintendent Gallant. The notice must state the grounds for the discharge of the member on probation, essentially why the member is deemed to have failed to demonstrate the suitability to continue as a member. The member on probation has 14 days to respond (an extension of time is possible).

[15] Even after the notice of intent has been issued by the decision maker, it remains possible to supplement the record if new information comes to the attention of the decision maker (para 16(6)). The member on probation will, of course, have to be notified of the new information and given an opportunity to provide a written response. That took place in the instant case.

[16] Once the "decision maker has sufficient information" (s 17), a decision is made. It is a binary decision: either retain (possibly with terms and conditions) or discharge the member on probation.

III. The preliminary recommendation/The facts

[17] A preliminary recommendation to discharge Mr. Rinella was made on December 18, 2020 by Staff-Sergeant David Beaudoin who had supervising authority over Constable Rinella. The preliminary recommendation was made to Inspector Christian Sabourin who made the actual recommendation to discharge Mr. Rinella on February 15, 2021.

[18] S/Sgt Beaudoin, of the Integrated National Security Enforcement Team [INSET] in the C Division, found that there were very serious issues with the performance and the behaviour of Mr. Rinella despite attempts to correct the encountered problems. Follows a 30-page report detailing various incidents. These require a somewhat detailed presentation to understand the other three levels of decision.

[19] The applicant had 2 ½ years of policing experience prior to joining the RCMP. Although the probation period started in December 2018, it was interrupted on March 29, 2020. Constable Rinella was then reassigned to administrative duties as of April 15, 2020, following a *Code of Conduct* investigation which was launched with respect to one of the incidents described in S/Sgt Beaudoin's report.

[20] S/Sgt Beaudoin reviewed (the Report is found in the Certified Tribunal Record [CTR], tab 15) a number of incidents considered through the lens of the applicant's performance and behaviour. Even before being on probation, the final report from his training period included comments which, says S/Sgt Beaudoin, became recurring issues during his probationary period:

- "In moving forward, Cadet Rinella is encourage [*sic*] to keep an open mind to new tactics and procedures" (p 3/30);
- "At the time of this assessment he has attended learning assistance 7 times which is high. Cadet Rinella will have to focus his attention on his demeanour and attitude in the field" (p 3/30);
- "Cadet Rinella has struggled to receive feedback over the course of training and had difficulty being accountable for his actions. Cadet Rinella needs to ensure he will

continue to work on this area to show his commitment to self-improvement" (p 3/30).

[21] S/Sgt Beaudoin goes on to refer to six incidents in 2019 and 2020.

a) In March 2019, Mr. Rinella expressed an interest in an assignment to another RCMP detachment. The assignment was refused, yet Mr. Rinella raised the issue with a superintendent (without going through the proper hierarchy). Even after being advised that this did not conform with the proper RCMP policies, Mr. Rinella raised the same issue again, a few weeks later, with that same superintendent. He was again advised that that behaviour is not in line with the internal policies. This incident is seen as wilfully ignoring the process in place even after a member on probation was advised by his superior. That follows various warnings during his training in Regina. S/Sgt Beaudoin notes that the behaviour continued to deteriorate.

b) In May 2019, Mr. Rinella expressed the wish to take part in some training with the Emergency Response Team ("Groupe tactique d'intervention"). That was denied. He tried again in October 2019, even suggesting that he take holidays to do so. From the report we learn that Mr. Rinella registered for the training to take place in December 2019. It is only when the officer in charge of the Emergency Response Team training contacted the officer in charge of Mr. Rinella's unit that a third refusal was made. It is noted in Mr. Beaudoin's report that this incident shows that Mr. Rinella does not abide by the policies, procedures and practices. Furthermore,

Constable Rinella claimed to have misunderstood, which tends to demonstrate "questionable integrity" in view of the clear directions given to him.

c) On March 18, 2020, Mr. Rinella is involved in an incident with a motorist who complained about the abuse of authority he claimed the applicant was guilty of. It was alleged he failed to "act with integrity, fairness and impartiality", and he failed to "not compromise or abuse their authority, power or position" (*Code of Conduct* of the RCMP, SOR/2014-281, s 3.2). Mr. Rinella communicated with the police agency where the complaint had been initially lodged. It appears that Mr. Rinella was involved in a surveillance operation during which a citizen was the subject of an intervention during what is described as a competition between the two cars to pass other vehicles. Using the rotating lights, Mr. Rinella forced the person to stop and to identify himself, without identifying himself as a policeman. The S/Sgt's report details his encounters with Mr. Rinella on March 27 and 30, 2020. Constable Rinella had not reported the incident and he did not take notes about the encounter, which is considered to be a failure of the most basic requirements of police work. He claimed to have taken action as a private citizen under the Highway Safety Code (over which the RCMP has no jurisdiction in the Province of Quebec), yet he considered much later after the fact laying a charge of dangerous driving under the *Criminal Code*. In fact, S/Sgt Beaudoin documents various contradictions in the evolving story given to him by Constable Rinella and to his immediate supervisor. Later on, he refused to provide his version to the investigator in charge of the disciplinary (*Code of Conduct*) investigation that had been launched.

The fact that Constable Rinella failed to produce a report in view of a significant incident involving the detention of a citizen and did not make the required notes about the incident is contrary to the policies and directions issued by the RCMP. That constitutes a performance issue that required immediate improvement in order to meet the exigencies of the position. Instead of acknowledging that much, Mr. Rinella argued that he was right.

In spite of the order given to Constable Rinella to refrain from discussing the incident with witnesses, he sought to obtain the details of the incident as reported by the plaintiff to a different police force: that was considered to be in breach of the directions given by his supervisors. In sum, Constable Rinella gave various explanations in response to the incident of March 18 which were in contradiction with each other; he wanted to charge a citizen with offenses after a complaint had been lodged against him; he did not produce a police report contemporaneously with the incident, and when he wrote the report, it was after he had found out about the version of events given by the complainant, thus acting in contravention to the order received not to do so. S/Sgt Beaudoin summed this up by saying that this shows a measure of questionable integrity. Moreover, Constable Rinella did not show a positive attitude throughout, which translates into the difficulty Constable Rinella has to improve his behaviour due to his lack of acceptance of feedback. This is not in line with the RCMP values which require that members take responsibility for their actions. This is made especially so as the applicant continued to argue that he would do it the same way in spite of being advised of the violation of rules.

d) The fourth incident occurred in the fall of 2020. In spite of his assignment to administrative duties, Mr. Rinella sought to take further training. S/Sgt Beaudoin, together with a colleague, met with Constable Rinella to advise him that in view of the ongoing *Code of Conduct* investigation, the two requests made are denied. Although he had been advised that the meeting was not to discuss the ongoing *Code of Conduct* investigation, Mr. Rinella persisted in seeking information about the investigation, including the role played by S/Sgt Beaudoin. That, writes S/Sgt Beaudoin, confirms the inability of Mr. Rinella to follow clear, simple and detailed instructions. This, again, reflects on his behaviour. Constable Rinella is portrayed as blaming the interlocutor who has not "understood" what he meant. The behaviour is said to be consistent with observations made since training. The constable does not take responsibility for his actions, which is contrary to the RCMP values that the organization wishes to foster. In a word, the blame is put on someone other than the applicant for the missteps he commits.

e) Being on administrative duties did not prevent Mr. Rinella's peripheral involvement in a national security investigation his unit was conducting, although not taking part in the investigation proper. In late October 2020, Mr. Rinella was tasked with following vehicular movements through GPS readings. Constable Rinella was responsible for monitoring the GPS. The person under surveillance had left for a location far from their residence without Constable Rinella monitoring adequately and advising his chain of command, as he had to. His failure to conduct appropriate checks during a period of time was argued by Mr. Rinella as being because of a lack of clear explanations. Other team members did not appear to misunderstand the

instructions. Mr Rinella was pulled off this investigation completely as his supervisors found his involvement in the work environment as being counter-productive in view of his attitude and behaviour.

The work to be performed was seen as being elementary. The performance of the duties was lacking. This shows, according to Mr. Beaudoin, the continued inability to abide by new procedures. Mr. Rinella also continued to display a refusal to take responsibility, leading to a showdown with his direct supervisor requiring the intervention of a superior.

f) In November 2020, a sixth incident took place. This time, many processes had been put in place since March 2020 to prevent, as much as possible, the spreading of the Covid-19 virus in the work place. At RCMP Headquarters in Montreal, these measures were made mandatory and made the subject of briefings where it was stressed that disciplinary measures would be taken where instructions were wilfully ignored. Among the measures taken were signs affixed on the floor providing the direction in which personnel were to walk in the workplace.

On November 2, 2020, S/Sgt Beaudoin advised Mr. Rinella that he was walking in the opposite direction from the arrows on the ground. Mr. Rinella turned around and responded that he did it because he had seen S/Sgt Beaudoin do the same thing, which suggested it was not that important.

The point of the matter is not that Mr. Rinella was going the wrong way. S/Sgt Beaudoin acknowledges that this may happen. It is rather that, instead of taking responsibility, Constable Rinella puts the blame on extraneous elements. Indeed, Constable Rinella was on administrative duties because of his failure to abide by

> the rules and policies: that tends to demonstrate that changes in his behaviour are not happening in spite of the numerous interventions up to that point.

[22] These incidents were seen as sufficient for S/Sgt Beaudoin to make the recommendation, on December 18, 2020, that Constable Rinella be discharged from the RCMP during his probationary period as having failed to demonstrate his suitability to continue to serve as a member. Mr. Beaudoin noted that the RCMP, through supervisors and management, have sought to address the failures witnessed during the period. However, the repeated failures go largely to the integrity and the refusal to abide by the policies of the RCMP. There is no supplementary training, concludes Mr. Beaudoin, that can be made available towards adhering to the values of the RCMP.

[23] The matter was referred to Inspector Christian Sabourin who is the designated officer to make the formal recommendaiton to the decision maker, Superintendent Michel Gallant. That recommendation was made on February 2, 2021, in a seven-page document.

IV. The recommendation to discharge by the Designated Officer

[24] I have summarized the six incidents referred to by S/Sgt Beaudoin in some detail. Inspector Sabourin indicates in his report having received S/Sgt Beaudoin's preliminary recommendation. Inspector Sabourin distilled the information some more, but his further summary is faithful to the information made available by S/Sgt Beaudoin as part of his preliminary recommendation. Inspector Sabourin then proceeds to provide the rationale for

recommending the discharge of Constable Rinella for having failed to demonstrate his suitability to serve.

