Protected A

File 2017-335698 (C-043)

2021 CAD 11

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

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

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

BETWEEN:

Constable Fareez Vellani

Regimental Number 54533

(Appellant)

and

Commanding Officer, "E" Division

Conduct Authority

(Respondent)

Protected A

File 2017-335698 (C-043)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: April 20, 2021

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INTRODUCTION

[1] Constable (Cst) Fareez Vellani, Regimental Number 54533 (Appellant), presents an appeal pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, as amended [*RCMP Act*], challenging the conduct measures imposed by the RCMP Conduct Board (Board), having established two allegations of discreditable conduct, contrary to section 7.1 of the *RCMP Code of Conduct* (a schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281) *(Code of Conduct)*. The Commanding Officer (CO) of "E" Division, Conduct Authority, is the Respondent.

[2] The Board rendered an oral decision on September 21, 2016, ordering the Appellant to resign within 14 days in default of which he would be dismissed. The written decision was later issued on April 4, 2017 and served on the Appellant on April 23, 2017.

[3] In accordance with subsection 45.15(1) of the *RCMP Act*, the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report containing findings and recommendations issued on October 27, 2020 (ERC file no. C-2018-001 (C-043)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the Commissioner dismiss the appeal and confirm the Board's decision pursuant to paragraph 45.16(3)(a) of the *RCMP Act*.

[4] The Commissioner has delegated the authority to make final and binding decisions on conduct appeals to me pursuant to subsection 45.16(11) of the *RCMP Act*.

[5] In rendering this decision, I have considered the material that was before the Board (Material), the appeal record (Appeal) and the Report. I will refer to the Appeal and the Material, by page number and the Report by paragraph number.

[6] The Appellant is represented by legal counsel and all submissions from counsel will be attributed to him.

[7] I apologize to the Parties for any delays attributable to the RCMP in the adjudication of this appeal.

[8] For the reasons that follow, the appeal is dismissed and the order of the Board is confirmed.

BACKGROUND

[9] The parties entered an Agreed Statement of Facts (ASF) (Report, para 6; Material, pp 3-6):

> 1. Cst Vellani admits allegations 1and 2 of the Notice of Conduct Hearing dated October 28, 2015. The parties agree that paragraphs 1 to 17 and paragraph 23 below replace the particulars of Allegation 1 of the Notice of Conduct Hearing. The parties also agree that paragraphs 1 to 12 and paragraph 18 to 23 below replace the particulars of Allegation 2 of the Notice of Conduct Hearing.
>
> 2. At all material times, Cst Fareez Vellani ("Cst Vellani") was a member of the Royal Canadian Mounted Police ("RCMP") and posted to "E" Division.

3. At all material times, Cst Vellani was the registered owner of a 2012, Ford F150 vehicle ("vehicle"), serial number XX, bearing the British Columbia licence plate XX.

4. At all material times, Cst Vellani's cellular telephone number was XX, with Rogers Communications.

5. At all material times, Cst Vellani's vehicle was insured via the Insurance Corporation of British Columbia ("ICBC") under policy number XX, which carried a collision deductible of $500.00 and a comprehensive deductible of $300.00.

6. At all material times, Cst Vellani also possessed additional insurance through Optium Inc. which would reimburse up to $300.00 of any deductible on his primary insurance policy.

7. On February 12, 2015, Cst Vellani parked his vehicle outside of a friend's residence for the night.

8. On February 13, 2015, at approximately 9:00 hrs, when departing his friend 's residence, Cst Vellani noticed that the front passenger window of his vehicle had been broken. Cst Vellani's sunglasses, garage door opener, Ipod and house keys were missing from the vehicle.

9. On February 13, 2015, at 9:25 hrs, while driving to his residence, Cst Vellani contacted the RCMP non-emergency line ("E-Comm") to report the theft and the damages caused to his vehicle overnight. Attached as Exhibit "A" to this Agreed Statement of Facts is the transcript of Cst Vellani's report to E-Comm. Lines 51 to 58 show that the only damage reported by Cst Vellani at that time was the smashed front passenger window.

10. While driving and on the phone with E-Comm, Cst Vellani had a single vehicle collision which caused damage to the front windshield, hood and front bumper of his vehicle. Attached as Exhibit "B" to this Agreed Statement of Facts is the audio recording of Cst Vellani's telephone conversation with RCMP E-Comm which, at 3 minutes 7 seconds captured the sound of the collision. Attached as Exhibit "C" to this Agreed Statement of Facts is the expert report of [BF] (expert hired by ICBC) showing that Cst Vellani's cell phone (XX) was in motion while he was on the phone with E-Comm.

11. On February 13, 2015, at 9:57 hrs, Cst Vellani called ICBC and initiated a theft/vandalism claim (ICBC claim file XX). Cst Vellani told the ICBC call taker, LD, that his vehicle had been vandalized the night before and that the vehicle's side window, windshield and hood had been damaged. Attached as Exhibit "D" to this Agreed Statement of Facts is a copy of Cst Vellani's ICBC claim of loss which, at page 2, show the list of damage reported by Cst Vellani that morning.

12. Cst Vellani later took his vehicle to Westcoast Collision for repair. On site, Cst Vellani spoke to PM, owner of the repair shop, and advised him that all the damage to his vehicle was the result of vandalism. Attached as Exhibit "E" to this Agreed Statement of Facts is a copy of the Westcoast collision estimate in which PM wrote "Damage is not consistent with loss type". PM had a later discussion with Cst Vellani during which he advised Cst Vellani that ICBC had placed the repair on hold as they felt the reported damage might be from two separate claims.

13. On February 13, 2015, at approximately 12:00 hrs, Cst Vellani spoke with Cst H, the RCMP member conducting the theft investigation (Prime file XX). During the conversation, Cst Vellani stated that his vehicle's front passenger window, hood and windshield had been smashed overnight. He also reported body damage to the driver's side and provided a list of stolen items. Cst Vellani failed to inform Cst H that half of the reported damage was unrelated to the theft investigation and was caused by a subsequent collision. Attached as Exhibit "F" to this Agreed Statement of Facts is the Ridge Meadows Prime file W- synopsis- 1 which outlines the information provided by Cst Vellani to Cst H during her theft investigation.

14. Without distinguishing between them, Cst Vellani reported the damage caused by the theft and the damage caused by the subsequent collision to Cst H, knowing that the latter was irrelevant to her investigation and that it would mislead Cst H in her investigation.

15. On February14, 2015, Cst H sent Cst Vellani an email requesting pictures of the vehicle damage for her investigation. Cst Vellani attended the repair shop himself and took the requested pictures.

16. On February 17, 2015, Cst Vellani sent Cst H an email stating "I got the pics for you. Still not word on the estimate for the damages, I should know sometime in the next couple of days." The eleven pictures sent by Cst Vellani show the damage that had been caused by the theft and the damage caused by the subsequent collision. Five of the eleven sent pictures exclusively depicted the damage caused during the subsequent collision. Cst Vellani sent Cst H these five pictures knowing that they were irrelevant to her investigation and that it would mislead Cst H in her investigation. Attached as Exhibit "G" to this Agreed Statement of Facts are the pictures sent by Cst Vellani to Cst H.

17. Cst Vellani reported the damage caused by the collision to Cst H to corroborate his insurance claim.

18. On February 24, 2015, Cst Vellani provided a verbal statement to ICBC adjuster DC in support of his insurance claim. During the statement, Cst Vellani stated that the damage caused to the windshield, side window and hood of his vehicle had all been caused by an act of theft and vandalism.

Attached as Exhibit "H" to this Agreed Statement of Facts is a signed copy of the voluntary statement Cst Vellani provided to ICBC adjuster DC.

19. On February 25, 2015, Cst Vellani authored a "Automobile Proof of Loss" form in which he solemnly declared, before notary public CC, that the loss of $4,000 reported to ICBC on February 13, 2015 was caused by Vandalism/Mischief/Theft. Attached as Exhibit "I" to this Agreed Statement of Facts is a signed copy of Cst Vellani's "Automobile Proof of Loss".

20. On March 20, 2015, Cst Vellani provided a warned statement to ICBC investigator BK in support of his insurance claim. During his statement, Cst Vellani again stated that the damages to the windshield, bumper and hood of his vehicle had been caused by an act of theft and/or vandalism and not by a collision. Attached as Exhibit "J" to this Agreed Statement of Facts is a transcript of Cst Vellani's statement in which, from lines 159 to 166, Cst Vellani clearly rejects investigator K's suggestion that some of the claim damage resulted from a collision and not a theft.

21. Cst Vellani knew that the damage caused to the hood and windshield had not been caused by an act of theft and/or vandalism, but by a collision and knowingly provided false and inaccurate information to ICBC. Cst Vellani knew that the damage caused during the collision should have been reported to ICBC under a separate claim which carried out its own deductible, but failed to do so.

