Protected A

File 2016-335707

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

an appeal of a conduct board decision pursuant to subsection 45.11(1) of the

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

BETWEEN:

Commanding Officer, "K" Division
Conduct Authority

(Appellant)

and

Constable Lee Brown
Regimental Number 54237

(Respondent)

(Parties)

CONDUCT APPEAL

Protected A

File 2016-335707

Stay of Proceedings

2018

ADJUDICATOR: Steven Dunn

DATE: April 9, 2018

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INTRODUCTION

[1] The Commanding Officer, "K" Division, Conduct Authority (Appellant), presents an appeal pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, as amended [*RCMP Act*], challenging a stay of proceedings granted by the conduct board (Board) following its finding that the delay by the Appellant in issuing the Notice of Conduct Hearing (Notice) to Constable Lee Brown, Regimental Number 54237 (Respondent), was unacceptable and constituted an abuse of process. The Board rendered its decision by email on October 13, 2016, and released a written decision on October 19, 2016 (Decision).

[2] The Appellant appeals the stay of proceedings on the basis that the Decision contains errors of law and is clearly unreasonable.

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

[4] In rendering this decision, I have considered the material that was before the Board (Material), as well as the appeal record (Appeal). Unless otherwise stated, I will refer to documents in the Material and the Appeal by page number.

[5] For the reasons to follow, I find the Board's conclusion, that the inordinate delay in this case caused the Respondent such significant prejudice that a stay of proceedings is warranted, to be clearly unreasonable. The appeal is allowed.

BACKGROUND

[6] On May 12, 2014, a Code of Conduct investigation was ordered by the Officer in Charge of "K" Division Traffic Services. in accordance with subsection 40(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, as it read before November 28, 2014 [former *RCMP Act*] (Material, pp 456-457).

[7] On May 13, 2014, the Respondent was suspended with pay.

[8] A criminal investigation was conducted by the Alberta Serious Incident Response Team (ASIRT) (Material, p 451). The report dated October 8, 2014, was provided to the "K" Division Professional Standards Unit (PSU) on December 8, 2014 (Material, pp 467-493).

[9] Following the completion of the Code of Conduct investigation, the PSU provided the investigation report, dated January 21, 2015, to the Officer in Charge (Material, pp 119-123).

[10] On February 25, 2015, the Conduct Authority Representative Directorate (CARD) received the file (Material, p 88).

[11] On April 2, 2015, the Appellant signed a notice to the Designated Officer to initiate a conduct hearing (Material, pp 62-63).

[12] On April 8, 2015, the Board was appointed pursuant to subsection 43(1) of the *RCMP Act* (Material, p 55).

[13] On April 15, 2015, the acting Commanding Officer received a letter from ASIRT, dated April 8, 2015, stating that a decision was made, following consultation with Crown counsel, not to pursue criminal charges (Material, pp 127-129).

[14] On April 12, 2016, the Respondent was served with the Notice signed by the Appellant on April 1, 2016, setting out two alleged contraventions of section 7.1 of the Code of Conduct (Allegations) (Material, pp 20, 60-61). The Allegations and particulars are as follows:

> **Allegation 1**
>
> On or about March 2, 2014, at or near [location redacted] in the Province of [location redacted], Constable Lee Brown engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> *Particulars of the contravention:*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "K" Division, in the province of [location redacted].
>
> 2. On March 2, 2014, while on duty and in uniform, you entered the gym facility at the [location redacted] and approached [the complainant].

3. [The complainant] was alone in the gym facility and you approached her and started flirting with her.

4. You proceeded to make inappropriate sexual advances towards [the complainant] including:

– Asking "Would it be bad if I asked you to touch me in an inappropriate place" or words to that effect;

– grabbing her hand and placing it on your groin, where your pants covered your erect penis;

– grabbing her hips from behind and pushing yourself into her, simulating intercourse;

– while behind her, pulling on her ponytail causing her head to move back;

– placing your hand on her pubic area outside her clothing and rubbing her.

5. Your actions were unwelcome and caused [the complainant] to leave the gym facility.

Allegation 2

On or between December 1, 2013 and December 31, 2013 at or near [location redacted] in the [location redacted], Constable Lee Brown engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "K" Division, in the province of [location redacted].

2. On or about December 22, 2013, while on duty and in uniform, you attended the private residence of [the complainant].

3. You remained at [the complainant]'s residence for approximately one hour and made sexual advances towards [*sic*] including:

– Asking "Would it be bad if I asked you to touch me in an inappropriate place?" and stating "you were hard" or words to that effect;

– Suggesting that you both go upstairs.

4. There was no duty related purpose for your attendance at the residence.

PRELIMINARY MOTION FOR ABUSE OF PROCESS

[15] On September 9, 2016, the Member Representative (MR) presented a motion for abuse of process caused by the unreasonable delay between the initiation of the conduct hearing by the Appellant and the date on which the Respondent was served with the Notice (Material, pp 366-378).

[16] On September 15, 2016, a conduct hearing was scheduled for October 25, 2016 (Material, pp 31-32).

Respondent's submission

[17] The MR submitted that by serving the Respondent with the Notice over one year after the date on which the conduct hearing was initiated, the Appellant failed to respect the time requirements of subsection 43(2) of the *RCMP Act*:

> **43(2)** As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.
>
> [Emphasis added.]

[18] The MR argued that the legislative intent in the amendment of the *RCMP Act* was to make timeliness of the essence (Material, p 370). In her view, the requirement for conduct boards to "make every reasonable effort to hold a conduct hearing within 90 days of being appointed by the designated officer" pursuant to section 3.8 of the Administration Manual, Chapter XII.1. Conduct (RCMP Conduct Policy), indicates Parliament's intent that the subject member also be served within this 90-day timeframe.

[19] The MR relied on the decision rendered by the Supreme Court of Canada (Supreme Court) in *R v Jordan* [2016] SCC 27 [*Jordan*]. She submitted that the framework developed in the context of the criminal justice system can be applied to administrative proceedings based on common law principles (Material, p 374). She further asserted that section 3.8 of the RCMP Conduct Policy sets the presumptive acceptable period of delay, and that any delay exceeding 90

days is presumed unreasonable. This presumption can be displaced by establishing exceptional circumstances. The MR argued that the Appellant has not presented exceptional circumstances that would allow the presumption to be displaced.