[25] It was already stressed during Mr. Rinella's training that there were deficiencies which required attention and focus (see para 18 of these Reasons for Judgment). The designated officer refers to the fact that Constable Rinella did not accept the RCMP practices in view of his past experience of some 2 ½ years in policing. He certainly cannot now claim a lack of experience. The final report following basic training noted personality lacunae. Constable Rinella was advised that he had to concentrate on his attitude and demeanor as he does not accept feedback. It was noted that he does not accept responsibility for his actions. These comments were known by Mr. Rinella who signed the final report.

[26] Meetings between Mr. Rinella and his superiors show that he does not admit he was wrong and does not accept responsibility, trying to justify his actions by manipulating the information. His integrity and honesty, which may be compromised by his actions and omissions, do not seem to be a concern for him. The incidents reported by S/Sgt Beaudoin demonstrate that much. What was noted during basic training continued during the probation period as noted by his supervisors through the various reported incidents.

[27] There is concern that the actions of Constable Rinella in major police operations may have a negative impact on the reputation of the RCMP as well as on the operations themselves.

[28] As a law enforcement agency, the RCMP operates within the confines of the law in serving and protecting while respecting the organizational values. These are fundamental to the mission of the RCMP which must be carried out by each member. Although some incidents may seem minor, each of them reflects that Constable Rinella continues to behave in an inappropriate fashion. Integrity was lacking in some situations, yet he does not accept that he was wrong. In spite of clear and precise instructions from supervisors, the behaviour did not improve.

[29] Probation serves to assess skills, qualifications, capacity and ability, and suitability; at the end of the day, will the person be an asset to the organization? Mr. Rinella lacks integrity and honesty, which does not accord with the fundamental values of the RCMP. These can hardly be taught. Every RCMP employee must display behaviour which exemplifies the fundamental values.

[30] A member, who during probation is in breach of a *Code of Conduct* provision, may face discharge if the offence is serious enough, instead of being subjected to the conduct process of Part IV of the *RCMP Act*. To put it bluntly, there is no need to complete the disciplinary process during the probationary period if the breach of the *Code of Conduct* is significant enough. The Administration Manual, at Chapter 27.4, under the title "Probationary Members", states:

> 3. 2. 2. If a probationary member contravenes a provision of the Code of Conduct during his/her probationary period, consider seeking the discharge of the probationary member if the contravention of the Code of Conduct may be serious enough to demonstrate the probationary member's unsuitability to continue to serve as a member, as an alternative to Part IV of the *RCMP Act*.

Inspector Sabourin reports that the two *Code of Conduct* provisions which are alleged to have been infringed by Mr. Rinella in the incident involving the citizen are s 2.1 and s 3.2. They read:

2.	RESPECT AND COURTESY	2.	RESPECT ET COURTOISIE
2.1	Members treat every person with respect and courtesy and do not engage in discrimination or harassment.	2.1	La conduite des membres envers toute personne est empreinte de respect et de courtoisie; ils ne font pas prevue de discrimination ou de harcèlement.
3.	RESPECT FOR THE LAW AND THE ADMINISTRATION OF JUSTICE	3.	RESPECT DE LA LOI ET DE L'ADMINISTRATION DE LA JUSTICE
…		[…]	
3.2	Members act with integrity, fairness and impartiality, and do not compromise or abuse their authority, power or position.	3.2	Les membres agissent avec intégrité, équité et impartialité sans abuser de leur autorité, de leur pouvoir ou de leur position ou les compromettre.

Inspector Sabourin advises that the *Code of Conduct* investigation is held in abeyance so that the RCMP can proceed with the process leading to the discharge if the recommendation he makes to that effect is followed.

V. Notice of Intent

[31] The Notice of Intent to discharge Constable Rinella came on June 21, 2021. It replaced the original notice of intent of February 26, 2021. That original notice was further to Inspector Sabourin's recommendation to discharge. The Modified Notice of Intent adds a further allegation concerning criminal charges laid against Constable Rinella for an incident allegedly happening on January 14, 2021. The Notice speaks of charges of assault (s 265 *Criminal Code*), assault with

a weapon or causing bodily harm (s 267 *Criminal Code*), and breaking and entering (s 348 *Criminal Code*). The Notice goes on to state that Mr. Rinella was to appear in court on July 12, 2021. These criminal allegations, as well as a further *Code of Conduct* investigation commenced on April 27, 2021, concerning a different incident involving alleged breaches of the Oath of Secrecy and the *Security of Information Act*, RSC 1985, c 0-5 [*SOIA*], were added for the consideration of the Decision Maker. I will come back to these with some details further in these reasons.

VI. Decision Maker's Decision

[32] Superintendent Gallant, the Decision Maker, produced a substantial record of decision running for 41 pages. He referred extensively to the Administration Manual, together with the Commissioner's Standing Orders concerned with Employment Requirements and Grievances and Appeals.

[33] It is noteworthy that the Decision Maker states the purpose of the probationary period and some of the evaluation factors to be considered. Probation serves the purpose of assessing the suitability of the member on probation, considering:

- the reliability;
- the compatibility with colleagues and clients;
- the work requirements;
- the ability to adhere to applicable policies, procedures, practices and the *Code of Conduct*; and
- the probationary member's character, integrity and attitude.

The Decision Maker operates pursuant to a delegation of authority from the Commissioner. The Decision Maker states that, following the preliminary recommendation from Mr. Rinella's line officer (S/Sgt Beaudoin), and the recommendation to discharge from the designated officer, Inspector Sabourin, the Notice of Intent to Discharge a Probationary Member was served.

A. *The process leading to the decision*

[34] The Decision Maker described what gave rise to a further incident, beyond the incidents reported by S/Sgt Beaudoin, which resulted in a *Code of Conduct* alleged violation.

[35] In the preparation of his response to the Notice of Intent, Constable Rinella requested to have access to his notes and emails. The access was granted and an extension of time of 30 more days to respond was granted to his counsel at the time.

[36] Upon reading the response, the Decision Maker noticed that Mr. Rinella had revealed the details of a national security investigation and the investigative techniques used in the course of the investigation.

[37] The Decision Maker expressed his concerns on April 22, 2021, and allowed Constable Rinella 10 days to provide his response. The Decision Maker supplied documents he claimed provided clear statements as to the mandatory requirements concerning the security of information:

> forwarded him copies of his Engagement Document (RCMP A114Be), his Security Screening Certificate and Briefing Form (TBS/SCT 330-47), his Certificate of Appointment/Designation

> (RCMP 1800), and his Acknowledgement of Professional Responsibilities in the Royal Canadian Mounted Police Form (RCMP 6465e). These four documents were signed by Constable Rinella over the course of his employment. I also sent him copies of the RCMP policy in Operational Manual (OM), Chapter 25.2 "Investigator's Notes" and of the RCMP policy in Security Manual (SM), Chapter 1.3 "Guidelines for *Security of Information Act*".
>
> (Decision, p 8/42)

[38] Following a request from counsel for Mr. Rinella, a further extension of time was granted on April 29 2021. In his email, Superintendent Gallant detailed his concerns with respect to this latest incident, which occurred since the early Notice of Intent. It appears that, in reading the material forwarded on behalf of Constable Rinella in response to the Notice of Intent, classified information, which was to remain classified, was disclosed by Mr. Rinella outside the framework created by the instruments referred to in paragraph 37 herein, which Constable Rinella had signed. These concerns were passed on to Mr. Beaudoin, by then Inspector Beaudoin, who initiated a *Code of Conduct* investigation concerning the disclosure of such sensitive information. Superintendent Gallant included this new disclosure incident as part of his decision to discharge Constable Rinella.

[39] Another extension of time, to June 1, 2021, was granted in view of the sending of 15 documents to Mr. Rinella and his counsel.

[40] On May 12, 2021, the Decision Maker was advised of a change of counsel to represent Constable Rinella. The new counsel sought a further extension of time (beyond June 1, 2021) because the full investigation report of the latest *Code of Conduct* investigation (disclosure of classified information) was not yet available.

[41] On June 7, 2021, an English version of the *Code of Conduct* Investigation Report regarding the public complaint (the incident of March 18, 2020) was forwarded to Mr. Rinella and his counsel. On June 16, the Decision Maker delivered the *Code of Conduct* Investigation Report regarding the unauthorized disclosure of sensitive and classified information to counsel for Constable Rinella. A modified Notice of Intent to Discharge, including now alleged criminal offences of assault and break and enter which were said to be related to a "domestic matter", was given to Mr. Rinella and counsel on June 23, 2021. These charges, laid by the Sureté du Québec, stemmed from an incident allegedly taking place on January 14, 2021. Constable Rinella was arrested and charged. Thus, further to the initial Notice of Intent, two more incidents were to be considered by the Decision Maker: the disclosure of sensitive information and criminal charges laid against the applicant.

[42] Counsel for Mr. Rinella asked for the final investigation report on the domestic matter in an email of July 2. On July 8, the Decision Maker responded as to the availability of the report related to the domestic matter and the limited use that he may make of that incident:

> I will first say that I will not provide a copy of the final investigation report for what you referred to as the domestic matter. I did not get a copy of that report and will not get one. The information provided to you that is relevant to that case was the initial information sheet that led to the laying of charges by the Crown that I sent you and Cst Rinella on 2021-06-23.
>
> I, as the Decision Maker, have taken note of the fact that Cst Rinella was arrested for that very matter, and that the file was reviewed by a Crown Prosecutor who determined a reasonable probability for conviction, the threshold for laying charges. I will use that portion of information for what it is only and I do not intend to get into the specifics of the case in my review on the Discharge Request.

The final deadline for submissions was set for July 30, 2021. On that date, counsel for Constable Rinella delivered electronically 23 pages of submissions, together with attachments for a total of 360 pages.

B. *The decision to discharge*

[43] The Decision Maker dismissed an argument made by Constable Rinella's first counsel according to which, despite his reassignment to administrative duties, he was still able to perform the duties of a member on probation. As such, the probation period continued to run. The Decision Maker concluded rather that the probationary period was interrupted as of April 2020. The probation period remained interrupted and the matter of the dismissal during probation was still ongoing.

[44] The Decision Maker then proceeded to review the various incidents which constituted the basis for the recommendation to dismiss. He found that it was appropriate for Mr. Rinella to seek explanations from instructors during training for why the RCMP used methods which may differ from his training and experience as a police officer in Quebec: that is part of the learning process. To quote from the Decision Maker's decision, "if cadet Rinella would not have met all standards at Depot [training], he would not have graduated" (p 27/42). The Decision Maker states that he will consider those observations in the training report only if they resurface during the probationary period.