22. On April 22, 2016, Cst Vellani plead guilty to a charge of providing false or misleading information contrary to section 42.1 (2)(a) of the Insurance (Vehicle) Act of British Columbia. Attached as Exhibit "K" to this Agreed Statement of Facts is a copy of Cst Vellani's certificate of conviction. Attached as Exhibit "L" to this Agreed Statement of Facts is the audio recording of Cst Vellani's court appearance.

23. Cst Vellani agrees that his actions were discreditable and could bring discredit to the Force contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

CONDUCT PROCEEDINGS

Code of Conduct Investigation

[10] On March 26, 2015, a Conduct Investigation Mandate Letter (Mandate Letter) was issued (Material, p 803) and served on the Appellant on March 27, 2015 (Material, p 802), initiating an investigation, based on information the designated conduct authority became aware of on February 19, 2015, to establish whether the Appellant contravened the *Code of Conduct*. On March 27, 2015, the Appellant was served with an Order of Suspension (Material, pp 804-805).

On April 14, 2015, the Investigation Report was completed by the Professional Standards Unit (Material, pp 709-720).

[11] On May 28, 2015, the Officer in Charge (OIC) of the Appellant's detachment referred the matter to the Respondent, stating in his Conduct Authority Report (Material, pp 696-702), "[t]he ranges of sanctions that may be imposed for this contravention exceed my authority under the RCMP Act", referring to dismissal and that both allegations would be established on a *prima facie* basis (Material, pp 700, 701).

[12] On October 28, 2015, the Respondent, signed a Notice of Conduct Hearing (Notice) (Material, p 1169), appointing the Board, and setting out the two *Code of Conduct* allegations, which was served on the Appellant on November 6, 2015 (Material, p 2). The allegations were listed as follows (*sic* throughout):

> **Allegation 1**
>
> On or about February 13th, 2015 at or near Maple Ridge, in the Province of British Columbia, Constable Fareez Vellani engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*
>
> *Particulars of the contravention:*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. On February 13th, 2015, at approximately 9:23 am you reported that your vehicle had been broken into to the RCMP by telephone. You advised that your front passenger window had been smashed and that items had been stolen from your vehicle.
>
> 3. Later on February 13th, 2015, you spoke to [Cst H] who was investigating your complaint. You advised her of additional damage to the windshield and hood of your vehicle.
>
> 4. You mislead [Cst H] in her investigation when you stated that you believed damages on your vehicle had been caused by frustrated thief (thieves) or something to that effect.
>
> 5. You mislead [Cst H] in her investigation when you failed to report that the damages to the hood and windshield of your vehicle had been caused by a collision.
>
> **Allegation 2**

> On or between February 13th, 2015 and March 20th, 2015, at or near Maple Ridge, in the Province of British Columbia, Constable Fareez Vellani engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> *Particulars of the contravention:*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. On February 13th, 2015 at approximately 9:00am you found your vehicle with damages to the passenger side window. You phoned the RCMP and reported that damage.
>
> 3. At approximately 10:00 am you contacted your insurance company (Insurance Corporation of British Columbia (ICBC)) and opened a claim. You indicated that the loss had been caused by an act of theft and/or vandalism. You reported damages to the side window, to the hood and to the windshield of your vehicle.
>
> 4. On February 24th, 2015 you provided a verbal statement to ICBC adjuster [DC] in support of your insurance claim in which you reported that the damages to the windshield and hood of your vehicle had been caused by an act of theft and/or vandalism. You further stated that "the shop" noticed the damaged to the hood of your vehicle and to the left door lock. You stated that you had not noticed this damage previously. You solemnly declared that your statement to [DC] was true before Notary Public [CC].
>
> 5. On February 25th, 2015 you also authored an "Automobile Proof of Loss" form in which you solemnly declared that the loss you had reported on February 13th, 2015 was caused by Vandalism/Mischief/Theft, and in which you are claiming from ICBC an indemnity of approximately [$]4,000 to be paid to West Coast Collisions for the damages to your insured vehicle.
>
> 6. On March 20th, 2015 you provided a verbal statement to ICBC investigator [BK] in support of your insurance claim. You told [BK] that the damages to the windshield and hood of your vehicle had been caused by an act of theft and/or vandalism.
>
> 7. You knew that the damages to the hood and windshield had not been caused by an act of theft and/or vandalism but by a collision.
>
> 8. You provided false, inaccurate and/or misleading information to ICBC in support of your insurance claim by saying that all damages to your vehicle included in your claim were caused by Vandalism/Mischief/Theft.
>
> [Emphasis in original.]

[13] The Notice further advised the Appellant that (Material, pp 1171-1172):

- A Conduct Board, consisting of Insp JK, was appointed by the designated authority;
- The Appellant had seven days to object to the appointment under section 44 of the *RCMP Act*;
- The Appellant could elect to have the conduct hearing held in either official language;
- The Appellant had thirty days from the date of service, or within another period as directed by the Conduct Board, to provide:
    a. a written admission or denial of each alleged contravention;
    b. any written submissions;
    c. any evidence, document or report, other than the investigative report, he intended to rely upon at the hearing.
- The Appellant had the right to representation and the Notice specified the contact information for the Member Representative Unit.

[14] On November 23, 2015, the Appellant's Member Representative (MR) confirmed he would be representing the Appellant (Material, p 560). On December 21, 2015, Conduct Authority Representative (CAR) provided the CAR witness list to the Board and the MR (Material, p 569).

[15] On December 23, 2015, the Board requested to schedule a pre-hearing conference. The MR confirmed that he had been granted an extension until January 8, 2016, and then sought an additional extension to January 15, 2016, which the Board granted (Material, p 568).

[16] On January 14, 2016, the MR sought an additional extension to February 4, 2016, stating he would be in a position to make submissions and move to pre-hearing upon the Appellant entering a plea in his "parallel criminal process" (Material, p 567).

[17] The Board rescheduled the pre-hearing conference to February 12, 2016, at 10:00 am (Material, p 566). On February 4, 2016, the MR sought an additional extension due to the adjournment of the Appellant's "criminal matter" which was moved to March 1, 2016. The pre-hearing conference was scheduled for April 4, 2016, at 10:00 am (Material, p 602).

[18] On March 24, 2016, the MR served the Response to Allegations (Material, pp 12-14) and the Member's List of Witnesses. The MR proposed that at the pre-hearing conference the Parties discuss proceeding by way of a hearing held on the sole issue of sanctions (Material, p 624).

[19] No formal pre-hearing conference document is in the Record, however, the CAR's email of June 13, 2016, states (Material, p 17):

> As agreed upon during the April 4, 2016 pre-hearing conference, I have prepared a "Conduct Authority Submission on Allegations" Package which include:
>
> - Agreed Statement of Facts (ASF)
> - Conduct Authority submission on allegations
> - Appendix
> - Supporting decisions

CAR's written submission on the allegations

[20] The CAR's submission on the allegations (Material, pp 37-40 plus attachments) recommended that the Board make the following conclusions relating to the severity of the Appellant's actions, based on the ASF (*sic* throughout):

> […]
>
> 4. It is the Conduct Authority's position that Cst. Vellani's actions, as they relate to this allegation [1], were not simply spur of the moment acts. Rather, the facts before the board establish that Cst. Vellani's actions were deliberate and that he intended to mislead Cst. [H]. […]
>
> 5. Cst. Vellani's actions are serious and, as shown by the facts in evidence, were deliberate. As a general duty police officer, Cst. Vellani, was clearly aware that ICBC investigators and general duty police officers work hand in hand and regularly exchange information during the course of their respective investigations. Cst. Vellani also knew that the information he

> provided to Cst. [H] during the course of her investigation would likely be shared with ICBC. I therefore submit that Cst. Vellani's actions should not be viewed by the board as a mere error in judgment, but as self-benefitting act of dishonesty done with the intent to support a fraudulent insurance claim.
>
> […]
>
> 8. It is the Conduct Authority's position that Cst. Vellani's actions as they relate to allegation 2 were also not made simply on the spur of the moment. Rather, the facts before the board establish that Cst. Vellani's actions were deliberate and repeated over an extended period of time. […]
>
> 9. As explicitly written on page 2 of the "Automobile Proof of Loss" under the "Statutory Declaration" section, the solemn declaration made by Cst. Vellani in front of the public notary is of the same force and effect as if made under oath.
>
> 10. Trust between the RCMP and other law enforcement agencies, such as ICBC, is paramount to the good administration of justice. As an experienced police officer, Cst. Vellani certainly understands the importance, for the RCMP, of maintaining that trust in order to successfully accomplish its law enforcement mission. By providing numerous false statements to ICBC, Cst. Vellani has not only affected his own credibility but more importantly undermined the trust that exists between the RCMP and ICBC.
>
> 11. Furthermore, Cst. Vellani's actions as they relate to both allegations are unequivocally in contravention of the Core Values of the Force such as honesty, integrity and accountability.
>
> 12. Cst Vellani's actions are also completely incompatible with the duties and responsibilities of an RCMP member as per section 18 and 37 of the RCMP Act. Specifically, he has failed his duty to maintain the integrity of the law, law enforcement and the administration of justice and his responsibility to prevent crimes and offences against the laws of Canada and the laws in force in the province he is employed. His conviction under the Insurance (Vehicle) Act of British Columbia, clearly establishes that Cst Vellani violated the law that, as a peace officer, he was sworn to uphold.
>
> […]

MR makes no response submission on the allegations

[21] On June 13, 2016, the MR replied to the CAR's email of the same date and stated (Material, p 16):

> The Member believes that the ASF speaks for itself and has no further submissions to make in relation to the allegations.