[20] Furthermore, the MR insisted that the Respondent suffered a significant prejudice caused by the stigma attached to a complaint of sexual assault which resulted in both criminal and internal investigations (Material, p 375). An added prejudice was the Respondent's suspension from duties for over two years. The MR argued that the inexplicable delay causing prejudice to the Respondent or to the integrity of the RCMP conduct process satisfies the test set out by the Supreme Court in *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307 [*Blencoe*]. As a result, she argued that the appropriate remedy is a stay of proceedings.

Appellant's submission

[21] The Conduct Authority Representative (CAR) argued that the Appellant fully complied with the requirements of subsection 43(2) of the *RCMP Act* (Material, p 88). The CAR contended that the replacement of the word "forthwith" in the former *RCMP Act* with the words "as soon as feasible" shows the legislator's intent to bring added flexibility to the provision. On this point, the CAR submitted that an intention to impose a strict limitation period would have been explicitly expressed with terms such as "immediately" or "without delay" (Material, p 89).

[22] The CAR added that, contrary to the Respondent's interpretation, section 3.8 of the RCMP Conduct Policy provides an ideal time frame of 90 days, which must be considered in the context of a more flexible process under the current *RCMP Act* (Material, p 91). The CAR conceded that the one-year delay was not ideal, but raised exceptional circumstances affecting the timely progression of conduct cases within the CARD. A sworn affidavit by the Director of the CARD outlined the significant challenges experienced by the unit at the time of the events (Material, pp 95-97).

[23] The CAR emphasized that in *R v Wigglesworth* [1987] 2 SCR 541 [*Wigglesworth*], the Supreme Court clearly stated that paragraph 11(b) of the *Canadian Charter of Rights and Freedoms*, 1982, c 11 [*Charter*] did not apply to the disciplinary process (Material, p 90). In

addition, the Supreme Court in *Blencoe* explained the assessment of unreasonable delay and stated the following:

> [157] In assessing a particular delay in the process of a specific administrative body, we must keep in mind two principles: (1) not all delay is the same; and (2) not all administrative bodies are the same […] we see three main factors to be balanced in assessing the reasonableness of an administrative delay: (1) the time taken compared to the inherent time requirements; (2) the causes of delay beyond the inherent time requirements of the matter; (3) and the impact of the delay […] our Court should avoid setting specific time limits in such matters.

[24] In the CAR's view, the concept of a presumptive ceiling as put forth in *Jordan* is not applicable to the RCMP administrative discipline process and is inconsistent with the intent of the *RCMP Act*, as established in *Wigglesworth* and *Blencoe*.

[25] The CAR stated that in the context of administrative law, *Blencoe* outlines that the governing standard respecting undue delay requires "proof of significant prejudice which results from an unacceptable delay" (Material, p 92). The CAR submitted that, in this case, the delay did not cause the Respondent a prejudice that amounted to an abuse of process (Material, p 93).

Findings on the merits of the motion

[26] The Board first considered the application of *Jordan*. The Board agreed with the Appellant that, as a result of *Wigglesworth*, paragraph 11(b) of the *Charter* and the presumptive ceiling in *Jordan* do not apply to RCMP disciplinary matters (Decision, p 6). The Board noted, however, some relevant passages from *Jordan* concerning the importance of timely trials in maintaining overall public confidence in the administration of justice (Decision, pp 6-7).

[27] The Board confirmed the applicability of *Blencoe* in considering a stay of proceedings for abuse of process caused by delay in the RCMP conduct process. The Board stated that the following elements must be proven on a balance of probabilities:

- the delay is unacceptable;
- a significant prejudice resulted from this delay; and

- a stay of proceedings is the appropriate remedy.

[28] First, in considering whether the delay was unacceptable, the Board stated that although the principles in *Blencoe* still apply, the amendments to the *RCMP Act* and the creation of the new conduct regime have occasioned changes with respect to the assessment of delays (Decision, p 8). Certain delays that may have been acceptable under the previous conduct regime may no longer be considered as such. The Board confirmed that section 3.8 of the RCMP Conduct Policy sets a benchmark of 90 days between the appointment of the conduct board and the conduct hearing. Although the Board acknowledged that the Notice may not always be served soon enough to allow the conduct process to meet the 90-day objective, it found that, in the present case, the delay of 370 days did not comply with the requirement in subsection 43(2) of the *RCMP Act* to serve the member with the Notice "as soon as feasible" (Decision, pp 9-10).

[29] Second, the Board considered whether a significant prejudice resulted from the delay. The Board stated that the Respondent was suspended with pay on May 13, 2014, and that he was served with the Notice more than one year after the conduct board was appointed on April 8, 2015. Based on this, the Board found that "[t]hroughout the two-year period, the [Respondent] was suspended from duty and did not know if or when there would be a conduct hearing" (Decision, p 10). The Board concluded that the Respondent suffered a significant prejudice.

[30] Third, in its assessment of the final requirement under *Blencoe*, the Board recognized that a stay of proceedings for an abuse of process will only be warranted in the clearest of cases, as established by the Supreme Court in *R v O'Connor*, [1995] 4 SCR 411 [*O'Connor*]. The Board found that, in this case, a stay of proceedings was the appropriate remedy (Decision, p 11). The Board explained that extended delays in the conduct process undermine the confidence of the public and members of the RCMP. For this reason, allegations of misconduct must be dealt with promptly and fairly. The Board determined that the extended delay could have been avoided and concluded by stating (Decision, p 11):

> [44] Although I am aware that a stay of proceedings will not allow the adjudication of the merits of the allegations, I conclude the integrity of the RCMP conduct process will be better protected by a stay of proceedings

> than by condoning the unacceptable delay and allowing this matter to proceed to a conduct hearing.

[31] Having found that the requirements set out in Blencoe were established on a balance of probabilities, the Board granted the motion for abuse of process and stayed the conduct proceedings against the Respondent.

