Federal Court of Appeal Cour d'appel fédérale

Date: 20260313

Docket: A-170-24

Citation: 2026 FCA 53

2026 FCA 53 (CanLII)

CORAM: **LOCKE J.A.**
MACTAVISH J.A.
HECKMAN J.A.

BETWEEN:

ROBERT BENISON, OLIVIER BROUILLARD, YANNICK COULOMBE, ERIC DEMERS, TARA MCDONALD, EDWARD PRETO, RANJIT SINGH SEEHRA, JAMES SMITH, JACQUELINE SPENCE, LICIO SOARES, BRUCE TROTZUK and HARDLAND VENEMA

Appellants

and

ROYAL CANADIAN MOUNTED POLICE EXTERNAL REVIEW COMMITTEE, THE CHAIRPERSON OF THE ROYAL CANADIAN MOUNTED POLICE EXTERNAL REVIEW COMMITTEE and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Ottawa, Ontario, on April 9, 2025.

Judgment delivered at Ottawa, Ontario, on March 13, 2026.

REASONS FOR JUDGMENT BY: HECKMAN J.A.

CONCURRED IN BY: LOCKE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

HECKMAN J.A.

I. OVERVIEW

The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes through mandamus,

> we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes.
>
> (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 150, *per* LeBel J., dissenting in part [*Blencoe*])

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[1] This is an appeal from a decision of the Federal Court (*per* Go J.) (2024 FC 570) [the Decision] dismissing an application for judicial review brought by the appellants, members of the Royal Canadian Mounted Police [RCMP]. In their application, the appellants sought orders of *mandamus* to (1) compel the RCMP External Review Committee [ERC] to complete its review of the appeals they had filed of certain internal RCMP decisions within 30 calendar days of the Decision and (2) to publish and report on the service standards that apply to the review of every appeal file before it. The Federal Court held that the appellants had not met all of the eight criteria required for the issuance of a writ of *mandamus* (*Apotex Inc. v. Canada (Attorney General)* (C.A.), 1993 CanLII 3004 (FCA), [1994] 1 FC 742 aff'd 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100 [*Apotex*]).

[2] In my view, the appeal should be allowed in part. The Federal Court made reviewable errors in deciding that the appellants did not satisfy all the criteria for the issuance of the first writ of *mandamus*. However, it did not err in holding that the appellants failed to satisfy all the criteria for the issuance of the second writ of *mandamus*.

[3] In refusing to issue the first writ of *mandamus*, the Federal Court made reviewable errors in its treatment of the *Apotex* criteria. Specifically, the Court erred (1) in its analysis, under the third *Apotex* criterion, of whether the ERC's delay in reviewing the appellants' appeals was

unreasonable and could constitute an implied refusal to perform its public duty to complete this review; (2) in deciding under the sixth *Apotex* criterion that the order of *mandamus* had no practical value or effect; (3) in finding that an order of *mandamus* would allow the appellants to unfairly jump the processing queue, a consequence that raised an absolute equitable bar to exercising its discretion to issue *mandamus*; and (4) in finding that the balance of convenience lay with the ERC.

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[4] This appeal affords this Court an opportunity to clarify several aspects of the analytical framework governing the application of the *Apotex* test. First, this Court must resolve a division in the Federal Court on whether *mandamus* can issue without proof that administrative delay has caused the applicant significant prejudice. Second, this appeal enables this Court to reexamine the principles that govern the assessment of whether delay is unreasonable in the context of *mandamus* applications in light of the Supreme Court's judgment in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220 [*Abrametz*]. Finally, it is necessary to clarify the burden incumbent on each party at each step of the *Apotex* test.

[5] I begin by setting out some background, including the statutory context, before describing the Federal Court's decision and the arguments of the parties on this appeal. After touching on the standard of review that applies to this appeal, I focus on the Federal Court's analysis of whether the appellants satisfied the *Apotex* criteria for the issuance of the first writ of *mandamus* requiring the ERC to review and issue findings and recommendations for each of their appeals within thirty days. I conclude with a brief discussion of the Federal Court's decision to refuse the

appellant's application for the second writ of *mandamus* requiring the ERC to publish service standards applicable to all appeals, including those referred to the ERC before April 1, 2022.

II. BACKGROUND

[6] Before summarizing the Decision and the arguments of the parties on this appeal, I lay out the statutory framework that governs the work of the ERC and briefly describe the group of RCMP members who have brought these proceedings.

A. *The Statutory Framework*

[7] The ERC is an independent, quasi-judicial tribunal established through the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 [the Act or the *RCMP Act*]. It is seized by the RCMP's Office for the Coordination of Grievances and Appeals when a member of the RCMP initiates an appeal of an internal RCMP labour-related decision. The ERC then analyzes the file and issues non-binding findings and recommendations to the RCMP Commissioner, who decides the appeal and thus may or, with justifications, may not follow the ERC's recommendations.

[8] ERC review is required for files that raise certain subject-matters before they can proceed to an appeal before the RCMP Commissioner. While members can request to opt-out from the ERC process under subsection 45.15(3) of the Act, the RCMP Commissioner may decline such requests.

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[9] In 2014, legislative and regulatory amendments [the 2014 amendments] significantly extended the range of matters which required referrals to the ERC before they could proceed to an appeal: *Enhancing Royal Canadian Mounted Police Accountability Act*, S.C. 2013, c. 18 [*Enhancing RCMP Accountability Act*]; *Royal Canadian Mounted Police Regulations*, 2014, S.O.R./2014-281 [the Regulations]. Following the 2014 amendments, these matters included the review of appeals of: (1) sanctions exceeding one day of pay; (2) administrative discharges and demotions, including on grounds of disability, absence or leaving duty without authorization, or conflict of interest; (3) directions to resign, recommendations for dismissal or dismissals; (4) stoppage of pay and allowances following suspension; and (5) harassment complaints: s. 45.15 of the Act, s. 17 of the Regulations. As a result of the 2014 amendments, the ERC's caseload increased: while it previously received a yearly average of 31 cases, this number increased to 102 beginning in the 2015-2016 fiscal year.

[10] Following the 2014 amendments, the ERC adopted a prioritization system to address its increased backlog, which classified appeals depending upon the nature and severity of the decision under appeal and the date at which they were filed. The severity ranking lists eleven types of decision, with discharges and dismissals without pay pegged at the highest level of severity. Financial penalties and the dismissal of a harassment complaint following an investigation are classified at the lowest levels of severity. This latter class of decisions excludes complaints for racial and sexual harassment, which have a higher priority even if they have been dismissed after an investigation.

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[11] Acting under section 28.1 of the Act, the ERC produced service standards respecting the time limits within which it is to deal with grievances and appeal cases that are referred to it. First, a “prescreening service standard,” which took effect in April 2020, requires that 85% of all files coming into the ERC be prescreened within 30 days of receipt. Prescreening ensures that case records referred to the ERC are complete and that there are no preliminary issues that would prevent their review. It also allows cases to be prioritized according to their impact. Second, a “findings and recommendations service standard,” which took effect on April 1, 2022 and applies prospectively, commits the ERC to issuing its findings and recommendations in 75% of files coming into the ERC within the year following their intake.

B. *The Appellants*

[12] The appellants are current or former members of the RCMP who were subjected to a disciplinary measure, for the most part resulting in financial penalties between two and thirty days’ pay, or who have put forward a harassment complaint that was dismissed after an investigation. All of them have at least one outstanding appeal before the ERC that was received from the RCMP and pre-screened by the ERC as complete and ready for review between October 2019 and November 2021.

[13] The proceeding before the Federal Court was commenced in 2022 by twenty-six applicants. However, the ERC has continued to work through some of the backlogged files, issuing its findings and recommendations for certain files that were mostly classified as “high priority appeals” under the prioritization system. Accordingly, an application became moot and

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others were since discontinued. On April 8, 2025, the day before this appeal was heard, this Court received a partial notice of discontinuance on behalf of four appellants. The style of cause has been amended to reflect this change. Twelve appellants remain. When the Federal Court delivered its judgment in April 2024, the delay in processing their appeals ranged between approximately three and a half and four and a half years.

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III. THE FEDERAL COURT'S DECISION

[14] The appellants applied to the Federal Court for a writ of *mandamus* requiring the ERC to render its findings and recommendations for each of their appeals within thirty days, and a second writ of *mandamus* requiring the ERC to publish service standards applicable to every appeal rather than only appeals referred to the ERC after April 1, 2022.

[15] On April 10, 2024, the Federal Court found that the appellants did not meet all of the eight criteria for the issuance of a writ of *mandamus* set out in this Court's decision in *Apotex* and it dismissed the application.

[16] Under the *Apotex* test, a Court may issue an order of *mandamus* compelling the performance of a public legal duty where the applicant establishes that:

1. there is a public duty to act;

2. the duty is owed to the applicant;

3. there is a clear right to performance of that duty, in that the applicant has satisfied all conditions precedent giving rise to the duty and there was a prior demand for its performance, a reasonable time to comply with the demand and a subsequent refusal, either expressed or implied (e.g., by unreasonable delay);

4. certain criteria are satisfied if the duty sought to be enforced is discretionary;

5. no other adequate remedy is available to the applicant;

6. the order will be of some practical value or effect;

7. the court finds no equitable bar to the relief sought; and

8. the balance of convenience favours issuing the order.

(*Apotex* at pp. 766-769)

[17] With regards to the first writ of *mandamus* sought by the appellants, the Federal Court held that they had failed to establish a clear right to the performance of the duty, that the order sought had a practical effect or value, that there was no equitable bar to the relief sought, and that the balance of convenience favoured the issuance of the order. The respondents had conceded that the other four *Apotex* criteria had been met.

[18] Relying on *Callaghan v. Canada (Chief Electoral Officer)*, 2010 FC 43, [2011] 2 F.C.R. 3 rev'd on other grounds 2011 FCA 74, [2011] 2 F.C.R. 80 and *Samideh v. Canada (Citizenship*

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and Immigration), 2023 FC 854, the Federal Court noted that an application for a writ of *mandamus* did not require a determination of the standard of review.

[19] The Federal Court found that the appellants had not demonstrated their clear right for the ERC to issue its findings and recommendations on their appeals within thirty days, as required by the third *Apotex* criterion. It applied the test articulated in *Conille v. Canada (Minister of Citizenship and Immigration)* (T.D.), 1998 CanLII 9097 (FC), [1999] 2 FC 33 [*Conille*], which provides that a public authority's delay in performing a statutory obligation is unreasonable where: (i) the applicant is not responsible for this delay, (ii) the authority has not satisfactorily justified it, and (iii) it has been longer than the nature of the process required, *prima facie*. The Federal Court decided that the appellants had not shown that the ERC's delay in complying with their demand for the processing of their appeals and the issuance of findings and recommendations was unreasonable and constituted an implied refusal.

[20] Specifically, the Federal Court found that the delay had not been longer than what the nature of the ERC's process required, *prima facie*. It rejected the appellants' submission that the language of the Act, the requirement of an ERC review for the appeal process to unfold, the strict timelines imposed on RCMP members to initiate appeals, and labour law principles supporting the timely resolution of workplace disputes indicated that the ERC was required to process the appeals expeditiously. The Federal Court noted that the appellants' appeals were not subject to the grievance process under their collective bargaining agreement and concluded that principles derived from labour law jurisprudence were thus inapplicable to the ERC review process. It also observed that the language of section 28.1 of the Act did not impose any specific timeline for the

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issuance of findings and recommendations, but rather required the ERC "to establish its own time limits" (Decision at para. 55). In the absence of such a timeline, the Federal Court held, whether delay is inordinate is determined by considering a list of non-exhaustive contextual factors.

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[21] A consideration of these contextual factors led the Federal Court to decline to find a "*prima facie* refusal to act" on the ERC's part. The Federal Court accepted that the 2014 amendments had drastically increased the ERC's caseload, and that permanent additional resources were only allocated years later, in 2020. It found that the ERC was addressing the backlog, notably through the prioritization system, and that all of the appeals which were part of the application involved the three lowest priorities within this system.

[22] With regards to the second step of the *Conille* test, that the ERC satisfactorily justify its delay, the Federal Court found that the ERC had provided a satisfactory justification and had demonstrated that it was addressing the backlog in a "methodical and principled manner" through the prioritization system and through the allocation of the resources now at its disposal, which had significantly improved its productivity.

[23] The Federal Court added that the appellants were required to demonstrate that they incurred a significant prejudice due to the delay, in addition to establishing the unreasonableness of the delay (Decision at paras. 32 and 78). In doing so, it rejected the appellants' suggestion that the significant prejudice standard set out in *Blencoe* and *Abrametz* was confined to abuse of process proceedings and was therefore not a requirement for the issuance of a writ of *mandamus*,

noting that the Federal Court had previously applied this standard in *mandamus* applications. It then found that the appellants had not adduced evidence of prejudice, and that because delay does not constitute prejudice in and of itself (*Blencoe* at para. 101), no prejudice was demonstrated.