[45] Mr. Rinella is not faulted either for showing eagerness to receive training with the Emergency Response Team at the Valleyfield Detachment. In that, the Decision Maker disagrees

with the preliminary recommendation of S/Sgt Beaudoin (as he then was). However, Constable Rinella is seen as displaying a lack of judgment in insisting to discuss the situation with superintendents in inappropriate settings. Furthermore, his request to participate in the training during holidays he would take to that effect, after having been told it was too early in his young career, attracted this finding by the Decision Maker:

> … The mere fact that he tried to go on training while on Annual Leave shows he did not measure the impact of his absence from work for that week alone, and even worse, considered asking his superiors for a release by having them acknowledge they would agree to the risk of injury to Constable Rinella while he is on the training. In my opinion, more than refusing to accept his superiors [*sic*] answers because they didn't suit him, Constable Rinella shows a total disregard for his units and colleagues in trying by every means to reach his goals, regardless of the impact on anyone other than himself.

[46] The Decision Maker then addressed the complaint (p 28/42) made by a citizen concerning the encounter of March 18, 2020. Because there were two opposing versions of the event, the Decision Maker chose not to render a decision on the allegations made. It is to be remembered that a *Code of Conduct* process had been launched, which was held in abeyance pending the review on suitability. That is provided for in the Administration Manual (see para 30 herein). Thus, the issue is not whether the allegations are to be determined on a balance of probabilities to be founded or unfounded, but rather what was to be determined is whether the actions and attitude, in the course of events following the incident, are, on a balance of probabilities, displaying issues concerning the suitability of Constable Rinella to continue to serve as a member of the RCMP.

[47] The Decision Maker documented significant concerns concerning Constable Rinella's suitability:

a) First, the incident of March 18, 2020, brings about a number of concerns. Although it is well known that police officers have a duty to prepare accurate, detailed and comprehensive notes as soon as possible after an investigation (*Wood v Schaeffer*, 2013 SCC 71, [2013] 3 SCR 1053), Constable Rinella failed to do so: it was only nine days after he was presented with a Conduct Mandate Letter about the incident that he provided an account of the encounter and traffic stop. Mr. Rinella had to be considered to already be an experienced police officer following training at École nationale de Police du Québec, serving in three different police services in the Province, before he joined the RCMP after basic training at the RCMP Training Academy. The ability to serve as a police officer is to be questioned if the applicant still had not caught on to the fundamentals of the job.

b) When questioned by S/Sgt Beaudoin as to why he did not take notes given that he now wanted to lay charges against the citizen, Mr. Rinella replied that as a young member, he was not aware of all the guidelines and policies. That, says the Decision Maker, is not credible. Indeed if that were credible, then the issue becomes how, with the training and experience as a police officer, he could display such ignorance. Constable Rinella raised that training at the Academy is not "real life". This shows disregard for the institution itself and the expertise of those teaching policing. That also shows an inability to accept feedback and take responsibility for one's action, as had been noted in the final report about Constable Rinella at the Academy itself.

c) The Decision Maker was concerned about the fact that Constable Rinella used his own mobile telephone to gather evidence at the scene of the incident. He took six days to send photographs taken at the scene to his office mobile telephone, while claiming he intended to file charges under the *Criminal Code* or the *Highway Traffic Act*.

d) There are finally serious concerns about the integrity and honesty of Constable Rinella in view of his attempt to find out about the version of events of the complainant from the police service where the citizen went to complain, following the detention. In the words of the Decision Maker, that "goes to show that he [Constable Rinella] is ready to go to great lengths to counteract actions that would be detrimental to his reputation, namely a public complaint against him" (p 30/42). Constable Rinella was trying to obtain information about the version of events of the complaining citizen. Constable Rinella should have known better than to communicate with a police officer from a different police force in such circumstances. There was no need to communicate with the other officer if Constable Rinella intended, as he said, to lay charges. In fact, that police officer was not a witness to the events of March 18.

[48] The incident concerning the lack of attention in monitoring a device giving GPS information is also troublesome. Given that Constable Rinella was already relegated to administrative duties, one would have expected the effort made by supervisors to allow him to stay involved somewhat in operations would attract "top notch service" on his part. The Decision Maker concludes that "I see in Constable Rinella's deportment a distinct lack of professionalism

in the course of an investigation" (p 31/42). The fact that Constable Rinella denied responsibility in claiming that the alarm he expected did not ring and there was some miscommunication brings back the concern that he does not take responsibility, as noted during his training.

[49] The incident at RCMP Headquarters where Constable Rinella was seen as walking in a direction opposite to the arrows on the floor during the Covid pandemic (in an attempt to prevent the spreading of the virus in the workplace) was seen as trivial. Nevertheless, the incident exemplifies once more Mr. Rinella's lack of accountability for his actions, again confirming observations made during training.

[50] That took the Decision Maker to the two latest incidents: the disclosure of sensitive and classified information and the criminal charges laid against Mr. Rinella in what had been described as a "domestic matter".

[51] First, the disclosure of classified information. The Decision Maker agrees with Constable Rinella that he was authorized to be on the RCMP premises and to access his work email account for the purpose of preparing his defense. Furthermore, he was authorized to print out copies of relevant emails. Sharing some information with counsel was to be expected. On the other hand, the Decision Maker disagrees with the assertion made by Constable Rinella that the accompanying member, who was to be present while Constable Rinella was on the premises of the INSET, was to inspect and vet emails at their discretion. That was not why he was present. On the contrary, says the Decision Maker, the accompanying member was instructed not to gain

access to the contents of emails. That was for the express purpose to ensure that there would be no screening of the material which could prove to be detrimental to Constable Rinella's defense.

[52] Then, what is the issue? It is not necessary for our purposes to divulge in detail the contents of the information disclosed. There was no need to disclose sensitive information to make the argument the applicant wished to make. The following paragraphs are the long and the short of it:

> In the case at hand, I understand Constable Rinella wanted to show the inefficiencies of the Tracking System used in the investigation rather than his own failings and I can understand how that could be used in his defense. I am of the opinion however, that it is not all of the information in the emails used that was necessary to divulge. There was no substantive gain or added value for Constable Rinella to divulge to anyone the name of the Subject of the INSET Investigation. Nor was there any gain to divulge the addresses visited by the Subject during the investigation or the Tracking System used. That is sensitive and classified information.
>
> I'm of the opinion that the RCMP had a reasonable expectation that Constable Rinella would have caught on to that and that he would have screened the information he was to pass on to counsel. The GS-22-1 SOIA signed by Constable Rinella 2019-01-17 that was provided to him on 2021-05-11 in the course of the present process clearly states at the top of page 2:
>
> > "Anyone covered under the SOIA who communicates classified information without authority to do so and does so knowingly or not, is guilty of an offence under the Act and subject to prosecution with a maximum imprisonment of 14 years."
>
> That speaks for itself and requires no more explanation.
>
> (p 36/42)

[53] With regard to the criminal charges laid against Constable Rinella (the domestic matter), the Decision Maker is careful to state that he does not sit as a criminal court, nor as a *Code of Conduct* board. He is not to decide whether the allegations are founded, or not, because this constitutes merely a discharge process which is solely concerned with the suitability to continue to serve as a member of the RCMP.

[54] The Decision Maker considered the charges laid against Mr. Rinella. Mr. Rinella was arrested in connection with the criminal charges laid about the events of January 14, 2021. He was, of course, released. However, the charges were still pending many months later. Charges may be laid and withdrawn when the circumstances are clarified. Hence it is possible that a more complete investigation can reveal circumstances which make the likelihood of success for the prosecution less so. The charge screening process in Quebec which involves a Crown prosecutor is such that it is expected that, if charges remain pending a few months after the incident giving rise to the charges, the reasonable probability of conviction, which is the standard used by prosecutors, has remained and is attained. The Decision Maker concluded that "[t]he laying of charges that remain pending in court after four months is in my opinion a direct statement of unsuitability" (p 38/42).

[55] The Decision Maker then proceeds to conclude on the only issue in front of him: whether Constable Rinella, on a balance of probabilities, should be discharged on the basis of s 16 of the CSO (Employment requirements), that is that he has failed to demonstrate his suitability to continue to serve as a member.

[56] In spite of positive performance reviews during training and field coaching, the Decision Maker expressed concerns about the ability to put the training into practice:

> … What I'm concerned with however, is not how well he has learned, but rather what he did with the things he learned. I cannot help but see much disregard on his part when putting into practice what he had learned. Notetaking & Report Writing are [*sic*] of them. Constable Rinella's statement about Depot not being Federal Policing is another. It does not suffice that one learns well all that he / she is thaught [*sic*]. What is important to an Organization is that it be confident that when left alone, their representatives will act according to what they were thaught [*sic*] as the right thing. Although Constable Rinella is said to have been a good learner, that was all with supervision. However, when left by himself, Constable Rinella's actions and demeanour since March 2020 are not reflective of that by all means.
>
> (p 36/42)

This is not disguised discipline, says the Decision Maker, but rather an assessment of suitability. Thus, the Decision Maker is concerned with the demeanor, behaviour and conduct, in both professional and personal settings, as they are revealing and cannot be set aside. In fact, it appears that the Decision Maker took into account the cumulative effect of incidents:

> Thus, what is clear in my mind is that it is uncommon to keep hearing about a member over and over again after such a short time in service, and to see that it is always in a negative sequence of events. It speaks a lot about the character, hence the suitability of an individual to continue to serve as a member.
>
> (p 39/42)

[57] The Decision Maker refers to the factors to be considered which are listed at paragraph 33 of the Court's reasons. He finds, "without a doubt", that Constable Rinella does not meet:

- the ability to meet work requirements, including those associated with the workload and the ability to complete the Field Coaching Program;
- the ability to adhere to applicable policies, procedures, practices and the *Code of Conduct*; and
- character, integrity and attitude.