The Board's decision on the allegations

[22] On June 15, 2016, the Board replied to the MR and emailed both representatives (Material, p 16) (*sic* throughout):

> [MR] I agree, the ASF does speak for itself. In any case, [CAR], I do thank you for your submissions.
>
> Attached please find my decision on the two Allegations. You can expect the text of the written decision, when it appears, to be virtually identical.
>
> With two contraventions of the *Code of Conduct* in place, we are now statutorily bound to consider the appropriate conduct measures.

[23] The Board in his decision on the allegations, made the following findings (Material, pp 19-22):

> My decision on Allegation 1
>
> […]
>
> [11] The CAR has suggested his motivation for misleading [Cst H] was to support a fraudulent insurance claim, and I agree. I will go further, however, and add that additional motivation was to avoid being held accountable for his single-motor-vehicle accident. He was clearly in an agitated state when he called the Maple Ridge RCMP call centre the morning of February 13, 2015. This is understandable, because he had just discovered his new pickup had been broken into, and amongst the many valuable items stolen was his set of house keys and a garage door opener. He was driving home to make sure the thieves had not ascertained his address from documents within the vehicle and broken into his house as well as his truck. His degree of anxiety is understandably elevated at this point, and significantly. Talking on a cell phone while driving is a dangerous activity in and of itself; doing so while in such an agitated state is even more dangerous. Constable Vellani is extremely fortunate that the resulting collision was with a sign post or some such object; it could just as easily have been a pedestrian, a cyclist, or another motorist.
>
> [12] Many provinces have statutory prohibitions against various forms of "distracted driving", but depending upon the consequences, a charge of Criminal Negligence can also ensue. […]
>
> [13] One question that remains unanswered is the nature of the object with which he collided. From the damage, it appears it was likely some kind of a road sign. If so, what if the road sign was an important one, warning motorists of an intersection, a rail crossing, a pedestrian right-of-way, a

construction site? The absence of the sign could have had fatal consequences for others. I do not wish to extrapolate, since the facts provided do not permit a more fulsome discussion along these lines, but in mentioning these potential consequences, I only wish to highlight that while misleading [Cst H] is a serious contravention of the code of conduct, of equal importance is the set of facts he deliberately withheld from her. He stood to realize a personal benefit from misleading [Cst H], in the form of being liable for one instead of two deductible insurance claims, and in the form of evading accountability for distracted driving and his resulting accident.

[14] I find a reasonable person, with knowledge of all of the circumstances of the case, as well knowledge not only of policing in general but policing in the RCMP in particular, would find Constable Vellani's deliberately having misled [Cst H] about the circumstances under which a significant portion of the overall damage to his truck occurred to be discreditable. His actions bring the reputation of the RCMP into disrepute.

[15] His actions took place while he was off duty, but the nexus to his employment situation is obvious in that he deliberately misled a fellow member of the RCMP. Allegation 1 is therefore established in its entirety.

My decision on Allegation 2

[…]

[17] The above analysis with respect to Constable Vellani's motivation for his actions applies with equal vigour here. He was acting in self-interested fashion, to avoid paying the deductible amount for a second claim and to evade accountability for his single-vehicle accident.

[18] The number of times he repeated his dishonest acts accentuates the gravity of his misconduct. Equally serious is his having lied in a solemn affirmation before a Notary Public. In its totality, given the motivation for self-benefit underlying his actions, this is a very serious contravention of the code of conduct.

[19] I find a reasonable person, with knowledge of all of the circumstances of the case, as well knowledge not only of policing in general but policing in the RCMP in particular, would find Constable Vellani's deliberately having misled ICBC personnel as well as a Notary Public, on several different occasions, for reasons of personal gain, about the circumstances under which a significant portion of the overall damage to his truck occurred, to be discreditable. His actions bring the reputation of the RCMP into disrepute. Allegation 2 is likewise established in its entirety.

Pre-hearing Disclosure

[24] On September 13, 2016, the CAR gave notice that she intended to call Insp. JM, Executive Officer to the CO of "E" Division, for the purpose of giving evidence on the *McNeil* disclosure implications and attached a one-page brief containing the intended evidence, which also specified Insp JM's professional background (Material, p 23-24).

[25] On September 14, 2016, the MR disclosed the report of Dr. N, dated July 12, 2016 (Material, pp 27-28), and the following day, sent a copy of the psychologist's CV to the Board and the CAR (Material, pp 31-33). The MR in his email of September 14, 2016, stated (Material, p 25):

> It should be noted that Dr. [N] is Cst. Vellani's treating psychologist and not an expert being asked to provide an independent expert opinion.

[26] On August 29, 2017, for the purpose of this Appeal, the MR re-sent the eleven letters of references he relied upon at the hearing (Material, pp 1302, 1303-1319) for the purpose of including it in the Material. Although the Record does not contain the date on which they were initially disclosed, the letters of reference, submitted by the MR, are followed in the Record, by the Written Submission of the Member, which appears to have been provided prior to the conduct measures hearing but following the decision on the allegations (Material, pp 1326-1329). The MR also submitted as part of document disclosure, prior to the conduct measures hearing, the Appellant's performance evaluations covering a period from April 1 to September 30, 2011 (Material, pp 1184-1187), April 1, 2013 to March 31, 2014 (Material, pp 1179-1183) and April 1, 2014 to April 1, 2015 (Material, pp 1174-1178).

Written submission of the member

[27] The Appellant's written submission (Material, pp 1326-1329) identifies himself as an RCMP member with nine years of experience and prior to this date, an auxiliary constable for 2 years in Coquitlam. He indicated that he began working with the Force as a volunteer from the time he was 20 years old, in Burnaby (Material, p 1326).

[28] The Appellant stated he graduated from Depot in 2007 and was posted to the general policing unit in Coquitlam, where he encountered overt racial discrimination on the part of his Staff Sergeant, who referred to "East Indian officers as 'brown pieces of shit'" and told him that he had chosen "the wrong career, and should have looked at being a janitor or a taxi driver". The Appellant noted sometime later, a *Code of Conduct* investigation ensued in relation to the Staff Sergeant's conduct, and subsequently the Staff Sergeant's suspension and retirement. The Appellant indicated that he provided a statement against the Staff Sergeant to investigators to describe the Staff Sergeant's discriminatory behaviour. Prior to this date, the Appellant left the Staff Sergeant's unit, as he was "voluntold" by the Staff Sergeant to transfer to the traffic service unit because the Staff Sergeant said "that's where all the useless people as he called them went". The Appellant indicated that the stress of working under this individual left him "mentally drained and exhausted" (Material, p 1326).

[29] The Appellant stated that in July 2010, his unmarked police vehicle was "t-boned" by an impaired driver, causing him to suffer permanent injury. Although he returned to full time duties after a few months of recovery and treatment he continued to require treatment and will require treatment "in the foreseeable future" (Material, p 1326).

[30] The Appellant also discussed the stress resulting from the end of his three-year relationship, when his common-law partner left him for another police officer and demanded he leave their home. Subsequently, he lost not only his home but his dogs, whom he had raised since they were puppies, and suffered financial loss (Material, p 1327).

[31] During this period, the Appellant sought professional help, was diagnosed with depression and anxiety, placed on ODS for one month and was prescribed anti-depressant medication by his physician (Material, p 1327). Moreover, he received little support from his superiors and found himself in another toxic work environment, having returned to general policing, after leaving the traffic services unit. He stated he was working under a Sergeant, who had previously worked closely with the original Staff Sergeant, against whom the Appellant had made a statement in the previous discrimination investigation. As a result, the Appellant applied

for a transfer. During this time, before he could transfer, the incident of February 13, 2015, which is the subject of the proceedings, occurred (Material, p 1328).