APPEAL

[32] On October 28, 2016, the Appellant presented Form 6437 – *Statement of Appeal* to the Office for the Coordination of Grievances and Appeals (OCGA) (Appeal, pp 3-6), claiming that the Board's decision to grant the stay of proceedings was based on an error of law and was clearly unreasonable. The Appellant requests that, pursuant to subsection 45.16(1) of the *RCMP Act*, the appeal be allowed and a new hearing be ordered (Appeal, p 45).

[33] On December 16, 2016, the Appellant filed appeal submissions with the OCGA raising four grounds of appeal (Appeal, pp 35-45) (*sic* throughout):

> **Errors of law**
>
> 1. The Board erred in its interpretation of the wording "as soon as feasible" contained in subsection 43(2) of the *RCMP Act*.
>
> 2. The Board erred in its interpretation of the 90-day timeframe specified in section 3.8 of the RCMP *Conduct Policy*.
>
> 3. The Board erred in its application of the principles in the Supreme Court decision *Jordan.*
>
> 4. The Board erred in its application of the test established by the Supreme Court in *Blencoe.*

[34] On January 13, 2017, the Respondent presented a preliminary issue challenging the right of the Appellant to appeal the Board's decision to grant a stay of proceedings (Appeal, p 134). The Respondent held that the Appellant did not have standing because the decision being appealed does not constitute a finding that a Code of Conduct allegation is established or is not established, as required by paragraph 45.11(1)(a) of the *RCMP Act*.

[35] In a decision issued on June 27, 2017, former Commissioner Paulson found that a stay of proceedings or a similar final order disposing of an allegation against a subject member can be

appealed by a conduct authority (Appeal, pp 261-276). The Commissioner favoured an inclusive interpretation of section 45.11 of the *RCMP Act* and reasoned that the stay of proceedings had ended the case against the Respondent with finality, which was tantamount to a finding that an allegation had not been established.

[36] The decision on the preliminary issue having been rendered and the submissions of the Parties finalized, I now turn to the merits of the appeal.

APPLICABLE STANDARD OF REVIEW

[37] In order to properly address the grounds of appeal raised by the Appellant, it is first necessary to identify the standard(s) against which they must be assessed.

[38] The Appellant states in his appeal submissions (Appeal, p 36):

> Pursuant to section 33(1) of the [*Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 (*CSO (Grievances and Appeals*)) the Appellant must establish on a balance of probabilities, that the decision that is the subject of the appeal is based on an error of law, contravenes the principles of procedural fairness, or is clearly unreasonable.
>
> [Emphasis added.]

[39] While the Appellant is correct in citing subsection 33(1) of the *CSO (Grievances and Appeals)* as the provision establishing the bases of review on conduct appeals, the Appellant incorrectly identified the civil standard of proof as applicable to the present appeal. The civil standard of balance of probabilities is the burden of proof necessary to succeed at first instance, but does not constitute the standard for the review of an initial decision on appeal.

[40] The Appellant appeals the Board's finding, and raises four grounds of appeal. In my view, the four grounds of appeal raised by the Appellant relate to the application of legal principles to the facts of the case. While the identification of the correct applicable legal principle by the Board is a question of law to which I owe no deference (*Housen v Nikolaisen*, [2002] 2 SCR 235, para 8), the Board's application of the legal principles to the facts of the case involves questions of mixed fact and law, which attracts significant deference.

[41] The term "clearly unreasonable" describes the applicable standard of review for questions of fact and of mixed fact and law. In *Kalkat v Canada (Attorney General)*, 2017 FC 794, the Federal Court considered the term "clearly unreasonable" as set out in subsection 33(1) of the *CSO (Grievances and Appeals)*:

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

[42] In *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at para 57, the Supreme Court explained that the difference between unreasonable and patently unreasonable lies in the "immediacy or obviousness of the defect", and that while a decision is patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", "some significant searching or testing" may be required to find a defect in a decision that is unreasonable.

[43] In sum, I owe significant deference to the Board's conclusions as I consider the four grounds of appeal raised by the Appellant. When assessing whether the Board's findings were clearly unreasonable for the purposes of subsection 33(1) of the *CSOs (Grievances and Appeals)*, I must determine whether the Board committed a manifest or determinative error in its application of the legal principles to the underlying facts.

ANALYSIS

1. The Board's interpretation of the wording "as soon as feasible" contained in subsection 43(2) of the *RCMP Act*

[44] With respect to the first ground of appeal, the Appellant compares the term "as soon as feasible" with the term "forthwith" contained in the equivalent provision of the former *RCMP Act*. The Appellant argues that the latter term dictated a highly sensitive timeframe for service,

and that the replacement of this term by the phrase “as soon as feasible” indicates the legislative intent to provide increased flexibility (Appeal, p 37). Accordingly, the Appellant takes the position that the Board applied an overly restrictive interpretation of the words “as soon as feasible” contained within subsection 43(2) of the *RCMP Act*.

[45] The Appellant further submits that in spite of the noted changes in the intent of the term under the current *RCMP Act*, the interpretation of “as soon as feasible” must be consistent with the manner in which adjudication boards have ruled with regard to the term “forthwith” (Appeal, p 38). In an oral decision, the adjudication board in *Appropriate Officer, “K” Division and Sergeant Black* (2012) [*Black*], held that the term “forthwith” does not mean instantly, but rather “without any unreasonable delay, considering the objects of the rule and the circumstances of the case” (Appeal, pp 37-38).

[46] The Appellant points out that the Department of Justice provided a similar description for the term “as soon as feasible”. In a document entitled “Legistics – Describing Time Period”, the Department of Justice describes the term “as soon as feasible” as “something must be done soon – taking the circumstances into account” (Appeal, p 36). The Appellant insists that the Board failed to consider all the circumstances that impacted the delay.

[47] The Respondent argues that the Appellant is raising additional arguments and information in regard to the interpretation of subsection 43(2) of the *RCMP Act* and the term “as soon as feasible” which could have reasonably been known and provided in his response to the initial motion for abuse of process (Appeal, p 301). The Respondent contends that in accordance with subsection 25(2) of the *CSO (Grievances and Appeals*), the Department of Justice document on time periods and the *Black* decision were both available to the Appellant when he provided his response to the initial motion; therefore, it should not be considered in the present appeal.