Given the importance put by the Decision Maker on various findings leading to his conclusion of unsuitability, I reproduce them herein:

> Considering:
>
> - Constable Rinella is a probationary member at the present time I have the required power delegated to me to make this decision
>
> - Constable Rinella seems not to have caught on to some fundamentals of the job like note taking and report writing although he is to be considered an experienced police officer as per his actions subsequent to the interception of a citizen while on surveillance that led to a complaint from the public
>
> - Constable Rinella's inability to receive and accept feedback over the course of training as document [*sic*] in his Cadet Final Report
>
> - Constable Rinella's inability to assume his own actions as documented in his Cadet Final Report
>
> - Constable Rinella's use of personal hardware (personal cellphone) to gather evidence when he took a photo of the citizen he intercepted while on surveillance that led to a complaint from the public
>
> - Constable Rinella's willingness to go to great lengths to counteract actions that would be detrimental to his reputation such as communicating with the Police Officer in Terrebone and try to get details about the complaint that was lodged by a citizen against him. Subsequent to that, he wrote his own notes and report

> - Constable Rinella's attempts to communicate [*sic*] a witness of a conduct investigation that targets himself (see above)
>
> - Constable Rinella's lack of comprehension of the Judicial system and/or disregard for it as when he did not pay due care to the timely analysis of the GPS locator/transmitter of a National Security Investigation Subject that was obtained through a judicial authorization
>
> - Constable Rinella's lack of comprehension and lack of judgment in abiding by the SOIA
>
> - Constable Rinella being arrested, detained and criminally charged with serious charges of breaking and entering, assault, and assault with a weapon, the case which is still pending in Court some 10 months after being charged
>
> - Constable Rinella's inability to exercise judgment and good behavior in the course of his employment when left alone as when he intercepted a citizen unlawfully during a surveillance and made inappropriate comments and actions that led to a complaint from the public
>
> - Constable Rinella's demeanour, behavior and conduct, both in a personal and professional setting (see above & refer to Criminal Proceedings File #700-01-180380-217
>
> - Constable Rinella plainly just does not act as a Police Officer

that led to the following conclusion:

> I conclude that Constable Rinella does not have what it takes to continue to serve as a police officer with the Royal Canadian Mounted Police. Therefore, I hereby order his discharge immediately on this date at midnight.

VII. The decision subject to the judicial review application

[58] In effect, the decision to discharge during the probation period is that of the Commissioner, which is delegated to Superintendent Gallant. It is for all intents and purposes a

decision taken by the management of the RCMP. I note that Superintendent Gallant is the Administration and Personnel Officer in the "C" Division of the RCMP with responsibilities in the Province of Quebec.

[59] There lies an appeal of the decision to discharge during the probation period to an Appeals Process Adjudicator. That process is governed by a different set of Commissioner's Standing Orders, those dealing with grievances and appeals, SOR/2014-289 [hereinafter "CSO (Grievances and Appeals)"]. The Adjudicator's decision is the only decision that is before this Court and can be the subject of a judicial review application (*Dugré v Canada (Attorney General)*, 2021 FCA 8).

[60] The process for appeals leading to the Adjudicator's decision provides the needed background for an understanding of the decision under appeal. It is not a process without boundaries. Thus, the grounds for an appeal are those spelled out at ss 47(3) of the CSO (Grievances and Appeals):

(3) An adjudicator, when rendering the decision, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.	**(3)** Lorsqu'il rend la décision, l'arbitre évalue si la décision qui fait l'objet de l'appel contrevient aux principes d'équité procédurale, est entachée d'une erreur de droit ou est manifestement déraisonnable.

The Adjudicator addressed the various issues raised by the applicant which fall within the grounds available under the CSO. However, the review is not one which can be done as if the Adjudicator was reassessing the whole matter. It is rather "an opportunity to challenge a decision already made. The adjudicator's role will be confined to determining if the impugned decision

was reached in violation of the applicable principles of procedural fairness, is tainted by an error of law, or is otherwise clearly unreasonable" (Adjudicator's decision, para 59).

[61] The decision under review referred to the three reports made in this case: the preliminary recommendation of the acting officer in charge of the INSET to which Mr. Rinella had been assigned (S/Sgt Beaudoin), the actual recommendation to discharge prepared by Inspector Sabourin, the Career Development and Resourcing Officer [CDRO], and the decision to discharge by the Decision Maker. In fact, the Adjudicator referred specifically to the recommendation and the decision to discharge. The Adjudicator quoted extensively from the reasons given by Superintendent Gallant for the discharge of Constable Rinella, some of which I have already quoted. I have appended to my reasons paragraph 35 taken from the reasons of the Adjudicator in view of the importance given to the *Code of Conduct* allegations Constable Rinella was facing. As will be seen, there are three sets of allegations where *Code of Conduct* proceedings were launched (but did not proceed in view of the suitability process): public complaint of traffic stop; disclosure of sensitive and classified information; conduct leading to criminal charges in a domestic matter.

[62] Allegations concerning procedural fairness on the part of the Decision Maker are considered by the Adjudicator on a standard of review of correctness. As for alleged errors of law, the Adjudicator announced he would review them on a standard of reasonableness. Finally, ss 47(3) speaks of a standard of "clearly unreasonable" concerning the decision made. These standards on appeal were not challenged. Relying on *Kalkat v Canada (Attorney General)*, 2017 FC 794 [*Kalkat*] and *Smith v Canada (Attorney General)*, 2021 FCA 73, "clearly unreasonable"

is equated to the "patent unreasonability" of yesteryear (*Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190). That in turn was found to be the most deferential standard of review (*Canada (Director of Investigation and Research v Southam Inc,* [1997] 1 SCR 748 [*Southam Inc*]. The Adjudicator quotes paragraph 57 from *Southam Inc* in order to explain the difference between "unreasonable" and "patently unreasonable":

> 57 The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 47, *per* Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

Referring to *Law Society of New Brunswick v Ryan*, 2003 SCC 20; [2003] 1 SCR 247, a decision will be clearly unreasonable if "the outcome under appeal is not plausible on the evidence" (Adjudicator's decision, para 69).

[63] The applicant raised issues of lack of procedural fairness. The Adjudicator notes that the applicant was given notice so that he has known all along what matters were under consideration as being relevant to suitability. He was given, and took, the opportunities to take part in the

process which obviously affected his interests. Similarly, the reasons given by the Decision Maker, which do not require perfection, were "reasons explaining his thought process, his findings and the evidence he relied upon or discounted to reach them, and why" (Adjudicator's decision, para 76).

[64] The more contentious issue is whether the Decision Maker had the impartiality required to make the decision. The allegation made by the applicant was that the Decision Maker placed himself in a conflict of interest when he authorized Constable Rinella to access his work emails for the purpose of preparing his own defense and then reported that Constable Rinella disclosed information of a sensitive nature. It will be recalled that, as the Decision Maker was reviewing the applicant's submissions, he could not but note the use made by the applicant of classified information gleaned from the reviewed material. The Decision Maker reported the incident to the applicant's line officer who, pursuant to ss 40(1) of the *RCMP Act*, caused an investigation to be made. The *Code of Conduct* investigation was not initiated by Superintendent Gallant. He reported what he saw in the submissions of Constable Rinella.

[65] The Decision Maker declined to recuse himself. The Adjudicator finds that the allegation of lack of impartiality as not having been established. He writes:

> [80] The Appellant somehow correlates the Respondent granting him access to emails as a conflict of interest, and by some means consequently making him a witness. The Respondent's only role was to permit the Appellant to access information believed by the latter to be necessary to assist him in mounting a full answer and defence. <u>This was done at the Appellant's own request.</u> No reasonable person would conclude that this permission would allow breaching national security law, particularly *SOIA*, and permitting the release of information pertaining to RCMP surveillance techniques and the identification of targets and

> addresses under investigation, none of which had any relevance to the Appellant's probationary discharge or disciplinary history.
>
> [Emphasis in original]

Constable Rinella should have known better, says the Adjudicator: a reasonable person would have vetted the sensitive information, especially in view of the fact that it was irrelevant to his possible discharge in his probationary discharge proceeding.

[66] Carrying on with his review of the matter, the Adjudicator notes that the Decision Maker imposed conditions on the consultation of the material, but he did not oversee himself the access to the information and the adherence to the conditions other than seeing what was disclosed by Mr. Rinella and reporting the matter to the line officer. That, concludes the Adjudicator, is the only thing he could have done:

> [83] In doing so, the Respondent followed the obligation imposed upon him by section 8.3 of the RCMP *Code of Conduct*, namely to report any conduct that potentially contravenes the *Code of Conduct*. This allegation is to be reviewed independently by the line officer, not the Respondent, who is to take the appropriate action that they deem required, including mandating an investigation in accordance with the requirement of subsection 40(1) of the *RCMP Act*. The mere fact that the Respondent followed the appropriate process does not make him conflicted in this situation.

Here is how the mandatory requirement of s 8.3 of the *Code of Conduct* is framed:

8.3 Members, unless exempted by the Commissioner, take appropriate action if the conduct of another member contravenes this Code and report the contravention as soon as feasible.	**8.3** Sauf si le commissaire les exempte de l'obligation de le faire, les membres prennent des mesures appropriées dans le cas où la conduite d'un membre contrevient au code et signalent la contravention dans les meilleurs délais.

[67] In the circumstances, the Decision Maker did not show bias, a conflict of interest or a change of role from decision maker to witness. The Decision Maker did not have the authority to allow disclosure of highly sensitive information during the probationary discharge process. In the opinion of the Adjudicator, "[a]ny reasonable person faced with the same facts as before me would conclude that the Respondent [the Decision Maker] did not become a witness simply by permitting the Appellant [Constable Rinella] access to his RCMP email, nor for referring the disclosed information to the appropriate conduct authority for determination if a security breach occurred" (para 86). A reasonable person would not conclude or suspect the appearance, or existence, of bias.

[68] Constable Rinella complained that he did not receive assistance and guidance to help him demonstrate suitability. The Adjudicator comments that suitability and performance are not synonymous. The Adjudicator writes at paragraph 96 of his decision:

> [96] I am unsure as to how the RCMP could have offered further guidance to the Appellant in efforts to improve his suitability. These incidents are not mere lapses in judgment and do not stem from knowledge deficiencies that can be corrected with a performance improvement plan, closer supervision, or mentorship. They demonstrate a persistent and ongoing disregard for the overall conduct expected not only of a police officer, but a member

> of the RCMP. Just to highlight a few examples in no specific order or degree of severity:
>
> - At Depot, the Appellant's instructors noted that he had trouble taking responsibility for his actions, contrary to the Core Values of the organization and despite mention of this by his instructors, the Appellant failed to correct his attitude;
>
> - In May 2019, the Appellant willfully disobeyed a direct order and circumvented his chain of command by attempting to participate in a training week with the "C" Division ERT. He was told twice that he was not granted permission to participate. When his plans to participate anyway were uncovered, by his line officer and his supervisor, the Appellant cited miscommunication as the reason;
>
> - In March 2020, the Appellant engaged a civilian in a traffic stop in an unmarked, undercover surveillance vehicle while on surveillance, then used his personal cellular device to take pictures of the civilian's vehicle and gave him the middle finger upon driving off. The following day, a public complaint was filed against the Appellant through another police agency;
>
> - The Appellant was criminally charged and released on conditions in relation to allegations of assault, assault with a weapon or causing bodily harm, and breaking and entering. The Respondent considered the evidence by accepting the fact that the Appellant was charged with criminal offences, not whether the criminal offences were or were not committed.