[32] The Appellant made the following remarks relating to the events of February 13, 2015 (Material, p 1328-1329):

> […]
>
> As I got closer to my vehicle, I observed that the front passenger side window had been smashed, I quickly approached the passenger side, and noted that the glove box on the vehicle was open, and that my owner's manual, and insurance documents were out and open on the seat. At this time, I looked at my sun visor and noted that my garage door remote was missing. I then checked the center console and found that my sunglasses, their case and a set of keys amongst other items that were missing from the center console. The keys had a set of my house keys, my girlfriend's house keys, mailbox keys and a FOB which allowed access to her residence.
>
> At this point I was in a state of panic, as some person(s) had a garage remote, keys to my residence and my address, and may have had access to my residence from sometime between 2300 hours until 0900 hours (11 hours).
>
> At approx 0915 hours, I contacted the Ridge Meadows RCMP on the non-emergency number and advised them of the theft from vehicle, and the fact that my garage remote, keys had been stolen and that there could be a BNE to the residence as well. I departed the Meadow Gardens Way, and began to drive home, still panicking about the state of my residence.
>
> The residence itself has an alarm, however the garage does not. Within my Garage, I also had another vehicle, sporting goods and a wide variety of tools. My biggest concern was the safety of the contents of a storage room within my garage which contained various items, mainly my gun safe, ammunition, extra police uniforms shirts and pants, and several thousand dollars in Camera equipment.
>
> Although the storage room is locked, it is keyed alike to my residential door locks. The firearms, which are all stored within the safe, unloaded, and trigger locked requiring a combination for access. In addition to the firearms, there was about 6000 rounds of various caliber ammunition ranging from pistol to rifle. Some of the tools within the garage are used in the metal working industry and with a little bit of tool experience and some time, it would not take long to gain access to the firearms.
>
> As I drove home, there was still a fair amount of the passenger glass still intact to the door frame, and as I approached a curve in the road, I drove

> over a bump/pothole/sewer grate; the remaining glass fell and caught me off guard, as I looked over and with the curve in the road, I did not steer sufficiently to follow the curve and got the vehicle partially up on center median as I corrected my mistake, I was unable to avoid a sign post which I struck with my vehicle.
>
> I continued on home, where I found my residence to be secured. I swapped my vehicles placing the Ford in the garage due to the rain and the fact that I was unable to secure the vehicle, at which time I also unplugged my garage door system until I could find instructions on how to clear all the old codes.
>
> At approx 0930 hours, I contacted ICBC on the dial-a-claim system to report the break in to my vehicle. While speaking to the Representative on the phone, my mind still dealing with my personal and workplace stressors, and now I had to deal with re-keying all my door locks, clearing the garage codes, contacting my girlfriend and have her building manager cancel the building FOB and also get her door re-keyed, getting the window replaced on the vehicle, I made the mistake of placing all the damage as a single claim, instead of two.
>
> I regrettably acted impulsively and then felt trapped, and didn't know how to fix it.

[33] The Appellant indicated that this incident and the behaviour which followed was out of character for him and pointed to letters of reference, from colleagues and former superiors, confirming this point. He emphasized his achievements at the traffic service unit, which included playing a "key role in acquiring Digital SLR Cameras and related photo equipment … and teaching the members how to use it". He stated that he was a trainer for the in car camera systems and set up the disk management and tracking systems for use. He indicated he had received awards, including Awards for Excellence in Performance (Material, p 1332), and Alexa's Team (Material, pp 1330, 1331), an award given to BC police officers who play a key role in removing impaired drivers (Material, p 1326).

[34] The Appellant indicated that he paid all penalties and for the vehicle damages in advance of ICBC's decision to deny his claim. He advised that he has apologized for involving friends and colleagues in this matter. He mentioned he continues to see a psychologist, and at his own expense has completed a course, certified by the Canadian Mental Health Association (CMHA), which provides tools for people living with depression, and how to manage triggers (Material, pp 1329, 1335).

Provincial Court

[35] On April 29, 2016, the Appellant pled guilty to violating paragraph 42.1(2)(a) of the *Insurance (Vehicle) Act* of British Columbia, for the offence of providing false or misleading information, and received the penalty of a fine, in the sum of $3,000.00, plus a victim surcharge of $450.00, in restitution, payable by August 30, 2016 (Material, pp 108-111, 1160-1163). The additional *Criminal Code* charge was withdrawn (Material, pp 1338, 1558).

[36] During sentencing, Justice Gulbransen of the Provincial Court of British Columbia (Court) found (Material, p 1337):

> [1] THE COURT: I think your lawyer has explained this extremely well, that this is a truly isolated event in your life. I accept that what happened was a momentary panic. And I think the psychological issues were playing a big part in this because your record otherwise shows you to be a sensible, hard-working and capable police officer. I think this is clearly something that, as explained by your particular situation at the time and the sudden panic over probably a bad driving move, which would cause you to pay your deductible and led to you telling this stupid lie.
>
> [2] I agree with your lawyer that it was inevitable that you would be found out, absolutely inevitable. I think it is to your credit you did not perpetuate the lie; you did not get paid out, you did not try and extend it and use your influence as a police officer to do so, and you have pled guilty, as you should.
>
> [3] So it is a long way of me saying I think this is an extremely isolated act. In my view it does not really, it should not derogate very much from the strong record you have as a peace officer. I think the problem you are going to face is this is an act of dishonesty as opposed to beating somebody up.
>
> [4] I certainly agree that this is a proper joint submission, so I impose a fine of $3,000, the victim fine surcharge is tacked on automatically by law, and the time to pay that will be August 30th, 2016.
>
> […]

Conduct Measures Hearing

[37] The conduct measures hearing proceeded on September 20, 2016 (Material, pp 1371-1602), with the Board providing his decision on September 21, 2016 (Material, pp 211-235).

Evidence of the CAR: Summary of the Non-Expert Testimony of Insp JM

[38] Insp JM was the CAR's only witness and was identified as the Executive Officer to the CO of "E" Division (Material, p 1395), acting OIC of the "E" Division Professional Standards Unit from November, 2014 to July 2016 (Material, p 1397), and as "gatekeeper for the divisional adherence to *McNeil*" (Material, p 1397).

[39] Insp JM was asked by the CAR about challenges members with misconduct records pose to the Force in relation to *McNeill* and answered in part (Material, p 1397-1399):

> […] I met with one (1) of our regional Crown counsels who described that he wants his charge approval Crown to have access to that McNeil file at the onset of the process as opposed to later on, so that they – they can use that as part of the determination of reasonable likelihood of conviction.

[40] Insp JM was asked by the CAR about staffing issues in relation to *McNeil* and replied in part (Material, p 1399):

> […] I often in those roles had staffing […] or the CDRO at a divisional level coming to me to talk about Member's discipline histories. Because what was happening is when they went out to the various detachment commanders, or unit commanders, or line officers, there was a lot of resistance and anxiety associated with receiving a Member with – in particular with an integrity based McNeil issue.

[41] Insp JM elaborated that there is "anxiety" in placing members with *McNeil* issues in positions where they will be expected to be in the chain of evidence operationally (Material, p 1401), stated as a result "we're placing Members in basically non-police positions", but then conceded that was not across the board and there are members with *McNeil* issues in operational positions (Material, p 1402).

[42] Insp JM then was asked about the types of integrity issues (Material, p 1398) and stated these are on a "sliding scale" from a "low end integrity issue" to a "high end" (Material, p 1400).

[43] The CAR asked (Material, p 1402):

> Where would you place the seriousness of the misconduct – the integrity McNeil issue that would arise in this case?

[44] After an objection by the MR and brief argument on the admissibility of Insp JM's opinion, the Board held that Insp JM's opinion was admissible, with a determination to be made later by the Board, relating to weight, taking into consideration there was no qualification as an expert witness (Material, p 1404).

[45] Under cross examination by the MR, Insp JM admitted not knowing the number of members subject to *McNeil* disclosures in the division (Material, p 1408), on only one occasion directly communicated with an employer, regarding concerns relating to *McNeil* (Material, p 1409), had direct knowledge of concerns by the Crown, having met with only one regional Crown (Material, p 1411) and could not think of specific examples of concerns but that the information came from other intermediaries (Material, p 1413).

[46] Under cross examination, Insp JM gave one example of 18 drug charges stayed when Crown counsel became aware of a *McNeil* issue, but could not think of others (Material, pp 1415-1416).

[47] Upon being asked if she is aware of any decisions in which a judge has advised that the member's evidence has been found to not be credible based on *McNeil*, Insp JM replied, "things that I've heard as rumours, and not as associated to my position" (Material, p 1425).

[48] When asked as to "what accommodations are being made to – employ these Members?" Insp replied (Material, p 1426):

> You're kind of asking me a staffing question. You know, they come to me for opinion how I think this will […] – impact different rules. But I, I can't speak specifically to what staffing […].
>
> *Evidence of Member: Summary of member's testimony*

[49] The only witness called by the MR to testify was Appellant who repeated much of the contents of his written submission (Material, pp 1438-1469).

[50] The Appellant indicated a year after his break up he was "finally able to pick myself up", but had "received very little support from – from my supervisors, mainly one (1) – mainly the

sergeant" (Material, p 1457). The Appellant reiterated his written submission of how he discovered his Sergeant had been "openly discussing my personal problems, belittling me and down-talking me in front of other NCOs, officers, and staff in general" (Material, p 1457). The Appellant indicated a co-worker had defended him and suffered backlash. The Appellant stated (Material, p 1458):

> […] I was angry. I was frustrated. I was emotionally exhausted. I was at my wits' end. I had enough problems dealing with my personal life and picking up the pieces. And the last thing I needed was to have this toxic work environment. I had to make changes and I had to do something, otherwise, I was going to fall apart. Around the end of January, of what was it, 2015, I went on HRMIS and I applied for a bunch of different sections within the lower mainland, Port Mann, traffic, IRSU, whatever had openings. I even looked at the postings outside of the – outside of the division just so I could get away from this and so that I could – I could function on – or not function, I could deal with picking up the pieces and getting my life back together (Brief Pause). I never did get that fresh start to move on anywhere else. I was subsequently suspended.