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[24] Noting that, as the *Apotex* test is conjunctive, the failure to satisfy the third criterion was in itself fatal to the application, the Federal Court nonetheless determined that in the alternative, the order of *mandamus* sought by the appellants would be of no practical value or effect because the ERC could not possibly comply with it. It found that the ERC had demonstrated that it did not have the capacity to complete its analysis of all appeals and then issue its findings and recommendations within thirty days. Moreover, the little information that the Federal Court had about the individual appeals did not enable it to assess independently whether they could be processed within thirty days. Accordingly, the sixth *Apotex* criterion was not met.

[25] In the further alternative, the Federal Court found that the seventh and eighth *Apotex* criteria were not met, because there was an equitable bar to *mandamus* and the balance of convenience did not favour the appellants, as a writ of *mandamus* would entitle them to leap-frog other RCMP members whose appeals were prioritized due to their higher level of severity. The Federal Court reasoned that the appellants' files represented 8.5% of the ERC overall backlog and all fell within the three lowest priorities, and concluded that allowing the appellants to leap-frog other appeals would not be equitable (Decision at paras. 96–97). In doing so, it relied on *Jia v. Canada (Citizenship and Immigration)*, 2014 FC 596, [2015] 3 F.C.R. 143 [*Jia*], where Justice Gleason, then of the Federal Court, reasoned that "*mandamus* is an equitable remedy" and that it

was not equitable to grant it where it would leap-frog successful applicants over others who were not part of an application for *mandamus*.

[26] Turning to the appellant's request for a second writ of *mandamus* ordering the ERC to publish and report on service standards for all appeals, rather than only those referred to the ERC after April 2022, the Federal Court held that the Act did not impose a non-discretionary duty upon the ERC to publish all-inclusive service standards. On the contrary, the wording of section 28.1 grants the ERC "full discretion to specify which files are subject to its service standards and which are not" (Decision at para. 110). The Federal Court added that, in any event, the appellants' arguments were not grounded in the *Apotex* test (Decision at para. 111). In particular, the second *Apotex* criterion was not met because the duty created by section 28.1 is owed to the general public rather than to the appellants or any specific individual. It concluded that the requested writ of *mandamus* was "so broad as to render it practically meaningless", since the Federal Court was not in a position to direct the ERC to adopt specific service standards covering wide-ranging applicable timelines for equally wide-ranging varieties of appeals (Decision at para. 113).

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IV. THE PARTIES' ARGUMENTS

A. *The Appellants*

[27] The appellants argue that the Federal Court committed errors of law and overriding and palpable errors of fact or mixed fact and law throughout its analysis, and that they are entitled to the two writs of *mandamus* because they have satisfied all the *Apotex* criteria.

[28] They submit that the Federal Court erred in law when it imported into the *Apotex* test a requirement that an applicant for *mandamus* establish that a public authority's delay in performing a statutory obligation causes it "significant prejudice." In their view, the significant prejudice requirement attaches to a finding of abuse of process in the context of an application for a stay of proceeding, not to the issuance of *mandamus*, a remedy meant to prevent an abuse of process. The appellants add that whether the significant prejudice standard should be imported into the test for the issuance of a writ of *mandamus* is a question that divides the Federal Court, and that the line of jurisprudence which answers that question in the affirmative is wrong insofar as it relies on a misapprehension of the Supreme Court of Canada's ruling in *Blencoe*.

[29] In the alternative, the appellants submit that the Federal Court committed an overriding and palpable error in finding that they had not demonstrated significant prejudice, since they adduced evidence of a broad range of prejudice, including the emotional distress experienced by the appellants and the requirement that, in the context of investigations in which they are involved, they disclose their misconduct records to Crown prosecutors (known as McNeil

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disclosures). They claim that appellants waiting for the ERC to review the rejection of their harassment complaints experience particularly severe prejudice as set out in the Final Report on the Implementation of the Merlo Davidson Settlement Agreement (the Honourable Michel Bastarache, Independent Assessor, *Broken Lives, Broken Dreams: the Devastating Effects of Sexual Harassment on Women in the RCMP* (Ottawa: Merlo Davidson Settlement, 2020) [the Report]). Moreover, they argue that the Federal Court also erred when it rejected the notion that prejudice can be presumed in the face of inordinate delay.

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[30] Turning to the question of the reasonableness of the delay, the appellants submit that the Federal Court failed to determine, as required by *Conille*, whether the delay in treating their claims was longer than that required by the nature of the process before the ERC. In the appellants' view, the Federal Court should have established a reasonable delay in light of various contextual elements that indicate the process was meant to be expeditious, notably the requirement for service standards set out at section 28.1 of the Act; the labour relations principles of quick and economical resolution, which were relevant because the ERC operates within a labour regime; and the stringent timeline within which an RCMP member must file their appeal. Comparing this reasonable delay with the delays experienced by the appellants, the Federal Court should have found an undue delay, *prima facie*.

[31] The appellants suggest that the Federal Court also erred in accepting, under the *Conille* test, that the ERC's increased workload and resource constraints following the 2014 amendments justified the delay. In their view, the Federal Court had a duty to inquire more closely into what delay would be reasonable and whether the ERC used its resources efficiently. The Federal Court

similarly erred in unquestioningly accepting that the ERC's adoption of its prioritization system to address its high caseload was a full excuse for delay rather than one of the many contextual factors in assessing the reasonableness of the delay. Finally, the appellants claim that the Federal Court failed to recognize that *Coderre v. Canada (Office of the Information Commissioner)*, 2015 FC 776 and *Chen v. Canada (Citizenship and Immigration)*, 2023 FC 885 [*Chen*] stand for the existence of a duty on the respondents to demonstrate, for every individual appeal, that the specific delay was warranted.

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[32] Turning to the practical effects requirement, the sixth *Apotex* criterion, the appellants submit that the Federal Court erred by conflating the practical feasibility of a writ of *mandamus* with its practical value for the appellants — the reduction of the delays. Additionally, the Federal Court misapprehended its discretionary power when it failed to vary the terms of the requested writ of *mandamus* and order the ERC to process the appeals within a timeline longer than thirty days, if necessary.

[33] On whether the balance of convenience favours *mandamus* and on the absence of an equitable bar to the remedy, the seventh and eighth *Apotex* criteria, the appellants submit that a writ of *mandamus* would not prejudice the merits of other RCMP members' appeals. In their view, by accepting the ERC's submissions on "leap-frogging" in the absence of a true queue and a quota on applications, the Federal Court made a palpable and overriding error. The appellants charge that the Federal Court misconstrued or failed to consider the evidence which weighed in favour of a writ of *mandamus*, including that some of their appeals involved subject-matters that should have been prioritized under the current system, and that requiring appellants to wait years

to appeal a harassment complaint, given the pervasive culture of harassment documented in the Report, is unconscionable. The appellants also argue that the Federal Court erroneously relied on *Jia* in accepting the ERC's leap-frogging concern; in *Jia*, the presence of a quota on applications that could be accepted meant that leap-frogging an applicant's case by issuing a *mandamus* order would cause substantive prejudice to those leap-frogged persons whose cases might not be decided due to the quota.

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[34] Finally, the appellants submit it was an error not to issue a writ of *mandamus* compelling the ERC to publish all-inclusive service standards. In their view, this is required under section 28.1 of the Act, and cases referred prior to April 2022 do not fall under any of the statutory exemptions for service standards. The appellants also claim that the Federal Court erred in finding that the second *Apotex* criterion was not met because the duty to publish service standards is owed to them as workers who are subjected to the ERC labour-related regime, for reasons of transparency and predictability. Finally, they argue that the Federal Court improperly concluded that the requested remedy — an order that service standards apply to all ERC files, pre-2022 or not — was too broad.

B. *The Respondents*

(1) The ERC

[35] The ERC submits that the appellants have not met their onus to demonstrate that the Federal Court erred in deciding that many of the *Apotex* criteria were not fulfilled. It argues that

the appellants are seeking to impermissibly relitigate the factual findings made by the Federal Court on the basis of unchallenged evidence.

[36] The ERC first submits that the Federal Court did not err in its finding that no unreasonable delay had been shown. The conclusion that administrative delays over two years in internal labour relations decision-making were not presumptively unreasonable was legally sound, since the reasonableness of a delay must be assessed through a fact-specific inquiry. Accordingly, the Federal Court's decision turned on the evidence before it, including the significant increase in caseload resulting from the 2014 amendments, the budgetary and human resources constraints faced by the ERC, and its adoption of a prioritization system to successfully address the resulting backlog — findings not challenged by the appellants. The ERC adds that, contrary to the appellants' claim, the Federal Court did not accept that a higher caseload and resource constraints were a "full excuse" for the delay. Instead, the Court cited authority for the proposition that case volume may be a justification for delay in some circumstances but that each case turns on its own facts. The Federal Court's findings that the ERC had increased its productivity and decreased its backlog between 2022 and 2024 and, through its prioritization system, was working its way through the backlog in a "methodical and principled manner" are entitled to deference. These findings supported the Federal Court's conclusion that the ERC had provided a reasonable explanation for the delay. The ERC adds that it was open to the Federal Court to find that the appellants, having failed to adduce sufficient evidence regarding the complexity of the individual appeals, had not met their onus to demonstrate that the delay was unreasonable.

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[37] The ERC argues that whether or not the Federal Court erred in relying on caselaw that requires applicants for *mandamus* to establish that they have experienced "significant prejudice", as that term is defined in *Blencoe* and *Abrametz*, is immaterial to this appeal since the appellants failed to establish any prejudice. Accordingly, it argues that this Court need not rule on the issue of the applicable standard of prejudice. The ERC submits that the Federal Court soundly determined that the appellants had not met their onus of establishing prejudice on any standard, as they did not adduce evidence of particularized prejudice and the Supreme Court of Canada has specifically ruled that "a lengthy delay is not *per se* inordinate" (*Abrametz* at para. 59).

[38] The ERC asserts that it was open to the Federal Court to conclude that the writ of *mandamus* requested by the appellants would have no practical value or effect and that the sixth *Apotex* criterion was not met. It argues that the Federal Court's assessment was anchored in the evidence adduced by the ERC, unchallenged by the appellants, that demonstrated that it would not be feasible for the ERC to issue its findings and recommendations for all the appeals within thirty days. Absent any proposed alternative timeframe from the appellants, the ERC submits that it would have been improper for the Federal Court to speculate on what a reasonable timeframe might have been.

[39] Turning to the seventh and eighth *Apotex* criteria, the ERC submits that this Court must show considerable deference to the Federal Court's assessment of the balance of convenience and considerations of equity because it is a "highly discretionary decision": *Canada (Minister of National Revenue) v. Swiftsure Taxi Co.*, 2005 FCA 136 at para. 9. According to the ERC, the

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appellants merely reiterate before this Court arguments, rejected by the Federal Court, that the prioritization system is unfair.

[40] Finally, with regards to the appellants' challenge of the Federal Court's refusal to issue the service standards *mandamus*, the ERC observes that while the appellants focus their arguments on the Court's treatment of the second *Apotex* criterion, the Court ruled that this request for *mandamus* was "not grounded in any of the *Apotex* criteria". Since the *Apotex* test is conjunctive, the ERC submits that the appellant's failure to challenge the Federal Court's findings on the remaining seven criteria is fatal to this ground of appeal.

(2) The Attorney General

[41] The Attorney General submits that the appellants anchored their applications for *mandamus* in the existence of delay in and of itself and failed to demonstrate with any level of specificity that the *Apotex* criteria were met. It adds that the Federal Court's decision — essentially a factual inquiry — contains no palpable and overriding errors. The Attorney General argues that, contrary to the appellant's claim, *Jia* supports the respondents' position because it stands for the proposition that granting *mandamus* is unfair to those individuals involved in the same administrative proceeding but not part of the application for *mandamus* because they are effectively leap-frogged by the successful applicants.

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V. STANDARD OF REVIEW

[42] Reasonableness is the presumptive standard of review that applies when a court reviews the merits of an administrative decision (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 16 [*Vavilov*]). However, the appellants' application for writs of *mandamus* is brought to remedy an alleged implied refusal by the ERC to perform its public legal duty and is thus grounded in the absence of an administrative decision. Accordingly, on this appeal, this Court is reviewing a decision of the Federal Court regarding whether, under the *Apotex* framework, the appellants have made out the requirements governing the issuance of a writ of *mandamus*. Therefore, the applicable standard of review is the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, not the standard of review that governs appeals from judicial reviews of administrative decision-making described in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. at paras. 45–47 (see *Budlakoti v. Canada (Minister of Citizenship and Immigration)*, 2015 FCA 139, leave to appeal to SCC refused, 36591 (28 January 2016) at paras. 37–38; *Winning Combination Inc. v. Canada (Minister of Health)*, 2017 FCA 101 at para. 57, leave to appeal to SCC refused, 37697 (12 April 2018); *Hong v. Canada (Attorney General)*, 2019 FCA 241 at para. 12).