[48] In his rebuttal, the Appellant refutes the Respondent’s restrictive interpretation of subsection 25(2) of the *CSO (Grievances and Appeals)* that would prevent him from making cogent submissions on appeal (Appeal, p 339). The Appellant maintains that he is entitled to reply to all elements of the Board’s decision and refer to documents supporting his position,

including legislation, case law, policies and guidebooks. He argues that his submissions do not raise any new issues or attempt to introduce new evidence.

[49] I must first consider the Respondent's argument with respect to the restriction on the presentation of new information on appeal in accordance with subsection 25(2) of the *CSO (Grievances and Appeals)*. I note that the Appellant, in his submissions before the Board, presented an argument differentiating the terms "as soon as feasible" and "forthwith" (Material, p 100):

> The CAR submits that "as soon as feasible" brings a sense of flexibility that was not present under the previous act. Replacing "forthwith" with "as soon as feasible" shows the intent to take away the sense of immediacy that was present under the previous RCMP Act. It should be interpreted as something must be done soon – taking the circumstances into account.

[50] I also note that the Board considered this argument and found that the phrase "as soon as feasible" does not bring as much flexibility as contended by the Appellant (Decision, p 8). Based on my review of the Appellant's submissions, I find that the Department of Justice document and the *Black* decision constitute information relevant to the Appellant's position on appeal that the Board erred in its interpretation by not taking the circumstances into account. Given that the Appellant could not have reasonably known how the Board would interpret the term, I am reluctant to restrict these arguments and supporting documents on the basis of subsection 25(2) of the *CSO (Grievances and Appeals)*. For this reason, I will consider both documents.

[51] It is useful to examine and compare the provisions containing the terms "forthwith" and "as soon as feasible". Under the former *RCMP Act*, the time period between the moment the appropriate officer was notified of the appointments and the moment the member was served with the notice of hearing was governed by the term "forthwith". Under the current *RCMP Act* and the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], the term "forthwith" was replaced with the expression "as soon as feasible". Here is the wording of the former *RCMP Act*:

> [Repealed, 2013, c 18, s 29]

> 43(1) Subject to subsections (7) and (8) where it appears to an appropriate officer that a member has contravened the Code of Conduct and the appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.
>
> 43(2) On being notified pursuant to subsection (1), the designated officer shall appoint three officers as members of an adjudication board to conduct the hearing and shall notify the appropriate officer of the appointments.
>
> […]
>
> 43(4) Forthwith after being notified pursuant to subsection (2), the appropriate officer shall serve the member alleged to have contravened the Code of Conduct with a notice in writing of hearing, together with
>
> (a) a copy of any written or documentary evidence that is intended to be produced at the hearing;
>
> (b) a copy of any statement obtained from any person who is intended to be called as a witness at the hearing; and
>
> (c) a list of exhibits that are intended to be entered at the hearing. [Emphasis added.]

[52] The current *RCMP Act* and *CSO (Conduct)* now read this way:

> *RCMP Act*
>
> 43(1) On being notified under subsection 41(1) of an alleged contravention of a provision of the Code of Conduct by a member, the officer designated for the purpose of that subsection shall, subject to the regulations, appoint one or more persons as members of a conduct board to decide whether the member contravened the provision.
>
> 43(2) As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.
>
> *CSO (Conduct)*
>
> 15(2) As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.

[Emphasis added.]

[53] The Appellant argues that the replacement of the term "forthwith" with the phrase "as soon as feasible" indicates the legislative intent to provide added flexibility in the service of the required notices "in recognition that the circumstances in which each case progresses to hearing will vary" (Appeal, p 38). The Appellant further maintains that the drafters would have otherwise adopted a more restrictive approach by identifying a specified time period.

[54] In my view, the flexibility the Appellant refers to existed under the former disciplinary regime. *Black's Law Dictionary* (10th edition, 2014) defines the term "forthwith" as follows:

1. Immediately; without delay.

2. Directly, promptly; within a reasonable time under the circumstances; with all convenient dispatch.

[55] In the *Black* decision, the adjudication board determined that "forthwith" in subsection 43(4) of the former *RCMP Act* meant "as soon as reasonably practicable under the circumstances" (Appeal, p 79; see also, *Black v Canada (Attorney General)*, 2012 FC 1306, para 19). To make this finding, the Board quoted from the RCMP External Review Committee (ERC) report in *Appropriate Officer, Depot Division v Constable Cheney* (2013), 13 AD (4th) 1 (D–119):

> I find that interpreting "forthwith" as meaning "immediate" and "without delay" in the present context would impose an unrealistic standard, given that there are several steps involved in preparing the Notice of Hearing. For example, according to section 43 of the Act, the Notice of Hearing must contain, among other elements, a statement of each alleged contravention with particulars for each. Furthermore, the Notice must be accompanied by a copy of any written or documentary evidence, statements of potential witnesses, and a list of exhibits.

[56] The steps involved in preparing the notice of hearing under the former *RCMP Act* are essentially the same as those involved under the current *RCMP Act*. Under the former *RCMP Act*, the member was served with the notice of hearing along with a copy of any written or documentary evidence, a copy of any statement obtained from any witness, as well as a list of

exhibits. Under the current *RCMP Act* and *CSO (Conduct)*, the member is served with the notice of hearing and the investigation report, which contains the same documents referred to under the former provision. Therefore, the current conduct regime does not require the conduct authority to serve the member with more documents than previously imposed. Had this been the case, a change in the description of the time period to one providing increased time for compliance might have been logical. I say this recognizing that now the Board receives the same information as the subject member. Accordingly, I find that the replacement of the term "forthwith" by the expression "as soon as feasible" cannot be attributed to a legislative intent to add increased flexibility to conduct authorities in serving the notice of hearing.

[57] Rather, I find that the substitution of the term "forthwith" by "as soon as feasible" is a result of the efforts made to modernize the language of the *RCMP Act*. In the document "Legistics – Describing Time Period" filed by the Appellant, the expression "as soon as feasible" is the recommended term to describe the category of time period referred to as "something must be done soon – taking the circumstances into account". The term "forthwith" is also categorized under this time period; however, a significant clarification on its present-day use is provided:

> "forthwith": Although this word has a generally accepted judicial sense that corresponds to the second category of time period, its use is discouraged because it is not plain language and its judicial sense may not be the same as the sense understood by the public.