[51] Relating to the incident of February 13, 2015, he added (Material, p 1462):

> As I drove home, I was still on the phone with E-Comm. My vehicle is equipped with blue tooth and hands-free technology, which is in accordance with the Motor Vehicle Act for hands-free use of a cell phone.

[52] Under cross examination by the CAR, the Appellant confirmed the difficulties with the new Sergeant began in 2014 (Material, p 1479). Upon being questioned under re-examination by the MR, as to the reason he did not reach out to that Sergeant's supervisor, or SRR or MEAP, he stated (Material p 1506):

> Part of it was fear. Part of it comes from the – unfortunately, the nature of the job, that when you're having problems and you're the whistle blower, you're going to go do something, you look – you get looked at differently by – by colleagues and members. I had already been a whistle blower on a different matter.

[53] Relating to his break up, the Appellant indicated on cross examination that his separation occurred in September 2013 (Material, p 1478), and agreed with the CAR that it had "dragged on for a year" and was settled by the end of 2014, between September and November (Material, pp 1478-1479). He confirmed that he stopped receiving counselling from his psychologist in

September 2014 (Material, p 1482), and he was in a new relationship by that time (Material, p 1483).

[54] The Appellant then answered questions relating to the misconduct (Material, pp 1484-1498), and explained his use of the word "impulsive" to describe the misconduct, despite the length of time and series of events that occurred following the filing of the claim (Material, pp 1499-1500):

> […] But if you suffer from anxiety and depression, it's not a one (1) – a one (1) day ordeal. It doesn't come and go. It's not like you can turn it on and off. And probably the best way to – to make somebody feel what it is to live like with -- with dealing with depression and anxiety – and I'll put it out to both – both you and the Conduct Authority, is if you take your glass of water that you have next to you and you hold it out in front of you, and hold it out there for one (1) minute. You're fine. You hold it out there for five (5) minutes, you're going to start feeling the effect of it. You hold it out there for an hour, or you hold it out there for a day, that – that weight of the glass, doesn't matter if its full or empty, it plays it own game. It paralyzes you. I've been dealing with this problem and various personal and env – employment stressors over the course of nine (9) years […] I can't turn it one. I can't turn it off. The only thing I can do is – is deal with it in the best -- in the best way that I can.
>
> I have – I have moved well forward of this. I understand what this – what this mental illness is able to do, and I have brought it under control. If we were here a week after this incident occurred, there is no way I could have sat here on stand and told you my story. Even a year and a half later, to bring this up and to share my story with complete strangers took a fair amount of energy and courage.
>
> So I'd like you to understand that even though I made that mistake, thirty-five (35) days later, or six (6) weeks, or a month and a half, however you want to call it, or five (5) weeks, it accounts to being a fraction of a percent of – of the timeline in which everything has happened.

[55] The CAR asked the Appellant about the date on which he resumed seeing his psychologist, after he was suspended, and he stated (Materials, pp 1504-1505):

> After the suspension I realized that the tools that I had in my tool belt for dealing with my anxiety and my depression were not sufficient to deal with what I was dealing with. I can't run to the emergency room every time I have a cut on the knee. So having certain tools in your tool belt to help deal

> with stuff, I tried my best to deal with it with what I had and, unfortunately, it wasn't enough.

[56] The Board asked the Appellant how he collided with the traffic sign (Materials, pp 1507-1509):

> [Appellant]: As I went on to the centre median the sign was probably about a metre – it's a wide median. The sign was probably about a meter or a metre and a half into the median. As soon as I hit it, hit the curb, I corrected. And I was able to get the car far enough over that about – the sign hit about the one third mark of the front bumper, which was depicted in the photos. And these signs are concreted in the grounds. There's essentially, some sort of a pillar in the ground, and these just pop in and out.
>
> [Board]: Right.
>
> [Appellant]: So as I hit the sign, it popped up. It kind of hit the side of the windshield, and just slipped off the side of the car.
>
> […]
>
> [Board]; So what did you do with the sign?
>
> [Appellant]: I pulled over actually up ahead, and I put the sign back. The sign wasn't damaged. It just popped out of the hole, and I popped it back in.

CAR submission on conduct measures

[57] The CAR submitted the aggravating factors to be considered by the Board, included:

- The loss of confidence of the CO (Material, p 1513);
- The Appellant's "actions or misconduct was planned and deliberate", "not made on the spur of the moment, and were not an impulsive act" (Material, p 1513), as the misconduct was extended over a long period of time, the Appellant having lied to various individuals and agencies (Material, p 1515);
- The "misconduct was self-benefitting as supported by the ASF" (Material, p 1515);
- The impact of the *McNeil* disclosure on the Force and that Insp JM's testimony demonstrated "how difficult it will be for "E" Division, or any other division possibly, to

effectively deploy member who, like Constable Vellini, find himself obliged to disclose a serious integrity –based misconduct" (Material, p 1517);

- The Appellant had been "investigated by another investigative agency and convicted by a court of law" (Material, p 1519) and that (Material, p 1520): "[a]lthough Constable Vellani was never convicted of any infraction under the Criminal Code, his action[s] during the period of February 2015 clearly amounted to an attempt at fraud". The MR objected to this characterization as there was no *Criminal Code* conviction. The Board noted the provincial offence related to fraud and questioned if the charge under provincial statute precluded a charge under the *Criminal Code* (Material, pp 1522-1523);

- The Appellant swore a false statement before a notary (Material, p 1524) for which, the CAR submitted, the only range of sanction is dismissal, under section 8.1 of the *Code of Conduct* (Material, pp 1525-1526).

[58] The CAR submitted the Appellant's actions were incompatible with section 37 of the *RCMP Act* to obey the law, that his conduct showed clear disregard for the core values of the Force, including honesty and integrity, and in this case, deterrence ought to override rehabilitation (Material, p 1526).

[59] The CAR cited authorities to support the position that misconduct demonstrating a lack of trustworthiness or dishonesty renders members unsuitable for future service, violates the trust central to the employment contract and in the absence of a causal connection, between the stress and the misconduct, even where a member is repentant, where there has been personal gain, even for minor amounts, the result has been dismissal (Material, pp 1528-1541).

[60] The CAR acknowledged that the Appellant had suffered from stress in his life, but the evidence is insufficient to find a causal connection between the stress and the misconduct (Material, pp 154, 1548). The CAR referred to the Appellant's performance evaluations and letters of reference assessing the Appellant as "average" (Material, p 1542). In reference to the Provincial Court finding that the Appellant's actions were isolated, the CAR stated that the

"Court [was] faced with different facts", another standard and did not have the ASF (Material, p 1550).

[61] The CAR submitted "dismissal is the proper outcome" (Material, p 1553).

MR submission on conduct measures

[62] In arguing dismissal was not appropriate, the MR emphasized subsection 24(2) of the *CSO (Conduct)* (Material, p 1555):

> The Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the Code of Conduct.

[63] The MR submitted that loss of confidence in the Appellant by the CO was incorrectly suggested by the CAR to be an aggravating factor. The confidence of the CO would amount to a mitigating factor, if it was present, but its absence does not constitute an aggravating factor (Material, p 1556).

[64] The MR contended that if the Appellant's misconduct was motivated by self gain, simply due to filing one claim, he would have benefitted only from the $200 deductible (Material, pp 1556-1557)

[65] The MR stressed that Insp JM's experience with staffing and accommodation of members with *McNeil* issues was not direct but only anecdotal and the evidence of Insp JM was not persuasive in relation to *McNeil* (Material, pp 1557-1558):

> She can only make reference to one (1) Crown she had spoken to who expressed concern over the disclosure matters regarding McNeil. She was not aware of any times – any – any opportunities in the Criminal Court where a Member had been found uncredible based on the McNeil disclosure. She talked about the sliding scale of honest and integrity and appears to be subjective that some lies are tolerable and some are not.
>
> […]
>
> […] she offered an opinion […] on how this would impact the credibility of the Member in court which […] – which I submit is unfounded. There's not evidence to support what that might look like at this point in time. That she

> could not reference any – any decisions in which it has been determined to be a factor.
>
> […]She was not able to say what that impact might be.

[66] The MR challenged the example in which 18 charges were withdrawn by a Crown due to a Member's *McNeil* issue, as in those circumstances the member had lied in that particular case itself (Material, pp 1558-1559).

[67] On the matter of the relationship with ICBC, the MR submitted that the Appellant paid restitution (Material, p 1559).

[68] The MR distinguished the authorities put forward by the CAR in support of dismissal, noting in one, the member was not dismissed, in another, the member demonstrated no remorse, and in another, there was a prior discipline history (Material, pp 1560-1561).

[69] The MR submitted that the Appellant did not lie to a superior, but a member of his own rank in a non-operational matter, for which the normal range of penalty is 15 to 20 days (Material, pp 1561-1562), that according to the *Conduct Measures Guide* and previous cases, the range is broad, consisting of three days forfeiture pay to dismissal (Material, p 1562), and that the Appellant accepted he had contravened section 8.1 of the *Code of Conduct* (Material, p 1563).