[43] Under the appellate standard of review, this Court may interfere with the Federal Court's decision to deny the writs of *mandamus* requested by the appellants if it is satisfied that the Federal Court (1) erred on questions of law or legal principle or on questions of mixed fact and law that raise extricable questions of law or legal principle, or (2) made palpable and overriding

errors on other issues, such as findings and inferences of fact and questions of mixed fact and law, including exercises of discretion (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 57, 60, 62 and 72, leave to appeal to SCC refused, 37793 (17 May 2018)). This Court may also reverse a discretionary decision of the Federal Court, including the exercise of its discretion to refuse prerogative relief, where the Court gives no or insufficient weight to relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pp. 76-77 [*Oldman River*]; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125 at para. 27).

VI. "BURDEN" AND THE STRUCTURE OF THE *APOTEX* TEST

[44] Before focusing on the Federal Court's analysis, a few words on the overall structure of the *Apotex* framework are in order.

[45] The *Apotex* test is conjunctive. If, in the view of the reviewing court, any of the eight criteria are not favourable to the applicant, *mandamus* will be denied. However, and significantly, the eight *Apotex* criteria do not serve the same purpose. The first four criteria are considered by the reviewing court to determine whether the applicant has shown that they would be entitled to an order of *mandamus*. The final four criteria relate to reasons for which the reviewing court should exercise its discretion to deny the remedy to which the applicant would otherwise be entitled.

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[46] The first four *Apotex* criteria largely coincide with the traditional requirements for the issuance of a writ of *mandamus*: the applicant must have a clear legal right to the performance of a public duty; this duty must be owed to the applicant; the public official must have no discretion to act or not; the conditions precedent to the performance of the duty must be satisfied; and the applicant must have demanded performance of the duty and been refused in words or conduct (Donald J.M. Brown & John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2025) at § 1:21-1:25 (Brown & Evans)).

[47] The final four criteria of *Apotex* are different. They reflect the fact that, even though a consideration of the first four criteria may establish that the preconditions for the issuance of a writ of *mandamus* are met, a reviewing court retains a discretion to refuse to issue any prerogative remedy, including *mandamus* (Brown & Evans at § 1:21). In other words, "even where a litigant has established a ground on which the courts may intervene in the administrative process… the court may decline to provide a remedy for reasons other than the merits of the application for judicial review" (Brown & Evans at § 3:1). This view finds support in this Court's decision to expressly define the seventh criterion as involving the exercise of its remedial discretion (*Apotex* at p. 769) and to treat the balance of convenience as a discretionary ground upon which *mandamus* may be refused, to be considered only once the applicant has established it is *prima facie* entitled to that remedy (*Apotex* at pp. 786-791).

[48] These final four criteria set out some of the grounds on which reviewing courts may refuse relief on judicial review proceedings: (1) where the applicant has failed to pursue an adequate alternative remedy to judicial review (see, e.g., *C.B. Powell Limited v. Canada (Border*

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Services Agency), 2010 FCA 61 at para. 30; Brown & Evans at § 3.9 et seq.); (2) where the remedy sought would serve no purpose or have no practical effect (see, e.g., *Oldman River* at p. 80; Brown & Evans at § 3:35); (3) where there is an equitable bar to relief, including where an applicant has unreasonably delayed in seeking relief (see, e.g., *Oldman River* at pp. 77-80; *3533158 Canada Inc. v. Canada (Attorney General)*, 2024 FC 1090 at paras. 116 et seq., aff'd 2025 FCA 63 at para. 3; Brown & Evans at § 3:41-3:46) or where the applicant has not come before the reviewing court with clean hands (e.g. *Khalil v. Canada (Secretary of State)*, 1999 CanLII 9360 (FCA), [1999] 4 F.C. 661 at para. 15 [*Khalil*]; Brown & Evans at § 3:48-3:50); and (4) where the balance of convenience militates against granting a remedy, including where doing so would have a disproportionate impact on the parties, the interests of third parties or the public interest (e.g., *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 at para. 52 [*MiningWatch*]; Brown & Evans at § 3:54).

[49] The differing nature of these criteria matters in this case, as the burden of proof shifts for the second set of criteria. In urging this Court to dismiss the appellants' claim that they are entitled to the second *mandamus* order, the ERC argues that the eight *Apotex* criteria must all be met and that the appellants' failure to "meet their burden" on all the criteria is fatal to their claim. Accordingly, in the ERC's submission, "there is simply no reason to engage with the appellants' arguments on a single criterion of the eight-part cumulative *Apotex* test" if the appellants have not established that all criteria lean in their favour.

[50] I disagree. An applicant who establishes that the first four *Apotex* criteria are favourable has shown that it is *prima facie* entitled to a writ of *mandamus*. However, the four final criteria

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may be raised by the respondent or by the reviewing court, on its own motion, as discretionary bars to *mandamus*. Even though the applicant might be entitled to *mandamus*, relief should be denied in the court's discretion because, on the evidence before it, an adequate alternative remedy was available, an order of *mandamus* would have no practical value or effect, there is an equitable bar to relief, or relief should not, on the balance of convenience, be granted.

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[51] Where such bars to relief are raised by the respondent or the reviewing court, or where their existence is apparent from the record before the court, the applicant bears a tactical burden to disprove their existence, lest its application for *mandamus* be dismissed. Otherwise, an applicant is not required to proactively disprove the existence of discretionary bars to judicial review; absent a finding by the reviewing court that such bars exist, the applicant is entitled to the relief it has sought.

[52] In the case at bar, the Federal Court concluded that the appellants' request for the second writ of *mandamus* was not "grounded in any of the *Apotex* criteria". I cannot discern in the Court's conclusion a finding that any of the discretionary bars to relief on judicial review set out in the final four *Apotex* criteria arise on the evidence before it. Absent such a finding, and assuming that the first four *Apotex* criteria militate in favour of the issuance of an order of *mandamus*, the appellants would be entitled to that relief. As noted previously, however, I am of the view that the appeal with regards to the second writ of *mandamus* should be dismissed because the appellants failed to establish their entitlement to *mandamus* under the first four *Apotex* criteria.

[53] With this clarification of the *Apotex* framework in mind, I turn to an examination of the disputed *Apotex* criteria relating to the first writ of *mandamus*.

VII. UNREASONABLE DELAY UNDER THE THIRD *APOTEX* CRITERION

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[54] Under the third *Apotex* criterion, the appellants were required to demonstrate that they had a clear right to performance by the ERC of its duty to issue findings and recommendations with respect to their appeals. To do so, they needed to establish that they had satisfied all conditions precedent giving rise to the duty and that there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal, either express or implied, for example by unreasonable delay (*Apotex* at p. 767). The Federal Court held that, since it was common ground that the appellants were not responsible for the delay, it would be unreasonable if it had been longer than the nature of the ERC's review process required, *prima facie*, and the ERC had not provided a satisfactory justification for the delay (*Conille* at para. 23). Relying on *Vaziri v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 [*Vaziri*], the Federal Court also held that, in addition to establishing the delay was unreasonable under *Conille*, the appellants had to establish that it had caused them significant prejudice.

[55] In my view, the Federal Court made several reviewable errors in setting out and applying the test under the third *Apotex* criterion. First, it failed to take into account indicators of the nature and purpose of the ERC's proceedings, a contextual factor it was required to consider to decide whether the ERC's delay was unreasonable. Second, in deciding whether the delay

experienced by the appellants was longer than required by the nature of the ERC's process, the Federal Court failed to consider as relevant to its analysis the ERC's findings and recommendations service standard for the processing of files. Third, in assessing whether the ERC provided a satisfactory justification for the delay, the Federal Court relied on jurisprudence developed in the context of the processing of immigration applications without regard to how the statutory objectives or the rights and interests of applicants in that context differ from those that prevail in the ERC's review of appeals related to workplace disputes involving member discipline and harassment. Moreover, it accepted as satisfactory an explanation for delay untethered to the actual delay experienced by the appellants. Finally, the Federal Court incorrectly required the appellants to prove that the ERC's delay had caused them significant prejudice. Cumulatively, these errors led the Federal Court to erroneously decide that the appellants failed to demonstrate their clear right to the issuance of the findings and recommendations in their respective appeals.

[56] In this section of the reasons, after identifying and expanding on the errors in the Federal Court's analysis, I explain how the appellants have in my view established that the ERC's delay in issuing its findings and recommendations has on its face been longer than the review process requires, and why the ERC has not provided a satisfactory justification for the delay. However, I begin by reviewing the legal framework that governs courts' assessment of whether administrative delay is unreasonable — described in *Blencoe* and *Abrametz*, the leading cases on this question — and I situate the *Conille* test, applied by the Federal Court, within this framework.

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A. *The legal principles that govern the assessment of unreasonable delay*

[57] In *Abrametz*, the Supreme Court re-examined the legal principles that govern whether a lengthy administrative delay results in an abuse of process. It confirmed its earlier decision in *Blencoe* that administrative delay amounts to an abuse of process if it is inordinate and has caused significant prejudice and where the delay is found to be manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute (*Abrametz* at para. 72). The appellants do not allege that the delays they have experienced amount to an abuse of process. However, *Abrametz* sets out a detailed analysis of how to assess whether an administrative delay is "inordinate" and, since the appellants must establish that the ERC's delay was unreasonable under the third *Apotex* criterion for *mandamus* to issue, a review of this aspect of *Abrametz* and of *Blencoe*, its predecessor, is warranted.

(1) *Abrametz* and unreasonable administrative delay

[58] In *Abrametz*, the Supreme Court begins its analysis of administrative delay by recognizing that legislatures delegate authority to administrative decision-makers like the ERC "because of their proximity and responsiveness to stakeholders, their ability to render decisions promptly, flexibly and efficiently, and their ability to provide simplified and streamlined proceedings that can promote access to justice" (*Abrametz* at para. 32).

[59] By frustrating the goal of timely justice, unreasonable delay strikes at the raison d'être of administrative decision-making:

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> Inordinate delay in administrative proceedings, as in other legal proceedings, is contrary to the interests of society. Decisions by administrative decision makers need to be rendered promptly and efficiently. Administrative delay undermines a key purpose for which such decision-making authority was delegated — expeditious and efficient decision-making.
>
> (*Abrametz* at para. 46)

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[60] A lengthy delay is not in itself inordinate; the time taken to complete a process must be considered in light of the circumstances of the case (*Abrametz* at para. 50). Accordingly, in determining whether delay is inordinate, three non-exhaustive contextual factors should be considered: (a) the nature and purpose of the proceedings; (b) the length and causes of the delay; and (c) the complexity of the facts and issues in the case (*Abrametz* at para. 51). I now turn to these three factors.

(a) *The nature and purpose of the proceedings*

[61] The great diversity in administrative decision-makers, with their different powers, mandates and structures, means that there cannot be a "one size fits all" approach to assessing the reasonableness of administrative delay:

> Their decisions vary in complexity and significance. Sometimes they involve technical considerations. Other times, common sense and an understanding of the practicalities of ordinary life suffice: *Vavilov*, at para. 88. Of necessity, time requirements inherent to each of these kinds of proceedings will vary.
>
> (*Abrametz* at para. 52)

[62] In considering the nature and purpose of the proceedings, courts focus on the substantive and procedural complexities inherent in the kind of matter the administrative decision-maker deals with (*Blencoe* at para. 157, LeBel J., dissenting but not on this point). They also take into account the objectives pursued by the proceedings and how these proceedings affect the rights and interests of those involved. Their tolerance of delay is likely to vary with the nature of the individual rights at stake in a proceeding (Brown & Evans at § 9:58).

[63] In *Abrametz*, the Supreme Court found that the timely investigation and prosecution of complaints to professional disciplinary bodies was supported by the purposes of such bodies to protect vulnerable members of the public, regulate the profession and preserve public confidence in the profession; by the impact of prolonged disciplinary proceedings on a professional's livelihood, reputation and personal life; and by the interest of complainants and the general public in expeditious proceedings.

(b) *The length and causes of the delay*

[64] This factor recognizes that, while some delays may result in unfairness, other delays, including those incurred to satisfy the requirements of procedural fairness, may not (*Abrametz* at para. 65). Lengthy delays may be justifiable when considered in context. For example, in certain circumstances, delays resulting from the suspension of a disciplinary proceeding pending the conclusion of criminal proceedings can be justified as consistent with procedural fairness (*Abrametz* at para. 59).

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[65] The causes of the delay or of parts of the delay must also be considered. Delay that is an inherent part of a fair process is justified and cannot amount to an abuse of process, nor can delay caused or explicitly or implicitly waived by a party (*Abrametz* at paras. 62–63).