[58] Given that the phrase "as soon as feasible" is, in the judicial sense, an alternative expression of "forthwith", it follows that the former term should be interpreted in a manner consistent with the latter. As acknowledged by the adjudication board in *Black*, the term "forthwith" means "as soon as practicable having regard to all of the circumstances of the case" (Appeal, p 79). By the same token, the circumstances must be examined when determining whether the condition "as soon as feasible" was respected.

[59] In this case, the Board considered the distinction between the two terms, and concluded that "[d]espite the removal of "forthwith", section 43(2) [of the RCMP Act] still requires a reasonably quick action by the conduct authority" (Decision, p 8). Next, the Board considered the Appellant's argument that the delay was caused by the significant challenges experienced by

the CARD at the time of the events as well as by the serious concerns expressed by the complainant about participating in the hearing process (Decision, p 9). The Board found that, despite these circumstances, the delay of approximately 370 days in serving the Appellant with the Notice was unacceptable (Decision, pp 9-10).

[60] The Board's finding is owed significant deference. In light of the above considerations, I find that the Board made no manifest or determinative error in concluding that the Appellant had the obligation, pursuant to subsection 43(2) of the *RCMP Act*, to serve the Respondent with the Notice in a timely manner. I also find that the Board took into account the circumstances raised by the Appellant for the added delays. In my view, the Board's conclusion that these circumstances did not justify such an inordinate delay in serving the Respondent with the Notice is not clearly unreasonable.

2. The Board's interpretation of the 90-day time frame specified in section 3.8 of the *RCMP Conduct Policy*

[61] The Appellant argues that the Board erred in its interpretation and application of section 3.8 of the RCMP Conduct Policy. The Appellant submits that the conduct process involves a degree of flexibility, reasonableness and practicability rather than a simple countdown of dates (Appeal, p 38). Therefore, the Appellant contends that, contrary to the Board's analysis, the 90-day time frame is "no more than a guideline".

[62] In the Appellant's view, a significant degree of flexibility is provided to subject members with regard to their obligation to respond to allegations within 30 days of being served with a notice of hearing, as required by subsection 15(3) of the *CSO (Conduct)*. The Appellant submits that, in order to successfully fulfill this obligation, extensions of time are regularly requested by member representatives and subsequently granted for a multitude of reasons including outstanding file tasks, work load and other commitments. According to the Appellant, the Board should have applied this same flexibility to the 90-day time limit specified in section 3.8 of the *RCMP Conduct Policy*.

[63] The Respondent contends that the Appellant is raising additional arguments in regard to the 90-day timeframe established in section 3.8 of the RCMP Conduct Policy that could have reasonably been provided in his response to the initial motion for abuse of process (Appeal, p 301). Consequently, the Respondent submits that it would be contrary to the *CSO (Grievances and Appeals)* for the Appellant to include such information in his written submission. In the Respondent's view, the Appellant's arguments on this ground of appeal should be rejected.

[64] To begin, I do not find that these arguments raised by the Appellant on appeal are subject to the restriction in subsection 25(2) of the *CSO (Grievances and Appeals)*. In his written submissions on the second ground of appeal, the Appellant is responding to the Board's interpretation of the 90-day timeframe in section 3.8 of the RCMP Conduct Policy. Therefore, I will consider the Appellant's arguments.

[65] In its decision, the Board addressed the 90-day timeframe set out in section 3.8 of the RCMP Conduct Policy and stated the following (Decision, p 9) (*sic* throughout):

> [34] The RCMP, through its policy, set a benchmark of 90 days for a conduct hearing to be held following the appointment of the conduct board. Although 90 days is not inflexible, conduct boards must "make every reasonable effort to hold a conduct hearing" within that timeframe. This implies that the following will occur within these 90 days:
>
> - the Notice of Conduct Hearing will be served on the member;
> - the member will seek and obtain legal advice;
> - the member will provide a mandatory written response (within 30 days of being served the Notice of Conduct Hearing);
> - the hearing date will then be set;
> - the conduct hearing will be held.

[66] In the present matter, the Board was appointed on April 8, 2015. According to section 3.8 of the RCMP Conduct Policy, conduct boards must "make every reasonable effort to hold a conduct meeting" within 90 days of being appointed. The record indicates that on May 28, 2015 (Material, p 27), and again on December 23, 2015, the Board communicated by email with the CAR requesting an update on the conduct matter and indicated that it had not yet received the Notice and the investigation report (Material, p 26). On January 11, 2016, the CAR informed the

Board that the Notice would be served to the Respondent before the end of the month at the latest. On February 25, 2016, the Board communicated with the CAR requesting confirmation that the Notice had been duly served (Material, p 25). On the same day, the CAR responded that due to unforeseen delays, the earlier estimate had been overly ambitious, and that the matter would be addressed as soon as possible (Material, p 24). The Respondent was ultimately served with the Notice on April 12, 2016 (Material, p 20).

[67] The Appellant argues that the Board should have applied increased flexibility in its interpretation and application of section 3.8 of the *RCMP Conduct Policy*. I find that the Board not only recognized that the 90-day timeframe is flexible, but also demonstrated significant flexibility and patience. The Board sent an initial inquiry to the CARD about the status of the Notice and materials on May 28, 2015, and then another on December 23, 2015, some 259 days after its appointment on April 8, 2015. Several additional follow-up emails later, the Notice was eventually served to the Respondent on April 12, 2016. The delay is glaring by any measure, but especially given that, as indicated by the Board, the service of a notice of hearing is only the first of several actions expected within the 90-day time period.

[68] Although section 3.8 of the RCMP Conduct Policy allows for some flexibility, it also sets a benchmark of 90 days. This expectation corresponds to one of the aims of the modernized RCMP conduct regime: expeditious conduct proceedings. In its decision, the Board recognized that in certain instances, the notice of conduct hearing will not be served in time for the 90-day objective to be met (Decision, p 9). While the Board accepted the need for flexibility, it concluded that, in this case, the delay was unacceptable.