[70] The MR then tendered numerous authorities to illustrate previous decisions in which despite similar facts, members received penalties short of dismissal (Material, pp 1565-1574), and stressed the "main goal of any disciplinary action is not necessarily to punish but to offer the chance for rehabilitation" (Material, p 1572).

[71] The MR raised the following mitigating factors from the performance evaluations and letters of references, for consideration by the Board:

- The Appellant had accepted responsibility and participated in the ASF and apologized;

- He has a "good work record" with "multiple performance logs" and "done well constantly through his service and has made efforts that are significant enough to be recognized by his supervisors" (Material, pp 1576-1577),

- He is a "valuable resource to the watch with his traffic knowledge" and "willing to share that with his fellow co-workers" (Material, p 1577),

- He was described as "kind, caring and [empathetic]" towards a missing dementia patient who had been located by him" (Material, p 1578);

- He was described as he "works very well with the rest of his peers" and "is willing to assist Members with their investigations as backup and completes his assigned tasks in a timely manner for the lead investigator" (Material, p 1579);

- In his service to the Junior Mountie unit and crime prevention unit it was remarked the Appellant showed "professionalism, honesty and integrity" (Material, p 1580);

- The Appellant is heavily involved in his church, community and extracurricular activities with the RCMP and had made efforts since he was 20 years old to become a member;

- There is "minimal likelihood of recidivism" (Material, p 1587);

- In the performance evaluation from April 1, 2011, to September 30, 2011, it was said that the Appellant was: the "resource for our in-car digital video systems, crash photography and commercial vehicle checks"; "always has the time to help and share his expertise" and "continues to contribute to the successes of this unit and works well within a team"; that "through the last four (4) years that he doesn't come to work to do the minimums" and "I can count on Constable Vellani on a moment's notice to dive into a major crash investigation without complaint" (Material, p 1581);

[72] The MR further submitted as mitigating factors that the Appellant had treatment and reviewed the CMHA course and counselling he had undertaken (Material, p 1583). As well, he argued that the incident was isolated and that although it lasted over five weeks it was because

the Appellant "didn't know how to get out of it, or didn't know how to fix it", and reiterated the various stressors in his life raised in the Appellant's testimony (Material, p 1583).

[73] The MR conceded that the report of Dr. N, the Appellant's psychologist, was not an expert report but stated "from her CV could be considered an expert in her field, but had been treating him ongoing and […] would have knowledge of his pre and post- situation" and suggested Dr. N is someone who has professional insight into the Appellant (Material, p 1585).

[74] The MR submitted that the Provincial Court Justice described the events as "an extremely isolated way to act", and stated "it should not derogate very much from the strong record you have as a peace officer" (Material, p 1590).

[75] The MR went on to say that the Justice had "not indicated in his decision that he will not find Constable Vellani non-credible in - - in the future", but does concede that the Justice alluded that "it might become an issue" (Material, p 1590). I will return to the Provincial Court proceedings later in this decision, but I feel compelled to clarify now what exactly was said. First though, the audio of the plea and sentencing is all of 18 minutes and 57 seconds which is not unusual in routine cases involving guilty pleas and joint submissions on sentence. Of that time, the Justice accepts the guilty plea and speaks to sentencing in just over two minutes, and what he actually states, after acknowledging the Appellant's policing profession, is, "I think the problem you are going to face is this is an act of dishonesty" (Audio, 17 minutes 47 seconds; Material, pp 1336-1338).

[76] The MR suggested the Appellant may be rehabilitated, this has been a learning experience for him and concluded that (Material, p 1591):

> [G]iven the factors surrounding the incident, all the stressors in Constable Vellani's life, the mitigating factors I've outlined, I submit that these measures should fall short of dismissal. To that end, I submit that measures in the range of thirty (30) to forty (40) days would be appropriate.

CAR's rebuttal

[77] The CAR distinguished the MR's cases, indicating many were joint submissions, in some there was no self gain, in another the member had her CO's support, and others were distinguishable due to expert evidence supporting, that the stress, although acknowledged, was causally linked to the misconduct (Material, pp 1594-1595).

[78] In response to the the letters of support, the CAR cited a previous report of the ERC finding that "the RCMP disciplinary process is not a popularity contest" (Material, p 1596). The CAR argued that the Appellant accepted responsibility consists of a mitigating circumstance with little weight because "it is trite law that credit to be granted on a guilty plea is reduced when the prosecution's case is insurmountable" (Material, p 1598).

[79] The CAR submitted that although Insp JM only spoke to one regional Crown, that Crown was in charge of Crown counsel in that region (Material, p 1600).

The Board's decision on conduct measures

[80] The Board issued an oral decision the day after the submissions, on September 21, 2016, and the written decision on April 4, 2017 (Material, pp 211-235). The Appellant was served with the written decision on April 23, 2017 (Material, pp 236).

[81] The Board set out the allegations under section 7.1 of the *Code of Conduct*, reproduced the ASF, summarized the submissions, included his decision on the allegations (Material, pp 213-229), and noted the governing regulations and legislation (Material, p 229):

> [94] […] Section 24(2) of the Commissioner's Standing Orders (Conduct) obliges the imposition of conduct measures that are "proportionate to the nature and circumstances of the contravention of the Code of Conduct". Section 36.2 (e) of the amended RCMP Act holds, ". . . in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive".

[82] The Board specified the requisite approach to imposing conduct measures (Material, p 229):

> [95] […] First, the range must be considered, and then aggravating and mitigating factors must be taken into account. The submissions of the representatives, alongside the cases submitted for analysis, certainly suggest a range of sanctions applicable to misconduct involving issues of honesty and integrity that includes dismissal. I disagree that dismissal is a starting point in every such case, however.

[83] The Board considered that "issues of honesty and integrity are never black and white", and that the member's motivation and the "moral turpitude", inherent in the activity must be examined (Material, p 229). The Board held that "dismissal tends to occur where there has been some form of personal gain sought or obtained, and where significant mitigating factors are absent", and found that the Appellant was motivated by personal gain to avoid paying a second deductible, and avoid accountability, as he engaged in "not a series of impulsive acts", but "part of an extended campaign to defraud" (Material, p 230).

[84] The Board stated that the *Conduct Measures Guide* is a "frame of reference" from which the aggravating and mitigating factors must be determined, but that it clearly sets out dismissal, even in the mitigated range for "knowingly providing false or misleading evidence while under oath or swearing to the truthfulness of any affidavit or other sworn legal document which the Member knows to contain false information", and found the Appellant engaged in such misconduct before the notary public (Material, pp 230, 1662-1663).

[85] On the principle of parity, the Board stated (Material, p 230):

> [101] I do not consider myself bound by the decisions of other boards, but previously-decided cases of a similar nature do help to establish the range of sanctions applicable. The principle of parity of sanction seeks to ensure fairness, so that similar forms of misconduct are treated in similar fashion. This lends continuity, stability, and predictability to conduct matters.
>
> [102] With this in mind, I carefully reviewed the cases submitted for consideration. […]

[86] In noting that many of the cases, submitted for consideration by the MR, featured sanctions imposed as a result of a joint submission, the Board determined that "relatively little

weight can be attached to those decisions", as they were frequently the result of negotiation involving factors known only to the parties (Material, p 231).

[87] The Board then reviewed the mitigating factors and rejected the Appellant's performance record as a mitigating factor (Material, p 231):

> [108] […] It is a well-accepted principle in sanctioning professional misconduct that a consistent pattern of above-average performance can act in a member's favour, but the Force has a right to expect at least average performance from its employees, and this seems to be what the Subject Member has delivered over the years. […]

[88] The Board indicated that he could not accept as a mitigating factor the Appellant's psychological state at the time, as the report of his psychologist failed to make a causal link between the Appellant's misconduct and his state of mind.

[89] The Board found instead (Material, p 232):

> [112] I cannot help but agree with her that depression and anxiety can potentially impair judgement and affect one's ability to deal with stress, but there is a very good reason Dr. [N] did not see the Subject Member in the months prior to his misconduct: by his own admission, he was actually doing relatively well, psychologically speaking. Things were going better for him at work, […]

[90] The Board identified the following mitigating factors (Material, pp 232-233):

- The Appellant's "brilliant flashes at work", resulting in his awards and his service for the Junior Mountie Police Academy and the Tim Horton's Children's Foundation;
- Performance logs finding him "innovative and compassionate", noting these were prepared "just a couple of months before the events in question";
- Letters of support from peers and colleagues;
- The admission by way of the ASF which eliminated the need for a hearing; and the Appellant's "heartfelt" apology to all involved.

[91] The Board identified the following aggravating factors (Material, pp 233-234):

- The misconduct was not a one-time lapse in judgment but "a harmful and destructive pattern" and said he disagreed with the Provincial Court that the events were an "isolated act", stating "had the contents of the ASF been made available, a different perspective may well have been gained";
- The Appellant made misrepresentations under oath;
- The Appellant was criminally convicted by the Provincial Court;
- The reputation of the RCMP was "tarnished in the eyes of important law enforcement partners" such as ICBC and those involved in the administration of justice;
- The *McNeil* considerations; and
- The personal benefit sought by the Appellant.