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[66] Under this factor, the Supreme Court recognized that administrative decision-makers' use and allocation of resources is relevant to assessing whether administrative delay is reasonable:

> [W]hether the administrative body used its resources efficiently should be considered in the analysis of inordinate delay. That said, insufficient agency resources cannot excuse inordinate delay in any case: *Blencoe*, at para. 135. Administrative tribunals have a duty to devote adequate resources to ensure the integrity of the process: see *Hennig v. Institute of Chartered Accountants (Alta.)*, 2008 ABCA 241, 433 A.R. 221, at para. 31.
>
> (*Abrametz* at para. 64)

[67] The question of whether insufficient resources can justify unreasonable delay was also considered in *Blencoe*, where a majority of the Supreme Court decided that a 32-month delay between the filing of sexual harassment complaints with a human rights commission and a scheduled hearing into the merits of the complaints was not so inordinate or inexcusable as to amount to an abuse of process justifying a stay of proceedings. In doing so, the majority sided with Lowry J. of the British Columbia Supreme Court, who held that the time that had elapsed was nothing more than the time required to process complaints of this kind given the limitations imposed by the resources available (*Blencoe* at para. 131).

[68] In the penultimate paragraph of the majority's reasons, Justice Bastarache had this to say about lack of agency resources as a justification for delay:

> … I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s. 11(b) of the Charter, the government "has a constitutional obligation to commit sufficient resources to prevent unreasonable delay". The demands of natural justice are apposite.
>
> (*Blencoe* at para. 135, underlining added)

[69] In *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771 [*Morin*], on which Justice Bastarache relied in his discussion of administrative delay, the majority judgment discussed the state's duty to commit adequate resources to prevent unreasonable delay in the context of the *Charter* right to be tried within a reasonable time:

> Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the *Charter*. (…) As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or courtrooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(b) was either conceived or in which it operates. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(b), account must be taken of this fact of life.
>
> …

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> How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources. (…)
>
> (*Morin* at pp. 794-795, underlining added)

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[70] I return to the question of resources as a justification for delay in my review of the Federal Court's analysis of whether the ERC's delay in its processing of the appellants' appeals is reasonable.

(c) *The complexity of the facts and issues in the case*

[71] The third contextual factor relevant to deciding whether administrative delay is inordinate recognizes that certain cases may require difficult and time-consuming investigations and that the complexity of the facts and issues particular to an individual case will affect the time required to decide the matter.

(2) *Blencoe* and unreasonable administrative delay

[72] In reviewing the principles governing the assessment of the reasonableness of administrative delay, it is useful to refer to the partially dissenting judgement of Justice LeBel in

Blencoe, which attracted the support of three other members of the Court. In his minority reasons, Justice LeBel identified three contextual factors to be balanced in assessing the reasonableness of an administrative delay:

> (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;
>
> (2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and
>
> (3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.
>
> (*Blencoe* at para. 160, underlining in the original)

[73] The minority reasons in *Blencoe* are not only of academic interest. The Supreme Court noted in *Abrametz* that while the minority reasons had set a lower threshold for an abuse of process that might call for a lesser remedy short of a stay of proceedings, the two sets of reasons could be read "as complementing each other and expressing a coherent set of principles" (*Abrametz* at para. 44).

[74] The inclusion of prejudice in the description of Justice LeBel's third contextual factor deserves comment, as the appellants have argued that a requirement of proof of significant

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prejudice has no place in the analysis of the reasonableness of an administrative delay under the third *Apotex* factor. The decisions to which Justice LeBel refers in support of his list of contextual factors involve unreasonable delay alleged to rise to the level of an abuse of process (*Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 1996 CanLII 616 (BC CA), 17 B.C.L.R. (3d) 336 (C.A.); *Blencoe* at para. 153), a violation of the right to life, liberty and security of the person (*Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 1989 CanLII 284 (SK CA), 60 D.L.R. (4th) 143 (Sask. C.A.)) or a violation of the *Charter* right to be tried within a reasonable time (*Morin*) that would warrant a stay of proceedings. As I note below, while evidence of significant prejudice is relevant to deciding whether delay amounts to an abuse of process warranting a stay of proceedings, it does not follow that it is also required to obtain *mandamus* relief for the very purpose of avoiding such prejudice. Indeed, in *Abrametz*, the Supreme Court treats the requirements of prejudice and of unreasonable delay as distinct preconditions for a finding of abuse of process.

(3) *Conille* in light of *Abrametz* and *Blencoe*

[75] In assessing the reasonableness of the ERC's delay, the Federal Court applied the test from *Conille*, a decision that precedes both *Blencoe* and *Abrametz*. To facilitate my review of the Federal Court's decision, I situate the *Conille* test within the framework set out by these leading decisions.

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[76] *Conille* holds that a delay is unreasonable where (1) it has been longer than the nature of the process required, *prima facie*; (2) the applicant and their counsel are not responsible for it; and (3) the authority responsible for the delay has not provided satisfactory justification.

[77] The first *Conille* factor, which compares the delay in question to the time that the nature of the process requires, *prima facie*, largely corresponds to the first *Abrametz* factor and the first factor from the *Blencoe* minority judgement. It addresses the time requirements inherent to the administrative proceedings in light of the legal and factual complexities of the matters dealt with by the administrative decision-maker, and considering the requirements of a fair process, the purpose of the proceedings and the rights and interests of those affected by them.

[78] The second *Conille* factor examines some of the causes of delay beyond the inherent time requirements described in the second factor from both *Abrametz* and the *Blencoe* minority judgement, specifically, whether delay was caused or waived, explicitly or implicitly, by the party or their counsel.

[79] The third *Conille* factor becomes relevant where the delay in question, excluding any delay for which the applicant and their counsel are responsible (accounted for in the second *Conille* factor), exceeds the inherent time requirements of the matter. It provides the authority responsible for the delay with an opportunity to identify factors that satisfactorily justify this excess delay. For example, an administrative decision-maker could attribute certain delays to factors specific to an individual case. These could include the presence of particularly complex

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facts and issues requiring difficult and time-consuming investigations, as set out in the third *Abrametz* factor.

[80] Having set out the framework governing how to assess the reasonableness of an administrative delay, I turn now to the Federal Court's analysis of the third *Apotex* factor, beginning with the application of the *Conille* factors and followed by the question of significant prejudice. Since it was common ground that the appellants were not responsible for the delay in question, I will, like the Federal Court, only address the first and third *Conille* factors.

B. *Was the delay longer than the nature of the ERC's review process required?*

(1) The Federal Court failed to consider relevant contextual factors

[81] *Abrametz* and *Blencoe* provide that the nature and purpose of the proceedings conducted by a public body are contextual factors that should be considered in deciding whether a delay in conducting these proceedings is inordinate.

[82] In order to demonstrate that the delay they experienced was longer than required by the nature of the ERC process, *prima facie*, the appellants argued that certain legislative provisions and RCMP policies indicated that the ERC was required to deal with their appeals expeditiously.

[83] First, the appellants submitted that the internal appeal process established for RCMP members under the Act and the Regulations were analogous to dispute resolution procedures

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established under labour regimes, which are animated by the objective of resolving disputes quickly, economically and with minimal disruption to the parties (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107 at para. 21 [*Horrocks*]).

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[84] The Federal Court dismissed this submission on the grounds that the ERC process was not a collective bargaining process governed by labour law. It held that the objective identified by the Supreme Court in *Horrocks* applied only to the resolution by labour arbitrators of disputes arising from the collective bargaining process and did not apply to the ERC's role in providing its findings and recommendations in the appellants' appeals (Decision at paras. 41–42).

[85] The fact that the ERC does not exercise authority under a collective agreement or resolve disputes as part of a collective bargaining process does not mean that the value of timely decision-making that underlies statutory schemes for the resolution of workplace disputes, including labour arbitration, is irrelevant or inapplicable to the Federal Court's assessment of unreasonable delay under the third *Apotex* criterion. The ERC impartially reviews appeals of conduct measures imposed on RCMP members and of decisions regarding harassment complaints, revocations of appointments, discharges, demotions and ordered stoppages of pay and allowances. In doing so, it contributes to fair and equitable labour relations and accountability within the RCMP. As such, the values and objectives that animate the ERC's mandate overlap with those that govern the work of labour arbitrators. Notably, the legislative summary that precedes the provisions of the legislation that brought in the 2014 amendments states that one of the objectives of the amendments to the Act is to modernize 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" (*Enhancing RCMP Accountability Act*, Summary, underlining added).

[86] The importance of timely decision-making in the context of workplace disputes at the RCMP has also been recognized by this Court and by the Federal Court. For example, prior to the Supreme Court landmark decision in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, through which RCMP members gained the right to collectively bargain, this Court was seized of an appeal of a judicial review which proves relevant to the present appeal. The case involved the RCMP Commissioner's dismissal of an RCMP member's appeal from a decision of the ERC which had refused his claim for compensation for the loss sustained on the sale of a house during his relocation. This Court stated that "as with disputes in other workplace settings, grievances by RCMP officers should normally be resolved within the statutory decision-making scheme, with the minimum of delay and outside interference" (*Millard v. Canada (Attorney General)*, 2000 CanLII 14893 (FCA), at para. 9).

[87] In *Boogard v. Canada (Attorney General)*, 2013 FC 267, Justice Rennie, then of the Federal Court, described the values and objectives that underlie the process for treating harassment complaints at the RCMP. Mr. Boogard, a staff sergeant, had filed a harassment complaint alleging that the RCMP Superintendent's comments about him had damaged his career. The complaint was dismissed, following an investigation, 18 months after it was filed. Mr. Boogard grieved the decision, but also filed an application for judicial review. The Federal Court declined to grant a remedy because, although the delays associated with the RCMP's

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complaint and grievance process were close to rendering these remedies ineffective, the grievance procedure could result in Mr. Boogard's appointment to a rank, a highly effective remedy not available on judicial review.

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[88] Noting that 18 months had been required to decide the complaint and that 14 months had passed since a grievance of that decision was filed, the Court made important observations on whether, in light of this considerable delay, the complaint and grievance process could be said to be an effective alternative remedy:

> [31] Grievance and harassment procedures are intended to be expeditious. The Harassment Policy notes that the objective of that policy is that complaints are to be resolved in a timely manner. Their summary nature supports the objective of a harmonious and effective workplace. Grievance decisions left outstanding allow issues to fester, bring uncertainty to the workplace together with ineffectiveness and inefficiency.
>
> [32] The delays in question stretch the tolerance for the harassment and grievance procedures to be considered an adequate alternate remedy to judicial review. To be an adequate remedy it must be timely. Timeliness, in turn, depends on the objectives of the process and interests at stake. It is important to remember that the grievance of the harassment decision was filed on November 18, 2011. It is now 2013 and no decision is on the horizon.
>
> [33] Complex judicial review proceedings and trials are routinely commenced and disposed of in this Court in far less time than this compliant (*sic*) has languished in the system. This gives rise to serious questions as to whether the objectives of the harassment and grievance procedures are being met. (…)

[89] While the circumstances in *Boogard* were somewhat different, the point made by Justice Rennie in his reasons is similar to that advanced by the appellants based on the *Horrocks* decision. Lengthy delays by an administrative agency involved in the processing of workplace-related complaints frustrate the objective that underlies such regimes: ensuring a harmonious and

effective workplace. This is the case whether or not the agency exercises authority under a collective agreement or resolves disputes arising under a collective bargaining process. It follows that the objective of timely resolution of workplace disputes underlying the ERC review process was relevant to assessing whether the delay experienced by the appellants was longer than the nature of that process required, *prima facie*. The Federal Court erred in disregarding this factor.

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[90] Moreover, I agree with the appellants that the requirement in section 28.1 of the Act that the ERC "establish, and make public, service standards respecting the time limits within which it is to deal with grievances and appeal cases that are referred to it" also highlights the importance placed by Parliament on the timely resolution of these matters. The fact that this provision does not mandate a *specific* timeline is beside the point: the statutory obligation to prepare such service standards indicates that Parliament intended that the ERC process appeals in a timely manner. The expedited nature of the RCMP procedures that provide for the perfection of the appeal files supports this inference: *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289, s. 23(1) (14-day time limit to appeal); Royal Canadian Mounted Police, Recourse Services Branch, *National Guidebook - Appeals Procedures* (February 26, 2016), paras. 6.1.1.2, 6.1.2 and 6.1.5 (written submissions on the merits no longer than 10 pages to be filed within 14 days with the possibility of a single 14-day extension of time granted only in exceptional circumstances).

[91] Finally, the Federal Court erred in failing to consider as relevant to its analysis under the first *Conille* factor the findings and recommendations service standard adopted by the ERC for appeals filed after April 1, 2022. This service standard commits the ERC to issuing findings and

recommendations in 75% of the appeals within the year following their intake. While not determinative, the ERC's own estimate of the time within which appeals are generally processed and the evidence regarding the extent to which the ERC was meeting or exceeding this service standard (Decision at para. 69) are relevant to ascertaining the time required by the nature of the process (*Asiedu v. Canada (Citizenship and Immigration)*, 2023 FC 1523 at para. 12; *Mamut v. Canada (Citizenship and Immigration)*, 2024 FC 1593 at para. 94).

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[92] The appellants do not seek by these arguments to "*Jordanize*" administrative delay before the ERC (Decision at para. 56). Rather, they argue that to the extent these provisions, policies and doctrines inform the nature and purpose of the proceedings conducted by the ERC, they should be considered in deciding whether a delay in conducting these proceedings is inordinate. Their arguments are perfectly consistent with the principles outlined in *Abrametz* and *Blencoe*. The Federal Court erred in dismissing their relevance.