[69] The Adjudicator was of the view that guidance and supervision were provided where it could be to correct behaviour:

> [99] I disagree with the Appellant that reasonable assistance, guidance and supervision (RAGS) were not offered to him. RAGS are offered in instances where beneficial and warranted to correct behaviour that has a likelihood of being corrected. I am satisfied RAGS were offered to the Appellant from the beginning of his career at Depot, and up to this point, on the expected behaviour of an RCMP member. For instance, he acknowledged and signed a

> document outlining his professional responsibilities as a member of the RCMP. To some extent, he was also provided with RAGS on the proper handling of information he comes across in the execution of his duties, as evidenced by forms he signed, namely the *Security Screening Certificate and Briefing Form* and the *Engagement Document*. Therefore, it cannot be said that these notions were foreign to the Appellant. Whether he applied the RAGS and chose to yield the benefit of them to improve himself is evidenced by the numerous incidents he found himself involved in.

[70] The applicant complained about the standard of proof and the application of the presumption of innocence. He was understood to claim that he should have benefitted from the presumption of innocence as the Decision Maker was considering the charges laid against Constable Rinella as part of a "domestic matter". The Adjudicator remarks that the presumption of innocence applies in criminal matters, not in administrative proceedings like the determination of suitability during a probationary period. The applicant is said to mischaracterize the use that was made of the incident. The Adjudicator writes:

> [101] When it comes to the alleged application of the erroneous standard of proof by the Respondent in regard to the criminal charges, I believe the Appellant is mischaracterizing the Respondent's reasoning. The Respondent explains that the laying of charges, which follows a charge approval process obeying a certain threshold, and the fact that these charges remained pending after four months, presumably after an examination of the completeness of the criminal file, are sufficient factors that allow considering the said charges as contributing to unsuitability. In a sense, the Respondent explains why he is attributing weight to the criminal charges in his assessment of suitability. I do not see evidence of misapplication of a legal standard of proof.

These were not about the merits of the charges or accepting them as true on any standard. It was rather an acceptance that the applicant was charged with offences which remained once the investigation was completed. At any rate, says the Adjudicator, the Decision Maker "considered

other allegations and incidents, beyond just the criminal charges, that resulted in a finding against the Appellant's suitability" (para 102). The weight to be given to the evidence of criminal charges against a constable is a different matter. But it was not improper to consider that evidence.

[71] Finally, the Adjudicator considered whether the decision was "clearly unreasonable". Constable Rinella suggested that his performance reviews, although accepted, were not sufficiently "integrated" in the decision. Again, the Adjudicator states that performance and suitability are not synonymous. Performance is one factor to be assessed as part of the suitability to be a member of the RCMP. In this case, the consideration given to the performance did not render the decision clearly unreasonable.

[72] The applicant claimed that "minor management friction" did not warrant discharge. The Adjudicator does not see these as minor management frictions. It speaks to insubordination (while on probation) and the impact on other members:

> [107] The Appellant mischaracterizes the facts by presenting a small part of the Appellant's entire conduct suggesting that an "uncomfortable situation" led to his discharge. There is no dispute that the Appellant sought training with the ERT even after being told that he did not have the approval of his superiors. This is not the only reason the Appellant was discharged. However, it did demonstrate some insubordination on his part and, as highlighted by the Respondent, that he "shows a total disregard for his unit and colleagues in trying by every means to reach is goals, regardless of the impact on anyone other than himself" (Appeal, p 35).

The incident was one of several which gave the Decision Maker insight into suitability. The applicant argued that such finding was disproportionate to the facts. Not so says the Adjudicator. It was not baseless; relying on the incident does not render the decision clearly unreasonable.

[73] Contrary to what the applicant suggests, the assessment to be made is not based on each single incident as not being sufficient, in and of itself, to warrant a discharge. If the complaint made against the applicant by a citizen who claimed that Constable Rinella abused his authority (see Annex to this judgment, "Code of Conduct Initiated on 24 March 2020") may not lead to a discharge, it is one of "a plethora of other incidents that evidence the Appellant's unsuitability" (Adjudicator's decision, para 110).

[74] The Adjudicator considered the criminal charges against the applicant (see Annex to this judgment, "Code of Conduct Paused Pending Criminal Investigation") for the weight to attribute to charges and alleged *Code of Conduct* violations which were not proceeding.

[75] Neither the criminal charges nor *Code of Conduct* violations require that they be resolved in order to consider them as to the suitability for continued service in the RCMP. The Adjudicator quotes from the Administration Manual, at Chapter 27.4, under the title "Probationary Members". I have already referred to clause 3.2.2 at paragraph 30. I reproduce for completeness sake the text from the Manual quoted in the Decision:

> 1. 5. the purpose of the probationary period is to provide the RCMP with the opportunity to assess the suitability of the probationary member by evaluating factors including, but not limited to those outlined in sec. 1.6., to determine if the probationary member should continue to be employed as a member following the completion of his/her probationary period.
>
> 1. 6. The assessment of a probationary member's suitability (see App 27-4-1) may include, but is not limited to, an evaluation of the probationary member's:
>
> 1. 6. 1. reliability, including attendance at work;
>
> 1. 6. 2. compatibility with colleagues or clients;

> 1. 6. 3. ability to meet work requirements, including those associated with the workload and the ability to complete the Field Coaching Program;
>
> 1. 6. 4. ability to adhere to applicable policies, procedures, practices and the Code of Conduct; and
>
> 1. 6. 5. character, integrity, and attitude.
>
> […]
>
> 2.5 A probationary member may be discharged at any time during his/her probationary period, after consideration of sec. 2.4., with 14 days' notice, or with payment in lieu of notice:
>
> […]
>
> 3. 2. 1. A commander has the responsibility to:
>
> 3. 2. 2. 1. support a probationary member by providing a probationary member with opportunities to demonstrate his/her suitability;
>
> […]
>
> 3. 2. 1. 6. if the probationary member is unable to demonstrate suitability, make a determination if it would be appropriate to seek the discharge of the probationary member;
>
> […]
>
> 3. 2. 2. If a probationary member contravenes a provision of the Code of Conduct during his/her probationary period, consider seeking the discharge of the probationary member if the contravention of the Code of Conduct may be serious enough to demonstrate the probationary member's unsuitability to continue to serve as a member, as an alternative to Part IV of the RCMP Act.

[76] The Adjudicator was satisfied that the "framework" was properly applied by the Decision Maker. Conclusions as to suitability can be drawn based on a number of incidents. The Adjudicator endorses these two passages taken from the Decision Maker's decision at page 37 of 42:

> [..] The present process is not a Criminal court and needs not Proof beyond reasonable doubt. It is no more a Conduct Board and needs not come to a decision upon a balance of probabilities as to the allegations being founded or unfounded.
>
> The present process is a Discharge Process as per Administration Manual 27.4.7. The threshold is much lower than in Criminal Court or before a Conduct Board. Not only is the threshold lower, but the objective is not in any point similar. In the present process, the goal is not to determine guilt beyond reasonable doubt. The goal here needs to determine upon a balance of probabilities the suitability of the member ([the Appellant]) to continue to serve as a member. In the present legislative context, the Decision Maker is not limited as to what he /she can rely on to determine the suitability of a probationary member to continue to serve as a member.

The conclusion drawn by the Decision Maker was based on the fact that Constable Rinella faced charges and allegations, not because these had met the required standard of proof. He did not consider that Constable Rinella had committed the offences. That involves a different process with a different finality and purpose.

[77] There is no reason to dwell on support letters offered by Constable Rinella in support of his suitability. They were given little value by the Decision Maker and the Adjudicator did not disagree. He says that “I agree with the Respondent’s finding that the character references offer no rebuttal to any specific allegation” (para 122). The assessment of the letters by the Decision Maker was justified in view of the evidence before him.

[78] The Adjudicator disagreed that the decision rendered by the Decision Maker was unintelligible. It appears that the applicant attempted to elicit what he presented as contradictions which would make the decision unintelligible. What are alleged to be contradictions are not. The Adjudicator states:

> [129] The Respondent's highlighting of positive or neutral events interwoven with the series of negative incidents does not in any way render the decision contradictory, clearly unreasonable, or even unintelligible. On the contrary, I find that it contributes to the reasonableness of the decision in evidencing the extent to which the Respondent went to ensure that his analysis was fulsome and transparent.

The reasons are said not to lack justification, intelligibility and transparency, which are the hallmarks of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at para 99 [*Vavilov*]).

[79] In the view of the Adjudicator, the decision covered in a transparent assessment of each incident why Constable Rinella is not suitable to remain a member of the RCMP. The reasons are detailed; procedural fairness was respected; a reasonable person would come to the same conclusion once presented with the facts before the Decision Maker. There has not been a demonstration that the decision is clearly unreasonable:

> [134] I am not persuaded that the Respondent erred in finding that the evidence demonstrated the Appellant's unsuitability. The Respondent concluded that there is sufficient information that clearly demonstrates that the Appellant lacks the suitability to adhere to multiple policies, is incompatible with the public, and lacks the character and integrity required of a member of the RCMP.

[80] Thus, the decision under review by the Court finds that:

- there was no violation of procedural fairness;
- there was no error of law; and
- the Decision Maker's decision was not clearly unreasonable.

VIII. Arguments and analysis

[81] This is a judicial review application, not an appeal of the decision of an Adjudicator or a hearing *de novo* where the Court would consider the merits of the discharge of Constable Rinella during his probationary period. A court of review is not a court of first view.

[82] The Court is tasked with reviewing the issues raised on behalf of Constable Rinella. The new counsel representing Mr. Rinella raised five issues, which can be summarized as the three that follow:

1) Was the Decision Maker, Superintendent Gallant, in breach of the procedural fairness principles when he disclosed the alleged violation of the *Code of Conduct* for failing to treat in an appropriate fashion highly sensitive information Constable Rinella was given access to in order to offer his submissions in the discharge proceedings? As such, Superintendent Gallant is alleged to have become a witness.
2) Was the fact that the *Code of Conduct* alleged violations were kept in abeyance while the RCMP chose to proceed with the discharge during the probation process an impediment to Constable Rinella to have full answer and defense?
3) Was it an error of law, on the part of Superintendent Gallant, to take into account the criminal charges laid against Constable Rinella in what has been described as a "domestic matter"?

[83] As the Court pointed out during the hearing of this application, it is the decision of the Adjudicator which is before the Court. Thus, the applicant should have raised what is the

standard of review applicable to the Adjudicator's decision which can be concerned with three grounds of appeal: procedural fairness on the part of the Decision Maker, an error of law on the part of the Decision Maker and whether the decision to discharge during the probationary period is clearly unreasonable. The Adjudicator found that none of these grounds of appeal were made out. What is a reviewing court to consider as the standard of review concerning the decision made by the Adjudicator, as he concluded that there was no violation of procedural fairness principles, no error of law and the decision to discharge Constable Rinella was not clearly unreasonable?