[92] The Board rejected the loss of confidence of the CO as an aggravating factor, stating (Material, p 232):

> [117] […] [T]he time has come, once and for all, to dispense with this antiquated concept. To begin with, the decision to dismiss an employee cannot be based on the subject evaluation of an employee's worth by any one individual. It is an object legal analysis.

[93] The Board stated "I do not find the mitigating factors in this case to be of sufficient weight to overcome this very significant aggravating factor" (Material, p 234).

[94] The Board acknowledged that dismissal "is only to be considered in the most extreme cases and that rehabilitation is the primary purpose of the imposition of conduct measures" and noted in *Ennis v The Canadian Imperial Bank of Commerce,* (1986) BCJ 1742, the Court examined the factors which allow for dismissal (Material, p 234):

> Real misconduct or incompetence must be demonstrated. The employee's conduct and the character it reveals must be such as to undermine or

> seriously impair the essential trust and confidence the employer is entitled to place in an employee in the circumstances of their particular relationship. The employee's behavior must show that he is repudiating the contract of employment or one of its essential ingredients.

[95] The Board held (Material, p 234):

> [128] I find the Subject Member has failed to live up to the terms of his contract of employment, which are clearly stated. Section 37(b) of the RCMP Act reads, "It is the responsibility of every member to maintain the integrity of the law, law enforcement and the administration of justice." Section 37(h) reads, "It is the responsibility of every member to maintain the honour of the Force and its principles and purposes." The core values of the Force include honesty, integrity, professionalism, accountability and respect.

[96] The Board concluded that the Appellant's actions "indicate a fundamental character flaw which make him unsuitable for further employment in our organization" and ordered the Appellant to resign within 14 days, in default of which he would be dismissed (Material, p 235).

APPEAL

Preliminary Matters

Leave to file submissions exceeding ten pages

[97] The submissions of both Parties exceed the maximum length of ten pages, as specified by the *National Guidebook – Appeal Procedures* and both seek leave to have the excess pages considered. The ten-page limit was imposed to prevent delays due to voluminous, extraneous material. In most cases the limit must be upheld to ensure the efficiency of the appeals process.

[98] In support of his request, the Appellant submits that the Board's decision is lengthy (25 single spaced pages) and the Record is large. Having raised several issues on appeal, the Appellant argues that the facts and law supporting his position on appeal cannot be adequately addressed in 10 pages and should be considered in full pursuant of his right to be heard (Appeal, pp 91, 284). The Respondent does not oppose leave sought by the Appellant but instead indicates that as the Appellant's submission is 18 pages in length, the Respondent requires 14 pages to adequately address the issues raised (Appeal, p 1311).

[99] The appeal at issue involves dismissal, a significant matter to the Appellant, requiring his procedural rights, such as the right to be heard, to be met as noted by the ERC (Report, paras 54-55). As well, the portion of the submissions, relating to argument (rather than background information), consist of nine pages from the Appellant (Appeal, pp 292-301), and eleven pages from the Respondent (Appeal, pp 1313-1324).

[100] For these reasons, I am prepared to make an exception and will consider the entire length of both submissions, despite exceeding the maximum limit. I agree with the ERC that such exceptions are not guaranteed in future and the maximum limit on submissions ought to be upheld in the usual circumstances (Report, para 54).

Request to make further submissions and convene a case meeting

[101] The Appellant seeks leave to make further submissions regarding the range of conduct measures should I determine that sanctions may be reconsidered, and requests a case meeting to make further oral submissions on the merits (Appeal, p 301).

[102] The Appellant has made no argument to support either request except in his rebuttal in which he explains he may "present oral submissions … on any merits of an appeal", under the *National Guidebook- Appeals Procedure* at sections 9.1, 9.3.1 and 9.5.3 (Appeal, pp 301, 1427).

[103] The Respondent opposes the requests and insists that the grounds of appeal are "straightforward and are sufficiently addressed through written submissions. There are no preliminary or collateral issues for an adjudicator to settle and a case meeting would not serve the interest of efficiency" (Appeal, p 1324).

[104] I find that the Appellant had many opportunities under the legislation and policy to make submissions and has done so. During the sanctions hearing, the MR made oral submissions on conduct measures, under subsection 24(1) of the *CSO (Conduct)*, consisting of legal and policy arguments to support the Appellant's position that the appropriate conduct measures consist of a range of 30 to 40-day forfeiture of pay (Appeal, p 550).

[105] Subsequent to the Board's decision, the Appellant filed a Statement of Appeal, Form 6437, listing the redress sought, stating that the order of the Board for dismissal ought to be replaced with a 30 to 40-day forfeiture of pay (Appeal, p 6). Then, in his written Appeal submission, the Appellant advised he "requests the Commissioner order that his sanction be replaced by an order for forfeiture of pay as he requested at the sanctions hearing" (Appeal, p 284).

[106] In his written rebuttal (Appeal, pp 1423-30), filed pursuant to section 5.4.1.3 of AM II.3 *(Grievances and Appeals)* and sections 6.1.1.2 and 6.1.2 of the *National Guidebook – Appeals Procedures,* the Appellant does not propose any alternative conduct measures, which differ from the suggested forfeiture of pay. Both the Appeal submission and rebuttal were prepared by legal counsel.

[107] The Appellant has had numerous opportunities to convey, first to the Board, the ERC, and now to an adjudicator, the conduct measures he deems appropriate in the circumstances, and has not varied from his position that it consists of a forfeiture of pay of 30-40 days, nor has he suggested any other alternative. He presents no compelling argument as to the reason a further opportunity to make submissions at a case meeting is required. Moreover, he does not present any argument of how, in the absence of a case meeting or further submissions, unfairness may result.

[108] According to the National Guidebook – Appeal Procedures:

> 9.1. Requesting a Case Meeting
>
> An appellant, a respondent or an adjudicator may request a case meeting by contacting the OCGA in writing. A case meeting can take place at any stage of the appeals process. Depending on the number of disputed preliminary or collateral issues and when they arise in the process, more than one case meeting may be required. **For a case meeting to proceed, an adjudicator must be satisfied that it is the most efficient way to settle the dispute and reach a decision.**
>
> [Emphasis added.]

[109] I am not satisfied that holding a case meeting and seeking further submissions, whether in writing or in person, is "the most efficient way to settle the dispute and reach a decision." I find

that in light of the numerous opportunities to submit his position, the Appellant's right to procedural fairness has been met. The Appellant's request for a case meeting is therefore denied.

Scope of review

[110] Subsection 33(1) of the *CSO (Grievances and Appeals)* sets out the scope of review in conduct appeals:

> 33(1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

Standard of review

Procedural Fairness

[111] Procedural fairness is composed of two broad rights which must be considered to determine whether there exists a violation so serious a party did not receive a fair hearing (ERC Report/Commissioner's Decision, G-568):

> Procedural fairness is a common law principle that has come to be seen as the "bedrock of administrative law". It comprises two broad rights: the right to be heard and the right to an impartial decision-maker [see David J. Mullan. *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) 4, 232]. Where procedural fairness is found to have been denied, a decision will be deemed invalid unless the substance of a claim "would otherwise be hopeless" [see *Cardinal v. Director of Kent Institution* [1985] 2 S.C.R. 643; *Kinsey v. Canada (Attorney General)*, 2007 FC 543; *Mobil Oil Canada v. Canada Newfoundland Offshore Petroleum Board* [1994] 1 S.C.R. 202; and *Stenhouse v. Canada (Attorney General)* [2004] FC 375].

[112] Breaches of procedural fairness will normally render a decision invalid. The usual remedy is to order a new hearing, with the exception where the circumstances will inevitably lead to the same outcome (*Mobil Oil Canada Ltd v Canada- Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, paras 51-54; *Renaud v Canada (Attorney General)*, 2013 FCA 266, para 5). I note that when considering questions of procedural fairness, I owe no deference to the Board.

Errors of Law

[113] Questions of mixed law and fact were distinguished from pure errors of law by the Supreme Court of Canada (SCC) in *Housen v Nikolaisen*, [2002] 2 SCR 235, (*Housen*) at paras 33 and 36:

> 33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. […]
>
> […]
>
> 36 […] Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[114] An error of law is generally described as the application of an incorrect legal requirement or a failure to consider a requisite element of a legal test. Stated another way, it is "[a] question which seeks to determine the proper interpretation of a legal requirement [or statutory provision] rather than the manner in which the requirement is applied to the particular facts is a question of law" (Robert Macaulay & James Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf (Toronto: Thompson Reuters, 2017), vol 3, at 28-336, n 236).

[115] While the Appellant suggests the Board made errors related to the law, such as, the failing to follow precedent, engaging in re-litigation, and not fully adhering to the legal test to determine conduct measures, the substance of these arguments are based on mixed law and fact. Although, the concerns raised by the Appellant do not necessarily constitute errors of law, I will consider them in my analysis of whether the Appellant has established that the Board's decision is clearly unreasonable.