(2) Increased caseload, resource constraints and prioritization are properly considered as justifications for delay under the third *Conille* factor

[93] In the part of its analysis regarding whether the ERC's delay in processing the appellants' appeals was longer than the nature of the process required, *prima facie*, the Federal Court considered the ERC's submission that this delay was attributable to the combination of: (a) a "dramatic" increase in the ERC's caseload that occurred due the 2014 amendments; (b) the government's failure to increase (until 2020) the ERC's budget and staffing levels to allow it to keep up with the higher caseload, leading to a backlog of appeals; and (c) the system adopted by the ERC in response to this backlog to prioritize appeals according to severity and under which

most of the appellants' appeals were ranked at the lowest priority level for processing. Having considered these circumstances together with "the relevant statutory provisions," the Court held that it was not persuaded that the ERC's delays amounted to a refusal to act (Decision at para. 43) and that the appellants had "failed to establish that the ERC's delay in resolving their appeals has been longer than the nature of the process required, *prima facie*" (Decision at para. 60).

[94] With respect, the Federal Court should not have considered the increase in caseload, insufficient resources and prioritization system under the first *Conille* factor. As the review of *Abrametz* and *Blencoe* makes clear, this factor addresses the time requirements inherent to the ERC's proceedings in light of the legal and factual complexities of the matters that the ERC deals with. It does so in consideration of the requirements of a fair process, the purpose of the proceedings and the rights and interests of those affected by them. Factors such as a sudden increase in caseload, a lengthy, albeit temporary dearth in resources and a prioritization system established to respond to the resulting backlog do not describe delays that are inherent in the appeals reviewed by the ERC. They are explanations for delays beyond the time required by the nature of the process and are properly discussed under the third *Conille* factor. Indeed, the Federal Court repeated its analysis of these factors and found that they also provided a satisfactory justification for the delay (Decision at paras. 61–72). I will address the Federal Court's conclusion under the third *Conille* factor in the following section.

[95] Similarly, whether the appellants' appeals presented unusually complex facts or issues that could justify delays over and above the time requirements inherent to the ERC's proceedings should have been considered under the third *Conille* factor. The appellants argued before the

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Federal Court that it should not have taken as long for the ERC to conduct its review of their appeals. The Court erred when it rejected this argument as part of its analysis under the first *Conille* factor because "there was insufficient evidence before [it] with respect to the complexity of the appeals involved" (Decision at para. 57). It is for the administrative decision-maker, not the appellants, to provide a satisfactory justification for delays that exceed the inherent time requirements of a matter, including delays based on the complexity of a specific case.

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(3) The delay was on its face longer than the nature of the process before the ERC required

[96] I agree with the appellants that the Federal Court should have found that they satisfied the first prong of the third *Apotex* criterion.

[97] In the case at bar, the principle that work-related disputes should be resolved expeditiously, legislative intent, and the existing service standards all indicate that the ERC should issue findings and recommendations promptly. At the time the Decision was published, in April 2024, the appellants' appeals had been outstanding for three and a half to four and a half years, up to four times the one-year timeline set by the findings and recommendations service standard for processing 75% of files. That was two years ago. In my opinion, every indicator militates in favour of a finding that the ERC's review of the appellants' appeals has been delayed beyond the inherent time requirements for processing such matters.

C. *Did the ERC provide a satisfactory justification for the delay?*

[98] Where an applicant for *mandamus* establishes that the delay in deciding their case, excluding any delay for which they or their counsel are responsible, exceeds the time requirements inherent to the administrative proceedings, the onus shifts to the respondent administrative decision-maker to demonstrate that the delay remains reasonable because there is a satisfactory justification. I note at the outset that, as mentioned in the preceding section, the Federal Court held that there was insufficient information in the record with regards to the complexity of the appellant's appeals for it to decide whether this factor could explain the ERC's delay in conducting its review of these appeals (Decision at para. 57). The onus rested with the ERC to adduce evidence relating to whether the relative complexity of individual appeals might justify delays in excess of the time requirements inherent to its proceedings. It failed to meet that onus.

[99] This error is in itself determinative. However, I wish to address serious reservations about two additional aspects of the reasoning that underlies the Federal Court's conclusion that the ERC provided a satisfactory justification for the delay experienced by the appellants. First, I am troubled that the Court relied on precedents that relate to the processing of applications for permanent residence, which is carried out in a statutory context quite different from that which governs the ERC's review of the appellants' appeals. Second, the explanation for the delay accepted by the Federal Court — that the ERC is adopting a methodical and principled approach to address its backlog and increased caseload — is not tied to the delay actually experienced by the appellants and could thus serve to justify any administrative delay, however egregious.

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(1) The Federal Court's reliance on *Jia*

[100] The Federal Court concluded that the ERC's delays in reviewing the appellants' appeals were not longer than the nature of the process required because it was not persuaded that these delays amounted to a refusal to act, since they were due to an increased caseload combined with staffing and administrative shortages (Decision at para. 43). Noting that *Abrametz* instructed courts to consider a list of non-exhaustive contextual factors to decide whether delay was inordinate, it relied on the Federal Court's decision in *Jia*, which in turn relied on that court's decision in *Vaziri*, for the proposition that the assessment of the reasonableness of processing delays must take into account "all pertinent circumstances, including the volume of applications received and the priorities and targets set out by the decision-maker" (Decision at paras. 51–52). While the Federal Court made the above comments in the course of its analysis under the first *Conille* factor, the reasoning underlying *Jia* also animates the court's analysis of the third *Conille* factor and its conclusion that the volume of the ERC's caseload, its insufficient resources and its prioritization system satisfactorily justify the ERC's delays.

[101] The decision-making involved in *Jia* and *Vaziri* — the processing of applications for visas and for permanent residence by the Minister of Immigration, Refugees and Citizenship [the Minister] — arises in a statutory and factual context that differs significantly from that in which the ERC operates.

[102] *Vaziri* involved a claim brought by an individual for an order of *mandamus* to require the Minister to render a decision on his father's sponsored application for permanent residence. Due

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to an increasing demand to immigrate to Canada (permanent residence applications numbered well into the hundreds of thousands annually), the Minister had identified annual target ranges for the number of applications to be accepted, had incorporated a 60:40 ratio between economic and non-economic classes of applicants and had prioritized spouses and dependent children over parents and grandparents.

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[103] The Federal Court rejected the applicant's argument that these policies were unlawful because they were not authorized by regulations. The Court noted that, under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], the Minister was "responsible for the administration of the Act" and that "in the absence of enacted regulations, he has the power to set policies governing the management of the flow of immigrants to Canada, so long as those policies and decisions are made in good faith and are consistent with the purpose, objectives, and scheme of *IRPA*" (*Vaziri* at para. 35, underlining added). This flexible authority to "administer the system" and "manage the immigration flow on the basis of social and economic policy considerations" enabled the Minister to put in place policies and procedures without which the immigration system would fail, including policies drawing distinctions between different groups of family class applicants (*Vaziri* at paras. 35–36).

[104] The Minister exercised this authority to delay the processing of applications in the parents and grandparents class in order to meet the Minister's processing commitments to spouses, partners and dependant children. The Court found, under the first *Conille* factor, that the deliberate delays in processing applications from the parents and grandparents class were "inherent in the system" and were not excessive for that class (*Vaziri* at para. 55). The Court also

applied this reasoning under the third *Conille* factor to find that the Minister had provided a reasonable explanation for the delay: it was "the direct result of lawful Ministerial policies which prioritize other [permanent residence] applicants over the parents and the grandparents class, which were effected in response to an overwhelming level of applications that had been submitted to [the Minister] in recent years" (*Vaziri* at para. 57).

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[105] Similarly, Mr. Jia, who had filed an application to immigrate to Canada as a member of the "investor class", sought an order of *mandamus* requiring the Minister to process his visa application. He claimed that the Minister's decision to allow the concurrent processing of older applications, including his own, at the same time as newer applications had delayed the processing of his application. The Court determined that this decision was authorized by the IRPA, which had, following *Vaziri*, been amended to expressly grant the Minister the power to give instructions with respect to the processing of applications that could apply retrospectively to pending applications. Mr. Jia argued that the Minister should have processed his and other similar applications on a first in, first out basis and that the cap on applications accepted each year should have been increased. There were over 5000 cases ahead of his application at the Hong Kong visa post.

[106] Relying on *Vaziri*, the Federal Court reaffirmed the Minister's authority to set quotas per immigrant class and to change processing priorities for pending immigration applications (*Jia* at para. 77). It held that Mr. Jia had not established that the delay in processing his visa application was unreasonable:

> [89] As was either expressly noted or implicit in *He*, *Zhang*, *Fang*, *Jiang*, *Kearney*, *Wurm*, *Mobasher*, and *Mazarei*, when evaluating whether a delay in processing a visa application has been unreasonable, the Court must have regard to all pertinent circumstances. These include the volume of applications received and the priorities and targets set by the Minister under the IRPA. As Justice Snider noted, at paragraph 55 of *Vaziri*, prior cases cannot be applied mechanically to settle the acceptable length for visa processing by [the Minister]. Rather, the reasonableness of the delay "must be informed by a full understanding of where the [a]pplicants' applications fit within the immigration scheme", which may legitimately provide for the slower processing of certain types of applications.
>
> [90] When viewed in this light, the delays faced by the applicants in these matters are not unreasonable. Simply put, there is no evidence that any of their applications has been taken out of its proper place in the queue or otherwise ignored by the respondent. Rather, as in *He*, *Zhang*, *Fang*, *Jiang*, *Kearney*, *Wurm*, and *Mobasher*, the delay in processing has simply been a function of the huge numbers of applications received and the quotas and processing priorities that the Minister legitimately set under the authority afforded him under the Act and Regulations. …

[107] *Vaziri* and *Jia* hold that the IRPA affords the Minister the power to set policies and make decisions to manage the flow of immigrants to Canada, including imposing deliberate delays on the processing of certain classes of applications for the benefit of other classes, so long as the policies and decisions are made in good faith and are consistent with the purpose, objectives, and scheme of the IRPA. Courts must assess the reasonableness of delays in the processing of an immigration application in light of this context, and such policies and decisions may constitute a satisfactory justification for the delay.

[108] In this appeal, the Federal Court essentially drew the following analogy between the case at bar and the circumstances in *Jia*. In response to higher caseloads and the development of a backlog due to a period of resource scarcity, the ERC created classes of RCMP members based on the severity of the matters that arise in the appeals. It imposed deliberate delays on the

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processing of low-severity appeals, including the appellants' appeals, by prioritizing for processing higher-severity appeals. If the delays attributable to ministerial policies and decisions that legitimately discriminate between classes of would-be immigrants are justified, then the ERC's implementation of its prioritization system to address its backlog should also constitute a satisfactory justification for the delay experienced by the appellants.

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[109] In my view, before accepting this analogy, the Federal Court was required to determine whether it was apt. The Minister's power to discriminate between classes of immigrants that justified the processing delays imposed in *Jia* and *Vaziri* was found to be necessary to achieve that scheme's objective of managing Canada's immigration flow on the basis of social and economic policy considerations and to be either expressly or impliedly set out in the IRPA scheme (*Vaziri* at para. 36). In accepting the ERC's explanation as a satisfactory justification, the Federal Court did not ask whether the ERC's adoption of its prioritization system and its imposition of open-ended delays on the processing of the appeals filed by certain RCMP members furthered the purpose, objectives and scheme of the *RCMP Act*. To the contrary, as previously noted, it failed to consider factors that were relevant to ascertaining the values and objectives that underlie the ERC's mandate under this scheme.

[110] Also absent from the Federal Court's decision is any analysis of how the rights and interests of the applicants in *Jia* and *Vaziri*, who have chosen to apply to sponsor family members for permanent residence or to seek admission to Canada, might differ from those of the appellants, who are pursuing appeals in workplace disputes with their employer through a

statutory mechanism provided for that purpose. As noted previously, courts' tolerance for delay is likely to vary with the nature of the rights at stake in a proceeding.

(2) The ERC's open-ended explanation could justify any delay

[111] The Federal Court found that even if the delay in addressing the appellants' appeals had been longer than the nature of the process required, the ERC had provided a satisfactory justification for the delay. It noted that the 2014 amendments to the Act increased the volume of appeals referable to the ERC and that no additional funding to address the increased caseload was provided until 2020-2021 causing a five-fold increase in the ERC's caseload between 2014 and 2021 and prompting the ERC to implement a prioritization system that, while putting the appellants' appeals among the lowest priority, "address[ed] the backlog in a 'methodical and principled manner'" (Decision at para. 71).