[69] Given that I agree the delay was inordinate and recognizing that policy does not have the force of law, I find no manifest or determinative error in the way the Board interpreted section 3.8 of the *RCMP Conduct Policy*.

[70] Before turning to the next ground of appeal, I would like to emphasize that setting a benchmark of 90 days in the RCMP Conduct Policy may have seemed feasible to the planners and policy writers; but in practice, it has often proven difficult to meet for many legitimate

reasons. No one involved in the conduct process will refute this reality. In my view, however, the questionable gaps and time frames in the advancement of this matter, especially from the appointment of the Board onward, are concerning.

3. The Board's application of the principles in the Supreme Court decision *Jordan*

[71] The Appellant submits that although the Board acknowledged that the new framework established in *Jordan* concerning delays in criminal proceedings does not apply to the conduct process, the Board gave disproportionate importance to several principles in this decision which consequently influenced its final conclusion (Appeal, p 39). The Appellant further argues that in *Jordan,* the Supreme Court clearly held that in terms of retroactivity, the application of a more contextual and flexible framework was necessary for cases already in the system. The Appellant contends that the same approach should have been taken by the Board given that the new conduct process was adopted in November 2014, which is prior to the *Jordan* decision. In the Appellant's view, the Board failed to apply the same latitude and flexibility.

[72] The Respondent again alleges that, contrary to subsection 25(2) of the *CSO (Grievances and Appeals)*, the Appellant is raising additional arguments with regard to the *Jordan* decision which could have reasonably been provided in his response to the motion for abuse of process (Appeal, p 302). The Respondent also emphasizes that the Commissioner, in his decision rendered in the appeal motion, confirms that principles developed in the criminal justice system can serve as guidance for conduct boards.

[73] I do not find that the arguments raised by the Appellant on appeal are subject to the restriction in subsection 25(2) of the *CSO (Grievances and Appeals)*. The Appellant challenges the Board's interpretation and application of the *Jordan* principles. Surely, this is permissible. I will therefore consider the Appellant's arguments.

[74] The principles from *Jordan* outlined by the Board in its decision refer to the importance of timely trials in ensuring public confidence. For ease of reference, the passages are reproduced below (Decision, pp 6-7):

> [22] […] Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.
>
> [23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (R. v. Askov, […], [1990] 2 SCR 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.
>
> [24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (Askov, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.
>
> [25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. […] Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).
>
> [26] Extended delays undermine the public confidence in the system. […]
>
> [27] Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. […]

[75] The Appellant maintains that the Board gave disproportionate importance to the *Jordan* principles and that it should have adopted a more flexible approach to the retroactive application of the Supreme Court decision. Based on my review of the Board's decision, I find that the cited passages from *Jordan* generally reflect the guiding principles of the RCMP conduct process that necessarily apply to the present matter.

[76] The RCMP has the responsibility of promoting public confidence in the investigation of misconduct and in the administration of police discipline. In *Kinsey v Canada (Attorney General)*, 2007 FC 543, the Federal Court held the following:

> [44] With respect to the purpose of the legislation, the RCMP Act grants the RCMP, as directed by the Commissioner, the primary responsibility for developing and maintaining standards of professionalism and discipline within its own ranks. Therefore, in carrying out this duty, the Commissioner is not simply establishing rights between parties. He balances the interests of the RCMP member subject to disciplinary action with those of the Force and the Canadian public, by ensuring police officers who have engaged in

> disgraceful conduct are sanctioned in a manner that maintains public confidence in the RCMP.
>
> [Emphasis added.]

[77] In a continued effort to promote the public confidence in RCMP disciplinary matters, one of the main objectives of modernizing the *RCMP Act* was to allow misconduct to be addressed in a more responsive, timely and effective manner. For instance, under the current process, most conduct matters are now dealt with through a meeting process, and can often be resolved at the lowest appropriate level. The objective of creating a more timely and efficient conduct process is specified in the first paragraph of the *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18, which set in motion the reform of the current *RCMP Act*:

> This enactment enhances the accountability of the Royal Canadian Mounted Police by reforming the *Royal Canadian Mounted Police Act* in two vital areas. First, it strengthens the Royal Canadian Mounted Police review and complaints body and implements a framework to handle investigations of serious incidents involving members. Second, it modernizes discipline, grievance and human resource management processes for members, with a view to preventing, addressing and correcting performance and conduct issues in a timely and fair manner.
>
> [Emphasis added.]

[78] Given the importance attributed to ensuring more timely and efficient conduct proceedings in the modernization of the *RCMP Act*, I do not agree with the Appellant that the Board gave disproportionate consideration to the general principles in *Jordan* on the importance of timely trials in maintaining public confidence. In fact, in my view, the Appellant has overstated the importance of the *Jordan* references in the Board's decision. For this same reason, I also disagree with the position adopted by the Appellant that the principles from *Jordan* should have been applied by the Board with a greater degree of flexibility considering retroactive applicability of the Supreme Court decision. The changes to the conduct process, including those intended to increase the timeliness of proceedings, came into force on November 28, 2014; therefore, even in the absence of *Jordan*, they directly apply to the present matter.

[79] As a result, I find no manifest or determinative error in the references to, or consideration of, select statements taken from the *Jordan* decision made by the Board.

4. The Board's application of the test established by the Supreme Court in *Blencoe*

[80] The Appellant submits that the Board erred in its interpretation and application of the three-part test established by the Supreme Court in *Blencoe*.

[81] First, the Appellant argues that, though not ideal, the delay did not amount to the level of unacceptability as described by the Supreme Court in *Blencoe* (Appeal, p 40). The Appellant maintains that, contrary to the interpretation of the Supreme Court, the Board failed to properly consider "the other circumstances of the case" such as the nature of the allegations, the changes implemented by the amended *RCMP Act*, as well as the challenges experienced by the CARD following the implementation of the new RCMP conduct process. Concerning the challenges experienced by the CARD, the Appellant submits that the Board should have given greater consideration to the fact that the Respondent's file was reassigned from counsel to counsel several times (Appeal, p 41).