[84] Instead of addressing the standard of review issue, the applicant proceeded to argue his case as if the issues on judicial review were concerned with the Decision Maker's decision, that of Superintendent Gallant instead of the Adjudicator's decision. I shall therefore outline the case put forth by the applicant, as well as the counter argument offered by the respondent when there is one. I will then address in the "Analysis" portion the standard of review requirement, to the extent it is needed for the resolution of this judicial review application. I will finally explain how I reach the conclusion that the application must be dismissed.

A. *Arguments*

[85] It is not a matter of dispute before the Court that Superintendent Gallant owed the applicant a duty of procedural fairness. That includes, of course, the requirement that the decision maker act in an impartial fashion, free from a reasonable apprehension of bias. The applicant argues that the Decision Maker, Superintendent Gallant, managed the file and dealt directly with Constable Rinella (memorandum of fact and law, para 15). It seems that the

applicant is suggesting that, in allowing Constable Rinella to have access to his work emails and other sensitive information, Superintendent Gallant somehow would be in breach of the requirement to act impartially. This can be disposed of quickly. That has no merit with respect to the argument that the process was unfair. In fact, the Decision Maker bent over backwards to manage the process in a fair manner. The Decision Maker was entitled to manage the procedure to be followed for the applicant to gain access, as he expressly requested, to the information he claimed he needed to fully address the issue of his suitability as an RCM policeman. That is also true of the extension of time granted to the applicant and his two successive counsel.

[86] The applicant is faulting the Decision Maker for having disclosed to the line officer that, in reviewing the submissions made on behalf of Constable Rinella, he read sensitive and classified information that evidently had been disclosed by him, since they ended up in submissions. Contrary to what seems to be suggested by the applicant, the *Code of Conduct* violation was not initiated by the Decision Maker. Rather it came about following an investigation launched by the line officer who was advised of the allegedly objective fact that protected information had been disclosed.

[87] The applicant argues in effect that Superintendent Gallant should not have reported the disclosure to the line officer, in spite of the duty spelled out in the *Code of Conduct* (s 8.3). The applicant seems to suggest also that, having read in the material submitted on behalf of Constable Rinella information he undoubtedly disclosed, the Decision Maker should not have taken into account that incident. Indeed, the applicant does not complain that he was not allowed to answer the concerns (memorandum of fact and law, para 25), only that the Decision Maker ought not to

have considered what had taken place in his assessment of the suitability to continue as a member.

[88] Moreover, the applicant claims that Superintendent Gallant became a witness in the *Code of Conduct* case, which never proceeded in view of his discharge from the RCMP. The Decision Maker in the administrative discharge process would, somehow, find himself in a conflict of interest being the one who advised of the incident to the line officer. In that same vein, the involvement of Inspector Beaudoin as the one who initiated the *Code of Conduct* investigation, resulting in the alleged *Code of Conduct* violation (see Annex, "Code of Conduct Initiated on April 27, 2021"), also constitutes a conflict of interest.

[89] It is contended on behalf of the applicant that the Decision Maker introduced a contentious issue, that was not resolved by the appropriate disciplinary process. It is the Decision Maker who allowed access to sensitive information, yet he "seems" ("semble") to find Constable Rinella guilty of an offence punishable by 14 years' imprisonment (memorandum of fact and law, para 40). That, claims the applicant, required that the disciplinary process run its course to adjudication. In the view of the applicant, by making his decision to dismiss, the Decision Maker sought to avoid having to testify at the *Code of Conduct* hearing with the attendant consequence that his own judgment would be the subject of review.

[90] Next, the applicant claims that the decision not to bring to adjudication the alleged *Code of Conduct* violations would have been detrimental to him because the Decision Maker took into account the incidents which gave rise to the *Code of Conduct* investigations.

[91] In spite of the fact that the applicant chose to decline to supply his own version of the events, as he acknowledges, he claims that he was not afforded the possibility which would have been inherent in a full blown adjudication of a disciplinary hearing. He did not have the benefit of the full and complete defense to which he is entitled. His right to remain silent is said to have been violated. It seems that the applicant now claims he could have offered a better "defense" had he been afforded the full blown disciplinary hearing.

[92] This ended up being merely an assertion. Neither in his factum nor during the hearing of the judicial review application did the applicant give any kind of cogent explanation for why, facing discharge from the RCMP for failure to demonstrate his suitability to continue to serve as a member (the Notice of Intent was perfectly explicit), he would have chosen to refrain to offer his explanation for what was alleged to be incidents demonstrating a lack of suitability. That was the matter at hand. It remained unclear why the possible discharge would have to take a back seat to *Code of Conduct* proceedings. Moreover, the applicant did not explain how his decision, whether strategic, tactical or otherwise, has become a matter sufficient to challenge the decision of the Adjudicator on whether or not the decision to discharge was appropriate. The fact that the *Code of Conduct* proceedings were kept in abeyance during the actual determination of the applicant's suitability during a probationary period had to be shown as consisting of a breach of procedural fairness, an error of law or making the decision to discharge clearly unreasonable. As I will explain later, that was not done.

[93] The applicant argues that it constituted an error of law on the part of the Decision Maker to take into account the criminal charges laid against Constable Rinella in the context of a "domestic matter".

[94] For once, the applicant refers in this part of his memorandum of fact and law to the actual decision of the Adjudicator. He seems to take issue with the following passages from the decision under review:

> I will expand on this later in my decision when determining whether the consideration of the criminal charges by the Respondent rendered his decision clearly unreasonable, but I would like to note that the Respondent considered the Appellant's continued suitability as a member of the RCMP not based on the merits of the criminal charges, or by accepting them as true based on any standard of proof. He accepted the fact that the Appellant was charged with criminal offences, not that he committed criminal offences. Furthermore, he considered other allegations and incidents, beyond just the criminal charges, that resulted in a finding against the Appellant's suitability.
>
> (…)
>
> I find that the Respondent applied the appropriate framework and made the relevant suitability considerations under AM 27.4 when he took into account the criminal charges in his assessment. The Respondent was not obligated to wait for the criminal proceedings to come to an end in order to draw conclusions pertaining to the Appellant's suitability; the seriousness of the allegations may suffice to demonstrate unsuitability, and in this case, they did. The Respondent recognized that these remained allegations, but they were still considered as support for the discharge (Appeal, p 44):
> (…)

[95] Referring to criminal charges would be, says the applicant, a violation of the presumption of innocence. He also refers to the constitutional protection against double jeopardy. The presumption of innocence would be such that the laying of criminal charges could not be taken

into account by the Decision Maker. The applicant suggests that the presumption's purpose is to prohibit the imposition of "sanctions" (as a penalty enacted to enforce obedience to a rule) until an accused has been found guilty (memorandum of fact and law, para 80). No authority is offered for that proposition, or even for the narrower proposition that the discharge of someone on probation because of unsuitability constitutes a sanction or penalty.

[96] The respondent insisted that adjudicators are entitled to a considerable amount of deference in view of their expertise in maintaining the integrity and professionalism of the RCMP (*Calandrini v Canada (Attorney General)*, 2018 FC 52; *Firsov v Canada (Attorney General)*, 2021 FC 877; *Kalkat*). That suggests that the standard of review is reasonableness.

[97] As stated earlier, the applicant never even attempted to address the standard of review issue. The respondent refers to the issue but leaves somewhat unclear what is the actual standard to be used on the issues raised. He states that the presumptive standard of review is reasonableness, while on procedural fairness the review is akin to the correctness standard. I understand that to mean that there is no deference owed to the decision (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121), as is the case for the correctness standard which continues to apply to procedural fairness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 74). In other words, a distinction without a difference.

[98] The respondent states in his factum that reasonableness "is the appropriate standard for review of the appeal decision on this application" (memorandum of fact and law, para 15). The

problem is that the respondent cites in support of his contention a case (*Canada (Attorney General) v Zalys*, 2020 FCA 81, at paras 53-54 [*Zalys*]) which does not apply necessarily in our case. Here the argument mustered by the applicant concerns whether or not the Decision Maker violated principles of procedural fairness. But in our case, there is an appeal from that decision to an adjudicator. An appeal heard by an adjudicator can be based on contravention of procedural fairness principles, questions of law or the decision being clearly unreasonable. It is from that decision that lies a judicial review application. In our case, the question remains whether the Adjudicator's decision to conclude that the Decision Maker was not in breach of procedural fairness principles is itself reviewable on a correctness or reasonableness standard.

[99] The respondent remained vague throughout his short factum as to the standard to be used on judicial review about the Adjudicator's finding that procedural fairness was not violated by Superintendent Gallant. Thus, he delves into the merits and states that "[t]here is no indication that the adjudicator did not decide the Applicant's appeal with an open mind that was fair to all parties. The Applicant has failed to substantiate claims of bias or conflict of interest where the Personnel Officer [Superintendent Gallant] authorized email access, which led to a *Code of Conduct* investigation due to the Applicant's disclosure of sensitive and classified information" (para 23).

[100] As for issues other than relating to procedural fairness, the respondent basically asserts that the Adjudicator's decision is reasonable, based on the principles developed in *Vavilov*.

B. *Analysis*

[101] The applicant conflates throughout his factum and the submissions of counsel three different processes: the criminal process, the disciplinary process and the administrative process. It is the administrative process which led in this case to the conclusion that Constable Rinella failed to demonstrate the suitability to continue to serve as a member of the RCMP. Obviously, it is for the member on probation to demonstrate their suitability. Nonetheless, I am willing to accept readily for the purpose of this judicial review application, given that the matter was not argued before the Court, that there exists a burden on the Decision Maker to satisfy that suitability is lacking. That is despite the fact that the *RCMP Act* appears to allow the Commissioner significant discretion to discharge a member on probation (ss 9.4(1) and para 21(2)(b), which grants the Commissioner the ability to make rules, the CSO, respecting the discharge of members on probation) and in view of the language in ss 16(2) of the CSO (Employment Requirements) which speaks in terms of the member on probation having failed to demonstrate their suitability. Does the use of the word “demonstrate” imply anything other than “display”? It is not completely clear whether that signals a reversal of the burden during the discharge process. I would be tempted to conclude that the Decision Maker must be satisfied that the probationary member did not display the suitability expected of an RCMP member without there being a reversal of burden. The Decision Maker takes into account the various allegations made and the comments, observations and contestations on the part of the member on probation with a view to reaching a conclusion on suitability. This is not a trial or a disciplinary hearing.