[112] It concluded that the evidence indicated that the ERC was working towards clearing the backlog and that, while the applicants may disagree with the prioritization system that puts their appeals among the lowest priority:

> the Applicants have not established that the ERC has not provided a satisfactory justification for the delay in dealing with their appeals. Indeed, it was based in part on this prioritization system that some of the RCMP members who were part of the initial application have seen their appeals dealt with by the ERC.
>
> (Decision at para. 71)

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[113] The Federal Court's findings on the causes of the delay are supported by the evidence. To streamline its review process and reduce the backlog caused by the 2014 amendments and inadequate government funding, the ERC took a number of measures. In addition to hiring additional resources once funding was made available and pre-screening files to ensure they were complete and ready for review, the ERC implemented a prioritization system and a service standard for issuing findings and recommendations.

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[114] Under the prioritization system, rather than reviewing cases on a first-come, first-served basis, cases are first prioritized based on their subject matter, with cases involving more severe disciplinary sanctions given priority to lessen the impact of such sanctions on members whose appeals are successful. Once prioritized by subject matter, cases "in the queue" that pertain to the same subject matter are reviewed in the order they are received. The intent of the prioritization system is to "maximize the ERC's current resources".

[115] Under its findings and recommendations service standard, the ERC commits to reviewing 75% of files received after April 1, 2022 within 12 months of intake. Since the appellants' appeals were received before April 1, 2022, this service standard does not apply to them.

[116] I agree with the Federal Court that the delays experienced by the appellants are attributable to the ERC's increased caseload combined with staffing and administrative shortages. It is also incontrovertible that the ERC's adoption of its prioritization system to facilitate the reduction of its caseload is also responsible for some of the delay experienced by the appellants, since the ERC has classified their appeals among the lowest priority, with the

consequence that more recent, higher priority appeals are processed before the appellants' appeals. The efforts expended by the ERC to meet its service standard are by definition focused on the processing of new appeals, not the appellants' appeals.

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[117] In brief, the Federal Court accepted the ERC's explanation that the delay suffered by the appellants is justified because the ERC is "addressing the case backlog resulting from the 2014 amendments within the confines of its current budget and staffing levels" in part through a prioritization system intended to "maximize the ERC's current resources" by putting the appellants' appeals among the lowest priority behind newer appeals judged to be of greater impact or severity.

[118] Essentially, the ERC submits that it is doing what it can with the resources it has been given and that, at some point in the future, the appellants' appeals will be reviewed. The problem with accepting such an explanation as a satisfactory justification for delay, even if it is supported by adequate evidence, is that it is untethered to the actual delay suffered by an applicant for *mandamus*. Absent from the Federal Court's reasons, the ERC's submissions or the record on this appeal is any estimate of when the appellants might expect their reviews to be completed under the process now in place. It is important at this stage to recall that the appellants' appeals were pre-screened by the ERC as complete and ready for review between three and a half and four and a half years before the Federal Court's judgment, and now close to five and a half to six and a half years ago.

[119] If the “we will get to your appeal slowly but surely, in a methodical and principled manner, as quickly as our resources allow and depending on the number of higher priority appeals we receive” explanation reasonably justifies a three to four year delay in processing the appellants’ appeals, what prevents it from being relied upon to justify longer delays? Courts “cannot simply accede to the government’s allocation of resources and tailor the period of permissible delay accordingly” (*Morin* at p. 795); rather, administrative decision-makers must devote adequate resources to prevent unreasonable delay (*Abrametz* at para. 64; *Blencoe* at para. 135). Accepting as satisfactory a justification for open-ended delay risks insulating unreasonable delays from intervention by the Federal Court through the issuance of a writ of *mandamus*.

(3) The appellants need not show that delay has caused them significant prejudice

[120] The Federal Court held that the appellants were required, in addition to establishing that the delay was unreasonable based on the *Conille* factors, to demonstrate that they had suffered “significant prejudice” caused by the delay (Decision at paras. 32 and 78–85). This was an error. Under the *Blencoe* and *Abrametz* framework, proof that administrative delay has caused significant prejudice is relevant to whether that delay amounts to an abuse of process justifying a stay of proceedings, not whether the delay is unreasonable.

[121] The requirement of “significant prejudice” as a condition to establishing an entitlement to *mandamus* applied by the Court appears to have originated in *Vaziri*. There, after listing the three requirements for unreasonable delay set out in *Conille*, the Federal Court stated: “To this list of three requirements, I would also add that a person seeking *mandamus* based on delay must also

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demonstrate significant prejudice which results from the delay (*Blencoe*, above at para. 101)" (*Vaziri* at para. 52; see also *Chen* at para. 16). The Federal Court is now divided on the question of whether proof of significant prejudice is required as part of the third *Apotex* criterion. It has applied the *Vaziri* approach in many, but not a majority, of cases (*Tousi v. Canada (Citizenship and Immigration)*, 2025 FC 671 at paras. 11–13 [*Tousi*]).

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[122] Paragraph 101 of *Blencoe*, cited by the Federal Court in *Vaziri* in support of its approach, reads as follows:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period… In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
>
> (*Blencoe* at para. 101, citations omitted)

[123] When read in its proper context, this passage does not support the existence of a requirement that applicants for *mandamus* seeking to establish unreasonable delay show that the delay has caused them significant prejudice. In *Blencoe*, the Supreme Court was considering whether administrative delay, without more, could constitute an abuse of process at common law warranting a stay of proceedings. It answered that question in the negative, noting that "staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period". As noted by the Supreme Court in *Abrametz*, more is needed to establish an abuse of process possibly warranting a stay of proceedings:

> *Blencoe* sets out a three-step test to determine whether delay that does not affect hearing fairness nonetheless amounts to an abuse of process. First, the delay must be inordinate. Second, the delay must have directly caused significant prejudice. When these two requirements are met, courts or tribunals will proceed to a final assessment of whether the delay amounts to an abuse of process. Delay will amount to an abuse of process if it is manifestly unfair to a party or in some other way brings the administration of justice into disrepute…
>
> (*Abrametz* at para. 43)

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[124] It is in this context that the Supreme Court rejected, in *Abrametz*, an invitation to recognize inordinate delay as prejudicial in and of itself — to "*Jordanize*" *Blencoe* — on the grounds that there was no constitutional right outside the criminal context to be "tried" within a reasonable time (*Abrametz* at para. 47). It should be recalled that in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, in the context of its interpretation and application of paragraph 11(d) of the *Charter*, the Supreme Court established presumptive ceilings beyond which delay, from a criminal charge to the actual or anticipated end of trial, is *presumed* to be unreasonable and warrant a stay, unless the Crown can establish exceptional circumstances.

[125] As specified in *Abrametz*, both inordinate administrative delay and evidence that this delay has directly caused significant prejudice are required for a finding that the delay has resulted in an abuse of process that could warrant a stay of proceedings. However, these prerequisites are distinct. There is no principled basis on which evidence of significant prejudice could be required to establish an unreasonable delay from which a refusal to perform a public duty to act might be implied. Doing so would be a "misapplication of *Blencoe*" (*Tousi* at para. 17).

[126] Indeed, while the Supreme Court has observed that *mandamus* may be ordered as a remedy for an abuse of process if one is found (*Abrametz* at para. 80), it has also stated that it may be an "appropriate tool to prevent… abuse of process" (*Abrametz* at para. 81, underlining added). In other words, *mandamus* may be used to prevent the occurrence of the significant prejudice which could result in an abuse of process. As recently noted by the Federal Court, requiring "significant prejudice" to find that a delay is unreasonable for the purposes of an application for *mandamus* "would, perversely, *require* a level of hardship that *mandamus* is specifically intended to prevent" (*Majidi v. Canada (Citizenship and Immigration)*, 2025 FC 680 at para. 31, emphasis in the original).

[127] Accordingly, to the extent that the Federal Court's determination that the appellants had not satisfied the third *Apotex* criterion rested on a requirement that they supply evidence of significant prejudice, that determination also cannot stand.

[128] My view that evidence of significant prejudice is not required to establish unreasonable delay under the third *Apotex* criterion does not mean that prejudice, whether significant or not, plays no role whatsoever in deciding whether a writ of *mandamus* should issue. As I discuss below, evidence of prejudice or of a lack thereof may be relevant to whether the balance of convenience supports *mandamus* relief under the eighth *Apotex* factor: see, e.g., *Ran v. Canada (Citizenship and Immigration)*, 2023 FC 1447 at para. 39; *Jebelli v. Canada (Citizenship and Immigration)*, 2025 FC 500 at para. 24.

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(4) The ERC failed to provide a satisfactory justification for the delays

[129] For the reasons detailed above, structural constraints induced by scarce resources are not, in and of themselves, a satisfactory justification for the delays that have occurred in processing the appellants' appeals: see, e.g., *Coderre v. Canada (Office of the Information Commissioner)*, 2015 FC 776 at para. 49, citing *Dragan v. Canada (Minister of Citizenship and Immigration) (T.D.)*, 2003 FCT 211, [2003] 4 FC 189 at para. 58. This Court knows only that the appeals are on the lower end of the prioritization system. The ERC has not adduced evidence regarding the expected average processing time for similarly situated appeals, the expected time required to process the appellants' appeals, or how much longer it would take the ERC to consider higher priority appeals if the prioritization system were disturbed to accommodate the writ of *mandamus* requested by the appellants. Despite the additional resources allocated to the ERC in 2020 to enable it to discharge its expanded mandate, the record does not indicate that processing of the appellants' appeals is imminent, let alone disclose any evidence of activity for these appeals since they were pre-screened by the ERC as complete and ready for review as early as 2019. Therefore, the appellants have in my view established a right to have the ERC perform its duty to issue findings and recommendations in their respective appeals. The ERC has failed to place before the court evidence linked specifically to the appellants' appeals that could justify a delay of this magnitude. The third *Apotex* criterion is satisfied.

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VIII. PRACTICAL VALUE OR EFFECT OF THE ORDER REQUESTED BY THE APPELLANTS

[130] The sixth *Apotex* criterion requires that the order of *mandamus* sought by the appellants be of some practical value or effect. In *Oldman River*, a decision to which this Court referred in formulating the sixth criterion in *Apotex*, an environmental group had applied for *certiorari* and *mandamus* to compel two federal departments to conduct an environmental assessment of a dam project pursuant to federal guidelines. The Federal Court had dismissed the application on the ground of futility. It reasoned that since provincial authorities had carried out their own environmental review, granting the requested relief would be needlessly repetitive. The Supreme Court agreed with this Court and found that the Federal Court should not have refused the remedy on this ground and that "prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory" (*Oldman River* at p. 80).

[131] The ERC argued before the Federal Court that it could not possibly comply with the remedy requested by the appellants — an order of *mandamus* requiring the ERC to provide findings and recommendations with regards to the appellants' appeals within thirty days — due to the complexity of its review process, the number of documents to be reviewed and its limited resources. In the ERC's view, an order with which it could not comply could have no practical value. Noting that it had insufficient information before it to assess whether the appeals could be processed within thirty days, the Court held that the remedy sought by the appellants had no practical value or effect.

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[132] I agree with the appellants that in considering this criterion, the Federal Court effectively conflated the question of whether an order of *mandamus* would be of some practical value or effect with the question of whether it would be possible for the ERC to comply with the specific remedy requested by the appellants.

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[133] As noted by the appellants, the Federal Court has the discretion to prescribe, in an order for *mandamus*, a timeframe for an agency to perform its public legal duty that is longer than that requested by the applicants (*Kalachnikov v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 777). In *Kalachnikov*, where an applicant sought an order of *mandamus* against the Minister to process his application for permanent residence, the Federal Court gave the Minister a period of six months, rather than the sixty days requested by the applicant, to allow the Minister to carry out required background checks. The Court even laid out in its order that the Minister could apply for an extension of that period if it provided adequate justification. The Federal Court has also exercised its discretion to allow the parties to agree on an appropriate timeframe for an order of *mandamus* (*Temeh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 288, [2018] 1 F.C.R. 325 at paras. 71–73). Accordingly, I see no merit in the ERC's submission that, in issuing a writ of *mandamus*, the Federal Court would have to "speculate" on the appropriate timeframe.

[134] The Federal Court failed to recognize its discretionary authority to issue an order for *mandamus* requiring the ERC to process the appellants' appeals within a timeframe beyond the thirty-day period proposed by the appellants and erred in accepting the respondent's argument that the remedy sought by the appellants would have no practical value or effect because the

ERC could not possibly complete its review within thirty days. An order of *mandamus* prescribing a reasonable timeframe for the ERC to complete its work would have the practical effect of limiting the long delay experienced by the appellants in the processing of their appeals, and it was a reviewable error for the Federal Court to fail to acknowledge so (see, e.g., *Bidgoly v. Canada (Citizenship and Immigration)*, 2022 FC 283 at para. 42).

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[135] I therefore find that the requested writ of *mandamus* will have a practical effect for the appellants, who will stand closer to the final resolution of their work-related dispute. The details of the reasonable timeframe in which the ERC will be required to discharge its duty will be discussed below.