[82] The Appellant further argues that the Board failed to apply the proper approach with respect to inevitability of unexpected delays. In the Appellant's view, the Board should have applied the same reasoning as the adjudication board did in *Black* (Appeal, p 86; *Black*, p 41):

> It just happens and you deal with it once it does. You especially cannot predict what employees are going to accomplish, or not accomplish, in the weeks or months before they depart on extended medical leave. The employer can only be expected to wade and do the very best they can to address outstanding issues.

[83] Second, the Appellant contends that the Board erred in its conclusion that the Respondent suffered a significant prejudice as a result of the delay (Appeal, p 41). In the Appellant's view, the Board's finding that "throughout the two-year period, the [Respondent] was suspended from duty and did not know if or when there would be a conduct hearing" does not satisfy the criteria established by the Supreme Court in *Blencoe* (Appeal, p 42; *Blencoe*, para 133):

> There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected.

[84] The Appellant argues that the mere assertion by the Respondent with no supporting evidence that he suffered a prejudice is insufficient to meet the required criteria. The Appellant presents a review of recent case law confirming that proof of prejudice must be established when considering whether a stay of proceedings should be granted. In one case involving a 35-month delay, the Manitoba Court of Appeal in *Nisbett v Manitoba (Human Rights Commission)*, 85 Man R (2d) 101, rejected the appellant's argument that the inference of prejudice is strengthened by the length of the delay. The Court held that "the question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" (Appeal, p 42). In another case concerning a delay of three years and six months between a complaint and a final decision, the Quebec Court of Appeal in *Ptack c Comité de l'ordre des dentistes du Québec*, [1993] RL 305 (QC CA), determined that although the delay was unreasonable, it was not convinced that there was any prejudice (Appeal, p 42). The Court further recognized the importance of a causal link between the delay and the prejudice. Under these circumstances, the Appellant maintains that the alleged stigma experienced by the Respondent arose from the allegations themselves, and not from the delay.

[85] Third, with respect to the appropriateness of the remedy, the Appellant submits that the Board erred by finding an abuse of process without having properly weighed "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead against the harm to the public interest in the enforcement of the legislation should the proceedings be halted" (Appeal, p 43; *Blencoe*, para 120). The Appellant argues that, in the present case, the delay did not negatively impact or harm the overall integrity of the RCMP conduct process.

[86] The Appellant further submits that the Board failed to consider other appropriate remedies as well as other important considerations, such as the fact that it was granting a stay of proceedings only a few days before the hearing date, witnesses had been summoned, and the Parties were ready to proceed (Appeal, p 44). Consequently, the granting of a stay of proceedings by the Board does not meet the required level of "clearest of cases" as articulated by the Supreme Court in *O'Connor*. The Appellant further submits that the Supreme Court clarified this principle in *R v Babos* [2014] 1 SCR 309, at para 30:

> A stay of proceedings is the most drastic remedy a criminal court can order […]. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[87] In the Appellant's view, allowing a stay of proceedings in the circumstances would result in a serious risk of bringing both the RCMP conduct process and the RCMP as an organization into disrepute.

[88] The Respondent argues that the Appellant is raising additional arguments and information with regard to the *Blencoe* decision, the challenges experienced by the CARD in 2015, the lack of significant prejudice suffered by the Respondent, and the integrity of the RCMP conduct process, public interest and the appropriate remedy (Appeal, pp 302-303). In the Respondent's view, these arguments could have reasonably been provided in the Appellant's response to the motion dated September 30, 2016; therefore, they should be rejected.

[89] Once again, I do not find that the arguments raised by the Appellant on appeal are necessarily subject to the restriction in subsection 25(2) of the *CSO (Grievances and Appeals)*. The Appellant challenges the Board's interpretation and application of the principles established by the Supreme Court in *Blencoe*. I will consider the Appellant's arguments in turn.

a) Was the delay unacceptable?

[90] In *Blencoe*, the Supreme Court held that a delay of 24 months between the filing of the initial complaint and the referral to the British Columbia Human Rights Tribunal (Tribunal) "was not so inordinate or inexcusable as to amount to an abuse of process" (*Blencoe*, para 132). In my view, it is overly simplistic to count months from the lodging of the complaint to the hearing date to determine whether the delay in the present matter is acceptable or not. As a starting point, the crucial periods within the delay must be closely examined.

[91] The delay considered unacceptable by the Board which led to the granting of the stay of proceedings is primarily the delay between the date on which the Board was appointed by the Designated Officer and the date on which the Respondent was served with the Notice. The Board was appointed on April 8, 2015, and the Respondent was served with the Notice on April 12,

2016, approximately 370 days later. In *Blencoe*, the corresponding delay would be between the date on which the Human Rights Commission referred the complaint to the Tribunal and the date on which the respondent was notified that a hearing had been set. In that case, the complaint was referred to the Tribunal on July 3, 1997, and the respondent was notified 69 days later, on September 10, 1997, that a hearing date had been set (*Blencoe*, paras 11, 16).

[92] In addition, unlike the case in *Blencoe*, there exists a legitimate expectation within the *RCMP Act* and the RCMP Conduct Policy that a notice of hearing will be served on the member "as soon as feasible" in order to allow the conduct board to decide the case as expeditiously as possible. Guided by my analysis of the first and second grounds of appeal above, I find that the Board committed no manifest or determinative error in its interpretation and application of the time frames set out in subsection 43(2) of the *RCMP Act* and section 3.8 of the RCMP Conduct Policy.

[93] Next, when assessing whether the delay in question is unacceptable, the Supreme Court confirmed in *Blencoe* that certain elements must be considered (*Blencoe*, para 122):

> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case.

[94] The Appellant submits that the Board failed to consider "the other circumstances of the case" such as the nature of the allegations, the changes implemented to the amended *RCMP Act*, and the challenges experienced by the CARD following the creation of the new RCMP conduct process. The record indicates that the challenges experienced by the unit at the time of the events were described in detail in a sworn affidavit by the Director of the CARD, which was filed with the Board (Material, pp 95-97).