[102] Factors in making that determination, although not exhaustive, are found in the Administration Manual (AM-27.4 Probationary Members). Not surprisingly, the purpose of a probation period is to observe new members for a maximum period of two years "to provide the RCMP with the opportunity to assess suitability" (AM ch. 27.4, s 1.5). The list of factors is open-ended. It includes:

- reliability;
- compatibility with colleagues;
- ability to meet work requirements (performance) and the ability to complete the Field Coaching Program;
- ability to adhere to policies, procedures, practices and the *Code of Conduct*; and
- character, integrity and attitude.

Constable Rinella was found to have failed to demonstrate his suitability for continuing to be a member through a series of incidents which are presented at some significant length in these reasons.

[103] What is striking in this case is the focus put by the applicant on a decision that is not before the Court, that is the decision of the Decision Maker, Superintendent Gallant. The decision under review is that of an Adjudicator who concluded that there was not, on the part of the Decision Maker, a violation of any of the grounds open to an appeal: a violation of a procedural fairness principle, an error of law or a decision which would be "clearly unreasonable".

[104] Since it is only the Adjudicator's decision which is before the Court, a threshold issue would have been whether the decision under review must be assessed on a standard of reasonableness, including whether it was reasonable for the Adjudicator to conclude that the decision of the Decision Maker was not made in violation of the principles of procedural fairness (the decision was reached by someone acting with impartiality).

[105] If the standard to be used is reasonableness, that has some consequences on judicial review. Thus, the reviewing court's starting point is the principle of judicial restraint and an appropriate posture of respect towards the administrative decision maker is required (*Vavilov*, paras 13-14). If the analysis conducted by Adjudicator Gagné is internally coherent and there is a rational chain of analysis, and it is justified in view of the facts and the law that constrain the decision, the "reasonableness standard requires that the reviewing court defer to such a decision" (*Vavilov*, para 85). The reviewing court does not conduct a *de novo* review. Only serious shortcomings, not the superficial or peripheral kind, are required to render a decision unreasonable (*Vavilov*, para 100). The "line-by-line treasure hunt for error" does not lead to a successful reasonableness review (*Vavilov*, para 102). In sum, the reviewing court does not substitute its view of the matter for that of the administrative decision maker.

[106] There is a strong argument in the case at hand that the Adjudicator's decision is to be reviewed on a reasonableness standard including whether Superintendent Gallant acted in accordance with the procedural fairness principle. It is the conclusion reached by the Adjudicator on that issue which is the subject of the judicial review application, not whether the Decision

Maker, Superintendent Gallant, actually operated in an impartial fashion. To put it another way, it is the Adjudicator's decision which is under review, not that of the Decision Maker.

[107] The argument is strengthened by the existence of a presumption according to which reasonableness is the applicable standard (*Vavilov*, para 23 et al). The applicant did not attempt to argue that, concerning his argument that there was contravention of procedural fairness by the Decision Maker, the Adjudicator's finding that there was none should be reviewed on a standard other than reasonableness. As a matter of fact, the matter was not even broached.

[108] *Vavilov* provides for exceptions to the presumption. Correctness will be the standard where required by the Rule of Law (constitutional question, general questions of law of central importance to the legal system as a whole, questions regarding the jurisdictional boundaries between two or more administrative bodies). Such is not the case here. There is also where a statutory appeal mechanism exists such that there is an appeal to the superior court. In those circumstances the review is conducted according to the framework developed in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[109] There is no doubt that the Adjudicator's decision on alleged errors of law or the clear unreasonableness of the Decision Maker's decision should be reviewed by the Court on the reasonableness standard. What about the Adjudicator's decision to conclude that procedural fairness principles were not contravened? Given that the matter was not squarely addressed by neither one of the parties, I prefer to avoid disposing of this case on the basis that the alleged procedural fairness violations, which were found by the Adjudicator not to be present, are to be

reviewed on a reasonableness standard. In my view, the Adjudicator was correct to conclude that there was no such violation by the Decision Maker and I intend to dispose of the issue in that fashion.

[110] With all due respect, it is not appropriate for the applicant to conflate processes which have different purposes. The Decision Maker was tasked with determining if the applicant had failed to demonstrate his suitability as a member of the RCMP. That is the very purpose of the probation period to which new RCMP members are subjected. The *RCMP Act* provides the Commissioner with the ability, some may say the duty, to discharge a member, during the probationary period, who does not demonstrate their suitability to continue their service in the RCMP. The requirements in order to satisfy that one is suitable to continue to serve go beyond performance, although as noted by the Adjudicator, performance can certainly be considered. Character, integrity, attitude, the ability to adhere to policies, procedures, practices and the *Code of Conduct* feature prominently. That was not disputed by the applicant. There was no argument made that these are inappropriate in making a determination about suitability.

[111] Instead, the applicant seeks to take issue with the Decision Maker having noted that Constable Rinella disclosed that to which he was expressly given access to prepare submissions about suitability, only to discover that he had disclosed that sensitive and classified information when he read the applicant's brief. The Decision Maker did not investigate the matter: the disclosure was on the page put before him. Given the *Code of Conduct* (s 8.3) that applies to him as to any other RCMP member, he reported the matter to the line officer under whose supervision Constable Rinella was. The Decision Maker did not conduct the disciplinary

investigation. He did not file the *Code of Conduct* allegation. He did not conclude that there was a conviction to be entered: that constitutes a different process than the one he was responsible for, which is whether the applicant continues to be suitable. He merely did what appears to be mandated by the *Code of Conduct* for that process to follow its course. At any rate, had he not followed the requirement of s 8.3 of the *Code of Conduct*, there was nothing that was presented to this Court that would have prevented the Decision Maker from considering the inappropriate disclosure, after having, of course, given an opportunity to Constable Rinella to be heard. In the case at hand, I see no reason why the Decision Maker would be forbidden from considering that which he saw, that is that the applicant had disclosed that which, in the view of the Decision Maker, he should have known had to be dealt with more appropriate care. That is an incident that goes to suitability. What was essential was to give the applicant an opportunity to address the issue. He reported the incident to the officer responsible who ordered that an investigation be undertaken. However, that is a process that is different from the one the Decision Maker was responsible for. The two cannot be conflated.

[112] The applicant contends that the Decision Maker had become a witness against him in the disciplinary case because he gave access to the information. It is certainly true, as asserted by the applicant, that it is the Decision Maker who authorized his access to the sensitive information. The applicant sought that access. But that is beside the point. The report had to do with the unauthorized disclosure of classified information, not Constable Rinella's authorized access to it. Contrary to what is asserted by the applicant, both in his factum and by counsel at the hearing of this application, the Decision Maker did not in effect find him guilty of anything. Whether Constable Rinella could be found guilty of a *Code of Conduct* violation is not known and is

irrelevant. It is rather the behaviour which may or may not constitute a *Code of Conduct* violation that was relevant to his suitability. Mr. Rinella was given a full opportunity to comment on his behaviour in order to show that there was no negligence, inability to discern what is right or advisable, recklessness or whatever negative inference may be drawn from the incident. Once again, the suitability process is not the *Code of Conduct* process. The *Code of Conduct* is concerned with the maintenance of discipline and the integrity within the RCMP. It regulates the conduct of members. The suitability process is concerned solely with whether or not a member on probation should continue their service in view of a number of factors.

[113] There is no merit to the suggestion that the Decision Maker displayed through the disclosure incident a lack of impartiality. The Adjudicator was right to dismiss the allegation of a violation of principles of procedural fairness. On the contrary, the record before the Court shows a Decision Maker who was conscious of treating the applicant with fairness, bending over backwards to allow him to make representations, allowing access to sensitive and classified information at the request of the applicant and providing extensions of time to allow the applicant to make full representations. Constable Rinella suggests that the Decision Maker should have recused himself. No authority was submitted. The case for such requirement was not presented to the Court (*Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259). No reasonable apprehension of bias has been established.

[114] The applicant also tried to make hay out of the fact that the *Code of Conduct* cases were kept in abeyance while the administrative process concerning the possible discharge of the applicant for unsuitability was ongoing.

[115] The applicant was facing the very significant consequence of being discharged from the RCMP because various incidents made Inspector Sabourin recommend his dismissal. More incidents occurred after the initial Notice of Intent was filed, requiring a new Notice of Intent such that the applicant was clearly on notice as to what was to be considered. Constable Rinella would have favoured, he claims, a hearing about the alleged *Code of Conduct* violations. But, again, the applicant conflates discipline and the administrative processes operating on different tracks. The Decision Maker did not consider whether the *Code of Conduct* allegations were founded. Indeed he would have been wrong to do so. Whether the behaviour exhibited constitutes a violation of the *Code of Conduct* is a different matter which was not before the Decision Maker. It may be that it was not. It is for someone else to make that determination. But the behaviour may be relevant to the suitability of a member irrespective of whether it is a *Code of Conduct* violation. How much weight these limited allegations carry was not litigated on this record. Would they have made the decision patently unreasonable because unjustified weight would have been given to them? The applicant never raised that kind of an argument. At any rate, the behaviour in these incidents is added to the other incidents which had given rise to the Notice of Intent.

[116] The applicant finds it strange and paradoxical that Superintendent Gallant makes the difference in his reasons between the administrative discharge process and the *Code of Conduct* process. There is no paradox. As is well known, the same facts can give rise to various processes and remedies. To the extent the Decision Maker was not ruling on whether or not the *Code of Conduct* allegations were founded or unfounded, which the Decision Maker did not do, the applicant did not demonstrate that the Adjudicator was not correct in dismissing arguments of the

sort. The applicant's assertion (memorandum of fact and law, para 60) according to which the Decision Maker was on one hand claiming he did not take into account the disciplinary process, while on the other hand he considered certain aspects of it, is not accurate. It is rather that the facts that gave rise to *Code of Conduct* allegations can also be considered in a different process. The Decision Maker found that the behaviour that became the allegations subject to the *Code of Conduct* carried some weight on the suitability issue, not that the allegations were founded or not. Once again, the weight these may carry was not litigated. Arguments around the presumption of innocence and the right to silence, as if this were a criminal matter, lack an air of reality when the issue is behaviour which may run contrary to exhibiting the suitability required of an RCMP member. The applicant did not contend that the various allegations were factually incorrect, such that the decision could be argued as being clearly unreasonable. Rather, he merely argues that he had the right to remain silent, as if the disciplinary allegations were on trial in some fashion or another. The applicant knew, as he was put on notice, that his discharge during probation was the sole issue. The issue is the exhibited behaviour. This is purely factual. The issue was not whether or not the behaviour exhibited constituted a violation of the *Code of Conduct* which operates on a different track altogether and indeed was kept in abeyance.

[117] The applicant finally contended that an error of law occurred when the Decision Maker agreed to take into account criminal charges laid against him. Here, the applicant had to convince the reviewing court that this does not meet the standard of reasonableness applicable to question of law.