IX. EQUITABLE BARS TO *MANDAMUS*

[136] In assessing the balance of convenience, the Federal Court combined the seventh and eighth *Apotex* criteria into a single question: “Does the balance of convenience favour issuing the *mandamus* order, and in this context, is there any equitable bar to the relief sought” (Decision at para. 35).

[137] The Court held that a *mandamus* order would require the ERC to disregard other files in order to process the applicants’ files and “as a result, members facing more severe sanctions could be leap-frogged by the Applicants” (Decision at para. 97). This would “undermine the priority system and delay issuing [findings and recommendations] for more pressing appeals” (Decision at para. 100).

[138] In coming to this conclusion, the Federal Court relied on the determination in *Jia* that issuing an order of *mandamus* would be inequitable because it would leap-frog the successful applicants over others who had not sought relief:

> *[M]andamus* is an equitable remedy; the Court must therefore be satisfied that it is equitable in the circumstances to make the requested order as the Court of Appeal held in the *Apotex* case. Here, it would not be equitable to grant the requested relief—even if there had been a basis for doing so—as such relief would leap-frog the applicants over other [Immigrant Investor Program] applicants, who have not made applications to the Court. Just as my colleagues, Justices Phelan, Tremblay-Lamer and Annis held in *Agama*, at paragraphs 20–21; *Mobasher*, at paragraph 23; and *Mazarei*, at paragraph 33, I also believe that this concern represents an additional reason why an award of *mandamus* is not appropriate in these present cases.
>
> (*Jia* at para. 103)

[139] I have great reservations about the soundness of elevating any deviation from the rule that appeals should be processed in the order in which they were filed to an absolute equitable bar to issuing a writ of *mandamus*. In any event, even if *Jia* and the decisions upon which it relied [the *Jia* line of decisions] are sound, the Federal Court erred in relying on it in the circumstances of this case. I begin with a brief review of the cases cited by the Federal Court in *Jia*.

A. *The* Jia *line of decisions*

[140] In *Jia*, the Federal Court relied on three decisions to find an equitable bar to issuing an order of *mandamus* that would require that the applications of the individuals seeking *mandamus* be processed before the previously-filed applications of other individuals not party to the *mandamus* application: *Agama v. Canada (Minister of Citizenship and Immigration)*, 2013 FC

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135 [*Agama*]; *Mazarei v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 322 [*Mazarei*]; and *Mobasher v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 399 [*Mobasher*].

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[141] Ms. Agama had filed an application for a permanent resident visa under the Skilled Workers Class for a specific National Occupation Classification. The Minister had issued instructions establishing an annual cap of five hundred such applications to be considered for processing. Ms. Agama's application was rejected because she had filed it almost two months after the cap was reached. Ms. Agama sought an order of *mandamus* against the Minister. She argued that the Minister's failure to accurately — and in real time — post on its website the number of applications filed and to announce that the cap had been reached created a legitimate expectation that the cap had not been reached, resulting in a breach of her right to procedural fairness. The Federal Court found that Ms. Agama had not established that she had a legitimate expectation. In *obiter*, it noted at paragraph 21 that, even if Ms. Agama's position were founded, it would not be equitable to grant her relief without addressing the situation of others who had filed applications after the cap was reached but before Ms. Agama, and whose applications would thus have priority. Notably, Ms. Agama's application for *mandamus* was not based on unreasonable delay.

[142] In *Mazarei*, a group of applicants for permanent residence in the Quebec Investor class, alleging unreasonable delay in the processing of their applications, sought an order of *mandamus* to compel the Minister to make a final decision within one year. The Federal Court found that the delay experienced by the applicants was not unreasonable because there was a satisfactory

justification. Due to extraordinary circumstances caused by world events, the caseload of the specific visa office processing the applications had substantially increased when files were transferred there from two other embassies. The visa office had prioritized the processing of applications in other categories and staff resources had been dedicated to training additional staff. Having found that the delay was not unreasonable and that there was no reason to believe that their applications would not eventually be processed and accepted, the Court, citing *Agama*, nevertheless commented on the impact of issuing the order of *mandamus* on individuals who had applied for permanent residence earlier but had not sought *mandamus*:

> [31] Finally, it must be noted that maintaining the integrity of the system requires consideration of the inequitable impact of allowing a *mandamus* application on other applications for permanent residence.
>
> [32] The evidence indicates that the applicant's application was preceded by 519 to 523 applications for permanent residence as of June 4, 2013. If his application were allowed, in essence the applicant would be allowed to "jump the queue," thereby violating the fundamental rule of fairness by which the processing of applications occurs in order of the date of their filing.

[143] Finally, in *Mobasher*, the Federal Court decided that delays experienced by an applicant for permanent residence under the investor category were not unreasonable because there was a satisfactory explanation for the delay: the Minister had brought changes to the processing of such permanent residence applications via ministerial instructions, the inventory of applications to be processed had increased for reasons outside the Minister's control and a labour dispute had diminished the processing capacity of the Minister. Observing that the applicant's file was active and moving up the queue, the Court found that the intervention by the Court was not warranted and, citing *Agama*, noted at paragraph 29 that it "would only result in the inequitable outcome of

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allowing this application to jump the queue ahead of other applications that are also awaiting processing but that are ahead of the applicant in the queue".

B. *Recognizing "queue-jumping" as an absolute equitable bar to* mandamus *shields administrative delay from* mandamus *relief*

[144] I preface my observations by noting that, in each of the decisions discussed in the previous section, the Federal Court's discussion of equitable principles was unnecessary, since the Court had determined that *mandamus* was unavailable for other reasons. In *Jia*, *Mazarei* and *Mobasher*, the Federal Court had determined that there had been no unreasonable delay in the processing of the applications; there was thus no implied refusal to perform a public legal duty to act and no clear right to performance of the duty, and the third *Apotex* criterion was therefore not met. In *Agama* and *Jia*, the Federal Court had determined that the applicants had failed to establish that they had a legitimate expectation that might entitle them to an order enforcing a specific promise made by the Minister.

[145] In my view, the ERC and Attorney General essentially argue that, according to the *Jia* line of decisions, where (1) an applicant for *mandamus* establishes that, due to an unreasonable delay in processing their appeal, an administrative decision maker may be implied to have refused to perform a public legal duty to act; (2) a group of similarly situated individuals also affected by the unreasonable delay have filed appeals which predate that of the applicant and have not joined the application for *mandamus*; and (3) granting *mandamus* would require that the applicant's appeal be processed ahead of those of members of the similarly situated group, the effect of granting *mandamus* is to violate "the fundamental rule of fairness" by which

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applications are processed in the order in which they are filed, raising an equitable bar to *mandamus* under the seventh *Apotex* criterion.

[146] If this submission is correct, *mandamus* must be refused to an individual otherwise entitled to the remedy because they are only one of many individuals subjected to unreasonable administrative delay, some of whom have chosen, for reasons of their own, not to seek *mandamus*. Under this logic, only the individual whose application is next in line to be considered by the decision-maker could ever successfully apply for *mandamus*. Accepting this argument could shield from the reach of the prerogative writ of *mandamus* unreasonable delays in administrative decision-making simply by virtue of the fact that they affect groups of individuals, some of whom choose not to seek *mandamus*.

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[147] I therefore have serious doubts about the soundness of a rule that would erect an equitable bar to the granting of *mandamus* in relief of unreasonable administrative delay solely because it results in "queue jumping": for a similar view, see *Thomas v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164 at paras. 28–31. In any event, the rule developed in the *Jia* line of decisions does not apply in the circumstances of this case.

C. *The circumstances of this case do not engage the rule developed in the* Jia *line of decisions*

[148] The appellants are not asking to be placed at the head of a "queue" of applications brought by similarly situated RCMP members. Unlike the circumstances present in the *Jia* line of decisions, where applications were processed in order of their date of filing, under the ERC's

prioritization system, more recent appeals involving sanctions more severe than older appeals are treated first. The system does not primarily rest on the "fundamental rule of fairness" by which the processing of applications occurs in order of the date of filing. Rather, it is a triage mechanism to allocate scarce adjudicative resources based on the premise that it is preferable to process the appeals of RCMP members facing sanctions judged to be more severe before those of members facing sanctions judged to be less severe. The rule developed in the *Jia* line of decisions is inapplicable to the circumstances of this appeal.

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D. *There is no equitable bar to* mandamus

[149] The ERC's prioritization scheme assumes that the benefit accruing from a more timely adjudication of the appeals of members facing more severe sanctions outweighs any harm caused to the appellants by the delayed adjudication of their appeals. The granting of an order of *mandamus* to expedite the processing of the appellants' appeals thus engages the balance of convenience analysis from the eighth *Apotex* criterion, but does not constitute an equitable bar based on any judicial disapproval of the unfairness of queue-jumping. The ERC's appeal to notions of leap-frogging or queue-jumping is unhelpful and distracts from the real questions at play.

[150] As the respondents have raised no further equitable bars to the issuance of the first writ of *mandamus* and none are apparent from the record before this Court, I find that the seventh *Apotex* criterion is met.

X. THE BALANCE OF CONVENIENCE

[151] The eighth and final criterion to consider before issuing an order of *mandamus* is the balance of convenience. This criterion was carefully scrutinized by this Court in *Apotex* and, in *MiningWatch*, the Supreme Court provided guidance on when reviewing courts should deny prerogative relief to a successful applicant for judicial review based on the balance of convenience. Both decisions indicate that *mandamus* relief will not lightly be denied on grounds of the balance of convenience. The teachings from these two decisions must inform my review of the Federal Court's determination on the balance of convenience.

A. *The balance of convenience in light of* Apotex *and* MiningWatch

[152] In *Apotex*, the Minister of National Health and Welfare failed to render a decision granting Apotex, a manufacturer of generic drugs, a notice of compliance that would have allowed Apotex to market a generic version of a drug first developed and produced by Merck, an "innovator" pharmaceutical company. While Apotex had cleared all of the scientific safety and efficacy conditions required for a notice of compliance to issue, the Minister had delayed making a decision in light of the impending passage of legislation and regulations that would further extend innovator drug manufacturers' distribution and sales rights to patented drugs. This Court decided that Apotex had a vested right to the notice of compliance, notwithstanding the Minister's failure to render a decision before the new regulatory regime came into effect, and that it was thus entitled to an order of *mandamus* requiring the Minister to issue a notice of

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compliance. Merck submitted that the Court should exercise its discretion to deny this relief on the grounds that *mandamus* would frustrate legislative change.

[153] Justice Robertson, writing for the Court, observed that Merck was effectively inviting it to exercise the discretionary power of reviewing courts to refuse relief on a successful application for judicial review on the grounds of the "balance of convenience" (*Apotex* at pp. 787, 791). He noted that if the Court declined to interfere, even though the Minister's failure to perform a statutory duty had been found to be unjustified, it was effectively "rendering lawful that which has been deemed unlawful" (*Apotex* at p. 788). Accordingly, he decided that it would only be appropriate for a reviewing court to exercise its discretion in favour of the public interest by refusing to issue *mandamus* to a successful applicant for judicial review where issuing the order would cause obvious and unacceptable administrative cost or chaos or where potential health and safety risks to the public would outweigh the applicant's right to pursue personal or economic interests (*Apotex* at 791; see also *Khalil* at para. 49 (per Robertson J.A., dissenting, but not on this point)). In deciding not to deny Apotex an order of *mandamus* based on the balance of convenience, Justice Robertson concluded:

> [T]he balance of convenience test authorizes the Court to use its discretion to displace the law of relevant considerations and the doctrine of vested rights. It should therefore be used only in the clearest of circumstances and not be perceived as a panacea for bridging legislative gaps. Unless courts are prepared to be drawn into the forum reserved for those elected to office, any inclination to engage in a balancing of interests must be measured strictly against the rule of law.
>
> (*Apotex* at 794, underlining added)

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[154] The Supreme Court also set a high bar for reviewing courts to decline to issue a remedy on the grounds of balance of convenience in *MiningWatch*. The Court found that, in deciding to review the environmental impact of a mining project by way of a screening process rather than a comprehensive study, federal authorities had acted without statutory authority. The Federal Court had quashed the authorities' decision to proceed by way of screening and prohibited the issuance of federal permits or approvals until completion of a comprehensive study. This Court had then allowed the appeal and dismissed the application for judicial review. The Supreme Court sided with the Federal Court and yet overturned its order, finding that it had failed to give weight to all relevant circumstances. The Supreme Court held that the appropriate relief would have been to allow the application for judicial review and declare, without further relief, that the authorities had erred in failing to conduct a comprehensive study. However, it warned that reviewing courts should not exercise lightly their discretion to deny remedies to which successful applicants for judicial review are otherwise entitled:

> I acknowledge that in exercising discretion to grant declaratory relief without requiring the parties to substantially redo the environmental assessment, the result is to allow a process found not to comply with the requirements of the [*Canadian Environmental Asessement Act*] to stand in this case. But the fact that an appellant would otherwise be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought. <u>However, because such discretionary power may make inroads upon the rule of law, it must be exercised with the greatest care.</u> See Sir William Wade and C. Forsyth, *Administrative Law* (10th ed. 2009), at p. 599, and *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, at p. 361. In the exercise of that discretion to deny a portion of the relief sought, balance of convenience considerations are involved. See D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-88 and 3-89, referred to by Binnie J. in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 36. Such considerations will include any <u>disproportionate</u> impact on the parties or the interests of third parties (Brown and Evans, at p. 3-88, fn. 454).