[95] Based on my review of the impugned decision, I find that the Board made no error in the application of the first step of the test established in *Blencoe*. First, as stated in *Blencoe*, the Board acknowledged that no delay could be attributed to the Respondent (Decision, p 8). Next,

the Board reviewed the arguments presented by the Appellant on the other circumstances of the case (Decision, p 9):

> [32] The Respondent [Appellant in this appeal] submits the delay was caused by several factors. The CARD experienced significant challenges due to a realignment of human resources, file reassignments, staff departures and the volume of the files referred to the CARD. Also, the complainant in this sexual misconduct matter had expressed serious concerns about participating in the hearing process, which resulted in additional delays.

[96] After examining the current legislative and policy provisions, the Board determined that the other circumstances of the case relied upon by the Appellant did not justify the delay of approximately 370 days. The Board found that although the principles of *Blencoe* still apply, certain delays which were acceptable under the former discipline regime may now be considered inordinate (Decision, p 9). To a certain point, I agree with the Board. In my view, the other circumstances of the case which the Appellant claims contributed to the delay must be assessed while considering the nature of the RCMP conduct process as it now exists. One of the main objectives of modernizing the *RCMP Act* and introducing the 90-day time frame in policy was to ensure conduct matters proceed more expeditiously. The importance of understanding the administrative body when assessing a particular delay was examined by Justice Lebel in *Blencoe* at para 158:

> [158] Second, not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. Thus, inevitably, a court's assessment of a particular delay in a particular case before a particular administrative body has to depend on a nature of contextual analytical factors.

[97] In sum, I do not find the Board's conclusion on the unacceptability of the delay in the present case, even taking into account the nature of the Allegations, to be clearly unreasonable.

b) Did a significant prejudice result from the delay?

[98] The second element of the *Blencoe* test to determine whether a stay of proceedings for abuse of process is warranted is whether there is proof of a significant prejudice resulting from the unacceptable delay (*Blencoe*, para 101). The Supreme Court explained that the delay must have breached natural justice and the duty of fairness by impairing a party's ability to answer the complaint, because, for instance, "memories have faded, essential witnesses have died or are unavailable, or evidence has been lost" (*Blencoe*, para 101).

[99] In addition, the Supreme Court recognized that other forms of prejudice not involving the fairness of the hearing can amount to an abuse of process. Such prejudice can arise when inordinate delay directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, to the extent that the human rights system would be brought into disrepute (*Blencoe*, para 115). The Supreme Court emphasized that this high threshold would be rarely met.

[100] In its decision, the Board considered this element of the test and found that the Respondent suffered a significant prejudice as a result of the delay given that "[t]hroughout the two-year period, the Applicant [Respondent in appeal] was suspended from duty and did not know if or when there would be a conduct hearing" (Decision, p 10). The Board essentially reiterated the Respondent's arguments on the motion (Material, p 375; Decision, p 10).

[101] Although the Board correctly identified the legal principles set out in *Blencoe*, in my view, the Board's conclusion that the Respondent suffered a significant prejudice sufficient to justify a stay in these circumstances is problematic.

[102] First, I find that the Respondent failed to establish that he suffered a significant prejudice resulting from a breach of natural justice and duty of fairness. Despite the unreasonable delay, absolutely no evidence was produced to demonstrate that the delay would have impaired the Respondent's ability to defend himself against the Allegations. In fact, not only were the complainant and essential witnesses available and expected to testify, but their interviews were

recorded and summarized by ASIRT in the course of its investigation. Furthermore, no argument alleging the loss of crucial evidence was presented by the Respondent.

[103] Second, although the Supreme Court recognized that significant prejudice can result from a delay that does not compromise the hearing, I find that the Respondent failed to demonstrate that he suffered a prejudice to the level required by *Blencoe*. As held by the Supreme Court, the delay must have directly caused significant psychological harm or attached a stigma to the Respondent's reputation to such an extent that the RCMP conduct system would be brought into disrepute. In this case, no medical evidence was presented by the Respondent to establish that the inordinate delay caused him any degree of psychological harm, let alone significant psychological harm.

[104] I acknowledge that the Respondent naturally faced stigma as the subject of a complaint of sexual assault resulting in criminal and internal investigations; however, I note that the decision not to pursue criminal charges against the Respondent was released by ASIRT in a letter dated April 8, 2015 (Material, pp 451-453). The Board was appointed on the same day, marking the beginning of the delay that would eventually be considered unacceptable. Accordingly, during this subsequent period, the Respondent was spared the jeopardy associated to pending criminal charges of sexual assault.

[105] The remaining stigma which may have caused the Respondent to suffer a prejudice is associated to facing two Code of Conduct allegations for discreditable conduct. However, I am not convinced that the Respondent has satisfied the high threshold established in *Blencoe* and demonstrated that the delay caused a stigma to his reputation to the extent that the RCMP conduct system would be brought into disrepute. As made clear by the Supreme Court, there must be proof of significant prejudice which results from the unacceptable delay (*Blencoe,* para 101). It is apparent on the face of the record that the Board found the Respondent met this threshold in the absence of any convincing evidence.

[106] I recognize that this ground of appeal raises a question of mixed fact and law, to which considerable deference is owed. However, in my view, the Board committed a manifest and

determinative error in its application of *Blencoe* in finding that the Respondent suffered a significant prejudice from the delay. Accordingly, the Board's decision is clearly unreasonable and cannot stand.

c) Does the abuse of process require a stay of proceedings?

[107] The third element of the test established in Blencoe concerns whether the stay of proceedings is the appropriate remedy. Having rejected the Board's conclusion with respect to the prejudice suffered by the Respondent, there is no need for me to consider this final element.

DISPOSITION

[108] I find that the Board committed a manifest and determinative error in concluding that the Respondent suffered a significant prejudice to the extent that it requires the granting of a stay of proceedings as a result of an inordinate delay.

[109] Pursuant to paragraph 45.16(1)(b) of the *RCMP Act*, I allow the appeal and order a new hearing before a differently constituted conduct board.

[110] It should not be lost on anyone that this matter must be made a priority. Moreover, my decision is not an endorsement of the file management practices which were displayed here.

Steven Dunn Date

Conduct Adjudicator