[118] Once again, instead of demonstrating on a balance of probabilities that the taking into account of the existence of criminal charges was inappropriate and unreasonable, the applicant conflates the criminal process and the administrative discharge process. As such, the applicant does not discharge his burden and he thus fails. It is the fact that a probationary member of the RCMP was criminally charged, and remained charged after the police investigation was completed, that is deemed relevant on the issue of the suitability, not whether the applicant was actually guilty of the offence charged. The applicant never addressed the issue of the reasonableness of the Adjudicator's decision to reject the contention that this constitutes an error of law. That decision is owed a measure of deference by this Court.

[119] Contrary to what the applicant suggests, there is no indication that this fact alone (charges laid) constitutes a factor in and of itself that was sufficient to find the applicant as lacking the required suitability. The existence of criminal charges was what was considered. I reproduce paragraph 114 in its entirety as the Adjudicator agrees with Superintendent Gallant:

> [114] I find that the Respondent applied the appropriate framework and made the relevant suitability considerations under AM 27.4 when he took into account the criminal charges in his assessment. The Respondent was not obligated to wait for the criminal proceedings to come to an end in order to draw conclusions pertaining to the Appellant's suitability; the seriousness of the allegations may suffice to demonstrate unsuitability, and in this case, they did. The Respondent [Superintendent Gallant] recognized that these remained allegations, but they were still considered as support for the discharge (Appeal, p 44):
>
> > [..] The present process is not a Criminal Court and needs not Proof beyond reasonable doubt. It is no more a Conduct Board and needs not come to a decision upon a balance of probabilities as to the allegations being founded or unfounded.

> The present process is a Discharge Process as per Administration Manual 27.4.7. The threshold is much lower than in Criminal Court or before a Conduct Board. Not only is the threshold lower, but the objective is not in any point similar. In the present process, the goal is not to determine guilt beyond reasonable doubt. The goal here needs to determine upon a balance of probabilities the suitability of the member ([the Appellant]) to continue to serve as a member. In the present legislative context, the Decision Maker is not limited as to what he /she can rely on to determine the suitability of a probationary member to continue to serve as a member.

[120] What is the error of law made that should be reviewed on a standard of reasonableness? The Adjudicator agreed with the Decision Maker that the processes, one criminal and the other one being administrative in deciding on the suitability of a member on probation, are different. They should not be conflated. The fact that serious charges remained, following the vetting process of prosecutors to conclude that there existed a likelihood of success of a prosecution, was considered to be appropriate in the context of deciding if someone is suitable for continuing service in a police force. The applicant claims that it runs against the presumption of innocence to consider criminal charges laid against a probationary member. With respect, such is not the issue. It is rather that being charged, with the charges remaining pending after an investigation constitutes the issue, not whether or not the Crown will be successful in proving beyond a reasonable doubt that an accused has committed the offences charged. The applicant did not challenge on this record that the existence of criminal charges was not relevant. Nor was it argued that they carry no weight. It is not explained either how the Adjudicator's decision that there was no error of law in taking into account the existence of serious charges by the Decision Maker constitutes a reviewable decision on a standard of reasonableness on judicial review.

[121] The burden is on an applicant to demonstrate on a balance of probabilities that the Adjudicator's decision on this issue is not reasonable (*Vavilov*, para 100). The Decision Maker did not seek to conclude on whether or not the applicant was guilty of the offences for which he was charged. The issue is rather whether the existence of the charges could be part of the considerations relevant to suitability. The Decision Maker said yes, and the Adjudicator concurred. The presumption of innocence is a red herring. How much weight such finding that the existence of charges carries was not argued.

[122] Similarly, the contention that the presumption of innocence serves to protect against "sanctions" is not relevant since the discharge during the probationary period is not a sanction. It is the cumulative effect of a number of incidents over a period of less than two years that leaves the Decision Maker with the conclusion that the applicant has failed during that time to demonstrate his suitability to continue to serve as a member. He did not receive a sanction. The issue was all along suitability, not punishment relating to specific behaviour that would be proven according to some standard recognized by law. The applicant, at paragraph 81 of his factum, quotes only the second half of paragraph 116 of the Adjudicator's decision. I reproduce the entire paragraph:

> [116] Though the Respondent recognized that neither the *Code of Conduct* proceedings nor criminal matter had reached conclusion, he concluded that "[t]he laying of charges that remain pending in court after four months is, in my opinion, a direct statement of unsuitability" (Appeal, p 45). This assertion is indicative that the Respondent made a conclusion based on the fact the Appellant was facing the charges and allegations and not because they were established on the requisite standard of proof.
>
> [my emphasis]

Such is the assertion that was made and with which the Adjudicator agreed. That is what the applicant had to demonstrate was unreasonable. He has failed to do so.

[123] As a result, the applicant did not satisfy the Court that there has been in this case violation of principles of procedural fairness or errors of law. Although the Adjudicator found that the Decision Maker's decision was not clearly unreasonable, the applicant did not challenge that finding. He did not argue that the cumulative effect of the incidents, as used in the limited fashion professed by the Decision Maker in reaching his decision, led to a patently unreasonable decision on the suitability of the applicant.

IX. Conclusion

[124] This case was concerned with matters of administrative law. The cumulative effect of various incidents involving the applicant during a period where he had to demonstrate his suitability to continue to serve as a member of the RCMP resulted in the conclusion that his discharge was to be recommended. Such recommendation was agreed to by the Decision Maker after following a process that was procedurally fair. An Adjudicator found that the decision reached to dismiss the applicant while on probation was procedurally fair, did not involve an error of law or was clearly unreasonable.

[125] The Court is acting as a reviewing court of the Adjudicator's findings. There were no reviewable errors. The applicant chose to contest the Adjudicator's decision on the basis that there was somehow procedural unfairness on the part of the Decision Maker and an error of law. Such demonstration was not made. As a result, the judicial review application fails.

[126] The respondent is entitled to its costs in accordance with Rule 407 of the Rules of the Federal Courts.

JUDGMENT in T-2638-22

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. Costs are awarded to the respondent in accordance with Rule 407 of the Rules of the Federal Courts.

"Yvan Roy"
Judge

ANNEX

[35] In his Response, the Appellant listed the allegations he is facing and provided submissions on them. The Appellant makes specific reference to the following allegations:

> **A. Code of Conduct Initiated on 24 March 2020**
>
> *i. Public complaint of Traffic Stop*
>
> [Translation]
>
> Allegation 1:
>
> On March 18, 2020, in or around Terrebonne, in the province of Quebec, [the Appellant], while on duty, showed a lack of respect and courtesy towards a member of the public, in particular by swearing, giving the middle finger and by acting in an arrogant and intimidating manner. It is therefore alleged that [the Appellant] contravened paragraph 2.1 of the RCMP *Code of Conduct* which stipulates that "members treat every person with respect and courtesy and do not engage in discrimination or harassment."
>
> Allegation 2:
>
> On March 18, 2020, in or around Terrebonne, in the province of Quebec, [the Appellant], while on duty, abused his authority by detaining a motorist through inappropriate coercive means, in particular by forcing the motorist to stop through a dangerous driving maneuver, omitting to specify the reasons for his intervention, by refusing to identify himself as a police officer and by using intimidating language.
>
> It is therefore alleged that [the Appellant] contravened paragraph 3.2 of the RCMP Code of Conduct which stipulates that "members act with integrity, fairness and impartiality, and do not compromise or abuse their authority, power or position.
>
> [...]
>
> **B. Code of Conduct Initiated on April 27, 2021**
>
> *i. Disclosure of Sensitive and Classified Information*
>
> Allegation 1
>
> Between February 26, 2021, and April 10, 2021, in Westmount, in the province of Quebec, [the Appellant] disclosed sensitive and classified information in an unauthorized manner during the preparation of his defense in response to a notice of discharge from the RCMP.
>
> It is therefore alleged that [the Appellant] has contravened section 9.1 of the RCMP *Code of Conduct* which states that "Members access, use or disclose information obtained in their capacity as members only in the proper course of their duties and abide by all oaths by which they are bound as members."
>
> [...]

C. Code of Conduct Paused Pending Criminal Investigation

i. Conduct leading to criminal charges

[Translation]

Allegation 1

On or around January 14, 2021, in the municipality of Lac-Supérieur, in the province of Quebec, [the Appellant] is alleged to have entered a private residence without the permission of the residents.

It is therefore alleged that [the Appellant] contravened paragraph 7.1 of the RCMP *Code of Conduct* which stipulates that members shall behave in such way as to avoid discrediting the Force.

Allegation 2

On or around January 14, 2021, in the municipality of Lac-Supérieur, in the province of Quebec, [the Appellant] is alleged to have shown violence against Ms. [VTB], ex-spouse, in particular by pulling her by the arm to force her to follow him.

It is therefore alleged that [the Appellant] contravened paragraph 7.1 of the RCMP *Code of Conduct* which stipulates that members shall behave in such way as to avoid discrediting the Force.

Allegation 3

On or around January 14, 2021, in the municipality of Lac-Supérieur, in the province of Quebec, [the Appellant] is alleged to have used violence against Ms. [LJP], in particular by pressing her forcefully against a wall.

It is therefore alleged that [the Appellant] contravened paragraph 7.1 of the RCMP *Code of Conduct* which stipulates that members shall behave in such way as to avoid discrediting the Force.

Allegation 4

On or around January 14, 2021, in the municipality of Lac-Supérieur, in the province of Quebec, [the Appellant] is alleged to have used violence against [BG], including pushing him forcefully across the chest to get him out of his way.

It is therefore alleged that [the Appellant] contravened paragraph 7.1 of the RCMP *Code of Conduct* which stipulates that members shall behave in such way as to avoid discrediting the Force.

Allegation 5

On or around January 14, 2021, in the municipality of Lac-Supérieur, in the province of Quebec, [the Appellant] is alleged to have used violence against [VMG], including backing up his pickup-style vehicle and hitting him, knowing that he was in the way.

It is therefore alleged that [the Appellant] contravened paragraph 7.1 of the RCMP *Code of Conduct* which stipulates that members shall behave in such a way as to avoid discrediting the Force.

Allegation 6

On or around January 14, 2021, in the municipality of Lac-Supérieur, in the province of Quebec, [the Appellant] is alleged to have used violence against [BG], including backing up his pick-up style vehicle and hitting him, knowing that he was in his way.

It is therefore alleged that [the Appellant] contravened paragraph 7.1 of the RCMP *Code of Conduct* which stipulates that members shall behave in such way as to avoid discrediting the Force.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2638-22
STYLE OF CAUSE:	MATTHIEU RINELLA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 27, 2024
JUDGMENT AND REASONS:	ROY J.
DATED:	OCTOBER 2, 2024

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