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(*MiningWatch* at para. 52, underlining added)

[155] The Supreme Court found such a disproportionate impact on the facts before it. It noted that MiningWatch, the not-for-profit non-governmental organization that had sought judicial review of the authorities' decision, had brought the application as a test case of the federal government's statutory obligations, had no proprietary or pecuniary interest in the decision and had not challenged the substantive outcome of the screening process. In contrast, the Federal Court's order would prejudice the proponent of the mining project, which was not responsible for the authorities' decision to proceed by way of screening, by requiring it to incur further delay and costs. Moreover, the province of British Columbia had conducted an environmental assessment of the project with the proponent's full cooperation as well as public involvement. Taking these relevant circumstances into account in assessing the balance of convenience, as the Federal Court should have done, the Supreme Court concluded that its proposed declaration would be an appropriate remedy:

> The focus of MiningWatch's interest as a public interest litigant is the legal point to which the declaration will respond. On the other hand, I can see no justification in requiring [the proponent] to repeat the environmental assessment process when there was no challenge to the substantive decisions made by the [Responsible Authorities].
>
> (*MiningWatch* at para. 52)

[156] Both *Apotex* and *MiningWatch* call on reviewing courts to exercise prudence when choosing to exercise their discretion to decline relief to which an applicant for judicial review has shown they are entitled. Given its serious impact on an applicant, a reviewing court's

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decision to decline to issue *mandamus* at the eighth step of the *Apotex* test should be supported by evidence and justified by cogent reasons.

B. *The balance of convenience lies in favour of the issuance of* mandamus

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[157] I return now to how the Federal Court considered the balance of convenience in the case at bar. When it formulated the questions before it, the Federal Court combined the seventh and eighth *Apotex* criteria into a single question (Decision at para. 35). In its analysis, it purported to rely on the *Jia* line of decisions, which would raise an equitable bar against the granting of an order of *mandamus* that would allow applicants' appeals to be processed before earlier-filed appeals of similarly situated individuals (Decision at para. 96).

[158] As I have explained, the *Jia* line of decisions does not support denying *mandamus* in the circumstances of this case. However, and in any event, I am satisfied that in the section of its reasons titled "Does the balance of convenience favour issuing the *mandamus* order?", the Federal Court focused its analysis not on the existence of an equitable bar to relief but on whether the balance of convenience favoured *mandamus*.

[159] In this respect, the Federal Court, referring to its earlier findings regarding the ERC's implementation of the prioritization system, found, at paragraphs 97, 99 and 100, that:

- the appellants' appeals represented only 8.5% of the ERC's overall backlog;

- the appeals of several members of the RCMP who were initially part of the application for *mandamus* were deemed high-priority and were processed by the ERC before the Federal Court hearing; and

- by requiring the ERC to accord greater priority to the appellants' appeals, issuing a *mandamus* order would increase processing delays for appeals by members facing more severe sanctions.

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[160] According to the evidence before the Federal Court, the ERC's backlog included high priority appeals involving dismissed or demoted members and uninvestigated harassment complaints.

[161] The Federal Court concluded that the balance of convenience did not favour issuing a *mandamus* order because doing so would undermine the priority system and delay issuing findings and recommendations for more pressing appeals (Decision at para. 100). Significantly, it did not advert to the teachings in *Apotex* and *MiningWatch* that the discretion to deny relief based on the balance of convenience must be exercised only in the clearest of circumstances and with the greatest of care. Nor did it turn its mind to whether, on the evidence before it, issuing a writ of *mandamus* would cause obvious and unacceptable cost or chaos or, at the very least, have a *disproportionate* impact on the interests of the other RCMP members who have filed higher-priority appeals. In my view, the Federal Court committed a reviewable error in exercising its discretion without taking into account these relevant considerations.

[162] Measured against the standards established in *Apotex* and *MiningWatch*, neither the respondents' arguments nor a review of the record disclose circumstances of a nature that could justify the Federal Court's exercise of its discretionary power to refuse to issue the remedy to which the appellants have shown they are otherwise entitled. As previously noted, while the issuance of the writ of *mandamus* sought by the appellants would likely increase the delay required to process higher priority appeals, the evidence in the record does not establish the magnitude of any additional delays nor that the impact of such delays on other RCMP members would be disproportionate. Nor does the record give me any reason to believe that "administrative chaos" would ensue from prioritizing the appellants' appeals through an order of *mandamus*, or that this application for *mandamus* otherwise gives rise to the "clearest of circumstances" in which relief ought to be denied at the last step of the *Apotex* test. I am therefore not convinced that relief should not, on the balance of convenience, be granted.

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[163] Since the appellants have shown, through the first four *Apotex* criteria, that they are *prima facie* entitled to the first writ of *mandamus*, and because none of the discretionary bars to the issuance of *mandamus* set out in the final four *Apotex* criteria have been shown to apply, I am of the view that the first writ of *mandamus* should issue.

XI. THE FEDERAL COURT'S REFUSAL TO ISSUE THE SERVICE STANDARDS *MANDAMUS*

[164] The Federal Court decided that "the Appellants' arguments on the issue of service standards are not grounded in any of the *Apotex* criteria" (Decision at para. 111). The appellants have argued on this appeal that the Federal Court erred in interpreting section 28.1 of the Act as

conferring on the ERC a discretion to decide which files are subject to its service standards and in deciding that the duty to publish and report on service standards is owed to the general public rather than to them. They have also submitted that the Federal Court erred in finding that the order requested was overly broad. While the appellants' submissions clearly touch on some of the *Apotex* criteria, including the second and fourth criteria, they do not challenge the Federal Court's conclusions regarding some of the other *Apotex* criteria, including the seventh and eighth criteria. In the ERC's view, this is fatal to the appeal given that the *Apotex* test is conjunctive.

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[165] As I have already laid out, an applicant is not required to proactively disprove the existence of the discretionary bars to judicial review laid out in *Apotex*'s fifth to eighth criteria unless these bars are raised by the respondent or the reviewing court, or where their existence is apparent from the record before the court. Nonetheless, I am of the view that the Federal Court's decision to dismiss the appellants' application for the second writ of *mandamus* must be upheld, since they have not established their entitlement to *mandamus* under the first four *Apotex* criteria. I focus on the fourth criterion, which in my view is determinative, and do so without expressing an opinion on whether the first three *Apotex* criteria are met.

[166] In setting out the fourth *Apotex* criterion, this Court observed that, where the public legal duty that is sought to be enforced is discretionary, the following rules apply:

> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

> (c) in the exercise of a “fettered” discretion, the decision-maker must act upon “relevant”, as opposed to “irrelevant”, considerations;
>
> (d) *mandamus* is unavailable to compel the exercise of a “fettered discretion” in a particular way; and
>
> (e) *mandamus* is only available when the decision-maker’s discretion is “spent”; i.e., the applicant has a vested right to the performance of the duty.
>
> (*Apotex* at pp. 767-8, underlining in the original)

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[167] Having laid out the analytical framework, it is helpful to reproduce the text of section 28.1 of the Act, which provides:

Service standards respecting time limits	**Normes de service régissant les délais**
28.1 The Committee shall establish, and make public, service standards respecting the time limits within which it is to deal with grievances and appeal cases that are referred to it and specifying the circumstances under which those time limits do not apply or the circumstances under which they may be extended.	**28.1** Le Comité établit et rend publiques des normes de service concernant les délais pour le traitement des griefs et des dossiers d’appels qui font l’objet d’un renvoi devant lui et prévoyant les circonstances dans lesquelles ces délais ne s’appliquent pas ou peuvent être prorogés.

[168] The appellants emphasize that section 28.1 places a public legal duty on the ERC to establish, and make public, service standards respecting the time limits within which it is to deal with grievances and appeal cases that are referred to it. They invite the Court to accept that this provision mandates publication of service standards prescribing time limits for the processing of all files, including the appellants’ files. However, section 28.1 also requires the ERC to specify the circumstances under which the time limits set out in the service standards “do not apply.” It

does not prescribe these circumstances. Therefore, on a plain reading of section 28.1, the precise definition of these circumstances is left to the ERC's discretion.

[169] Significantly, while the appellants argue that, under section 28.1, the ERC "does not have free reign (*sic*) to apply the standards discriminately," they recognize that this provision "may grant the ERC the ability to determine the circumstances in which the Service Standards do not apply". In doing so, they effectively concede that section 28.1 confers on the ERC a discretion to decide in what circumstances the time limits set out in its service standards apply or do not apply, such that the remaining issue is whether the discretion was exercised — or not exercised — in one of the prohibited manners described in *Apotex*.

[170] The appellants claim that, in its findings and recommendations service standard, the ERC has only explicitly laid out three circumstances under which time limits do not apply or may be extended: where the ERC has received incomplete documentation for the case to proceed; where further clarifications or submissions are required for the case to be properly assessed; and where the ERC has approved the party's request for an abeyance. They observe that none of these circumstances apply to the appellants' files. For its part, the ERC argues that this service standard explicitly states that it applies only to files received on or after April 1, 2022. It follows, by necessary implication, that one of the circumstances under which the time limits set out in this service standard do not apply is where a file was received prior to April 1, 2022.

[171] At the end of the day, these arguments do not affect my conclusion that, on a plain reading, section 28.1 confers on the ERC a discretion to define the circumstances under which

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the time limits set out in its service standards do not apply. The appellants are asking this Court to compel the ERC to exercise that discretion in a particular way – by refraining from establishing a service standard that specifies the date on which a file is received as a circumstance under which its prescribed time limits do not apply. This Court's decision in *Apotex* is clear: *mandamus* is unavailable to compel the exercise of the ERC's discretion in a particular way.

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[172] The appellants suggest that the ERC's findings and recommendations service standard is inconsistent with the purpose behind the ERC's statutory duty to establish service standards and its duty under subsection 30(2) of the Act to report on its performance in meeting these standards to the Minister of Public Safety and Emergency Preparedness and, through the Minister, to Parliament.

[173] Section 28.1 unquestionably requires the ERC to publicly commit to a level of timeliness for the processing of grievances and appeal cases that can be expected in some, but not all, circumstances. <u>In those circumstances in which the time limits specified in its service standards apply</u>, these standards clarify when RCMP members can expect their grievances and appeal cases to be processed. Data that measures the ERC's performance in meeting its service standards can help the ERC improve its processes. The ERC's obligation to report its performance in relation to its service standards reinforces its accountability to the Canadian public, including to RCMP members, by making this performance transparent.

[174] It is undisputed that the ERC has exercised its authority under section 28.1 by adopting service standards. Yet, the appellants have not addressed in their submissions whether and how the ERC improperly exercised its discretion to set service standards in one of the manners listed by this Court in its description of the fourth *Apotex* criterion. Nor have they established that this discretion was not exercised reasonably in light of the broad statutory language and the statutory objectives of clarifying expectations and enhancing transparency and accountability (*Universal Ostrich Farms Inc. v. Canada (Food Inspection Agency)*, 2025 FCA 147 at paras. 47–53).

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[175] Accordingly, I find that the appellants have not satisfied the fourth *Apotex* criterion.

XII. THE APPROPRIATE REMEDY

[176] For the reasons detailed above, the appeal should be granted in part, for the first writ of *mandamus* only. Since time is of the essence on an application for *mandamus*, and because the record on this appeal enables this Court to decide for itself whether the *Apotex* criteria are satisfied, it would not be in the interests of justice to remit the matter before the Federal Court for redetermination.

[177] Accordingly, and considering the time limit set out in the findings and recommendations service standard and the significant delay already experienced by the appellants, I would order the ERC to issue its findings and recommendations in each of the appellants' outstanding appeals within six months of this Court's order, subject to the right of the ERC, on reasonable grounds, to apply for an extension of time.

XIII. DISPOSITION

[178] For the foregoing reasons, I would grant the appeal in part with the ERC being ordered to issue its findings and recommendations in the appellants' appeals within six months, but allowed, on reasonable grounds, to apply for an extension of time.

[179] Given that success is mixed, I would not order costs.

[180] The style of cause is amended to remove Catherine Bedard, Philippe Bertrand, Warren Hudym and Eric Humber as appellants.

"Gerald Heckman"
J.A.

"I agree.
J.A."

"I agree.
J.A."

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-170-24
STYLE OF CAUSE:	ROBERT BENISON *et al.* v. ROYAL CANADIAN MOUNTED POLICE EXTERNAL REVIEW COMMITTEE *et al.*
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 9, 2025
REASONS FOR JUDGMENT BY:	HECKMAN J.A.
CONCURRED IN BY:	LOCKE J.A. MACTAVISH J.A.
DATED:	MARCH 13, 2026

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