Clearly Unreasonable

[116] In *Kalkat v Canada (Attorney General)*, 2017 FC 794, the Federal Court examined the term "clearly unreasonable" in the context of the RCMP conduct process, which included a comparison of the English and French text in subsection 33(1) of the *CSO (Grievances and Appeals)*, and found that this phrase conveys a high level of deference to decision makers, stating:

> [62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term, I conclude that the Delegate did not err. Interpreting the "clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding (*British Columbia Workers' Compensation Appeal Tribunal v Fraser Health Authority*, 2016 SCC 25, at paragraph 30).

[117] In *Smith v Canada (Attorney General)*, 2019 FC 770, a similar finding was considered and adopted:

> [38] The Adjudicator undertook an extensive analysis in order to arrive at the conclusion that the standard of patent unreasonableness applies to the Conduct Authority Decision. This analysis included a review of relevant case law, the meaning of the word "clearly", and the French text of the subsection 33(1). The Adjudicator's conclusion that the applicable standard of review was patent unreasonableness is justifiable, transparent, and intelligible. The Court agrees that this was a reasonable conclusion.

[118] The Federal Court of Appeal subsequently dismissed the appeal of the *Smith* FC decision, 2021 FCA 73, stating, *inter alia*:

> [43] First, I find it interesting that the appellant and the intervener failed to properly address the French version of subsection 33(1) and why the [appeal] Decision is unreasonable in light of it. The French text uses the terms "manifestement déraisonnable" which translate to "patently unreasonable", and have been interpreted as such in the Supreme Court jurisprudence. Based on the modern approach to statutory interpretation, the conduct adjudicator's analysis demonstrates that subsection 33(1) was reasonably interpreted to require patent unreasonableness.

[119] In *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at para 57, the SCC explained that a decision is "patently unreasonable" only if the "defect is apparent on the face of the tribunal's reasons", or in other words, it is "openly, evidently, clearly" wrong. Additionally, a decision will only be considered "clearly unreasonable" if, even after mistakes are taken into account, the outcome under appeal is not plausible based on the evidence and submissions presented to the decision maker.

[120] Finally, whether the impugned decision is clearly unreasonable also depends on whether it is deficient in facts, law, or justification, transparency and intelligibility (see *Dunsmuir v New Brunswick,* 2008 SCC 9, at para 47, and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 *(Nurses),* all affirmed in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 *(Vavilov)*).

[121] The approach to reviewing the sufficiency of reasons was articulated by the SCC in *Nurses*:

> [16] **Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion** (Service Employees' International Union, Local No. 333 v. *Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [Emphasis added.]

[122] In decisions under the former Part IV *(Discipline)* of the *RCMP Act*, the Commissioner described the deferential appellate standard to be applied in reviewing sanctions imposed by adjudication boards. As noted by the ERC (File no. 2900-10-002 (D-125)) (Appeal, p 779):

> [161] In addressing the appropriateness of the sanction imposed, I note that significant deference is owed to the Board's decision on sanction. This was emphasized as follows in ERC 3200-95-002 (D-043) (passage reproduced and relied on by the Commissioner in ERC 2400-09-002 (D-121)):

> Sanction is inherently a matter of considerable subjectivity and the tribunal of first instance, the tribunal that heard the matter directly before it, is in the best position to exercise this subjectivity. An error of principle, a failure to consider relevant and important mitigating factors, consideration of irrelevant aggravating factors, or a result in which the sanction is clearly disproportionate are all examples of situations that may justify upholding the appeal on sanction. **In general, however, appellate bodies will not overturn a sanction only on the basis that they would have made a subjective evaluation different in the result from that of the hearing tribunal.** These principles, although developed in the context of judicial appellate deference to judicial decisions of first instance, apply in a parallel fashion to the standard appropriate in internal appeals where there is administrative- tribunal appellate review of administrative-tribunal decisions of first instance.
>
> [Emphasis added.]

Analysis

[123] The Appellant maintains the Board's sanction ought to be replaced with a forfeiture of pay under paragraph 45.16(3)(b) of the *RCMP Act*, as "the cumulative impact of the errors identified above is that the Board's decision cannot be sustained" (Appeal, p 301).

[124] The Appellant lists the following errors made by the Board:

- The Board violated the Appellant's right to procedural fairness by concluding the Appellant was motivated by personal gain, after failing to provide the Appellant an opportunity to explain himself (Appeal, p 293), and by omitting to provide reasons for how it determined the Appellant was engaged in an extended campaign to defraud (Appeal, p 294).

- The Board made a manifest and determinative error in omitting to provide reasons as to why the Appellant's testimony that his misconduct arose from an impulsive act was rejected, rendering the decision clearly unreasonable (Appeal, p 294).

- The Board made a manifest and determinative error in its heavy reliance on the conclusion relating to personal gain - that the Appellant was evading punishment or other liability without evidence, rendering the decision clearly unreasonable (Appeal, p 293).

- The Board discounted mitigating factors relating to the Appellant's mental health, making findings without evidence, engaging in illogical reasoning or ignoring or misapprehending crucial evidence, making a manifest and determinative error which renders the decision clearly unreasonable (Appeal, p 298).

- The Board discounted mitigating factors, including the Appellant's letters of reference and performance evaluations, making findings without evidence, engaging in illogical reasoning or ignoring or misapprehending crucial evidence, making a manifest and determinative error which renders the decision clearly unreasonable (Appeal, p 298).

- The Board erred in law, by ruling that the existence *McNeil* is an independent aggravating factor and made a manifest and determinative error in double counting aggravating factors in the consideration of *McNeil,* rendering the decision clearly unreasonable (Appeal, p 300).

- The Board erred in law, by admitting the opinion evidence of Insp JM and made a manifest and determinative error in assessing the weight of the opinion evidence, misconceiving it, rendering the decision clearly unreasonable (Appeal, p 295).

- The Board erred in law by not deferring to the finding of the Provincial Court that the Appellant's misconduct was "an impulsive act and isolated occurrence" and in doing so, engaged in re-litigation; alternatively, the Board in failing to give significant weight the Provincial Court's finding, made a manifest and determinative error which renders the decision clearly unreasonable (Appeal, p 297).

- The Board erred in law, by rejecting case law with similar facts, short of dismissal, due to joint submissions, by failing to engage in parity and made a manifest and determinative error in distinguishing the case law, due to joint submissions, rendering the decision clearly unreasonable (Appeal, p 298).

- The Board overstated and/or misstated aggravating factors, incorrectly finding the Appellant has a criminal conviction, making a manifest and determinative error which renders the decision clearly unreasonable (Appeal, p 300).

[125] I will examine these alleged errors in turn.

Was there a violation of the Appellant's right to procedural fairness because the Appellant was not given a chance to explain he was not motivated by personal gain?

[126] The Appellant insists that he was "never given a fair opportunity to counter the assertion that he was concerned with liability for the accident" and "was not asked directly". He testified "he caused zero damage to public property at the scene and that he was using a Bluetooth while driving". The Appellant submits that in the absence of giving him a fair chance to explain himself, the proceedings were rendered procedurally unfair (Appeal, p 293).

[127] The Respondent emphasizes that the Appellant was not denied his right to procedural fairness, as he had full notice of the case to meet, and chose not to enter evidence to counter the Board's finding in the decision on the allegations with his version of events. The Respondent stresses that the MR chose to make no written submissions on the allegations, upon being invited to do so by the Board, prior to the Board's decision on the allegations and then received the Board's decision on the allegations, well in advance of the sanctions hearing. At the sanction hearing, the Board referred to recent conduct board decisions, included in the MR's book of authorities and concluded "dismissal tends to occur where there has been some form of personal gain" (Appeal, p 1314).

[128] As I mentioned previously, procedural fairness is based on the Appellant's right to be heard by an impartial decision maker. The right to be heard requires full notice of the allegations and a corresponding opportunity to make a full response. In *Baker v Canada (Minister of Citizenship and Immigration),* [1990] 2 SCR 817 *(Baker)*, at paras 23-27, the SCC set out the factors to consider when assigning the requisite level of procedural fairness, including:

1. the nature of the decision and the process followed in making it;

2. the nature of the statutory scheme;

3. the importance of the decision to the individual affected;

4. the legitimate expectations of the person challenging the decision; and

5. the choices of procedure made by the administrative decision maker itself.

[129] First, I must determine if the Appellant had notice under the statutory scheme that his intention to benefit from his misconduct was an issue and it was reasonable for him to expect it to be raised, when and how that notice was conveyed and then, if the Appellant had an opportunity to make a full response to those allegations within a reasonable period of time, given that dismissal was within the range of conduct measures.

[130] Under the legislative and policy scheme of the RCMP conduct process, notice was served upon the Appellant at numerous stages of the proceedings, which advised him of the details of his alleged misconduct, comprising of making false and misleading statements to support a false insurance claim, and that dismissal was within the range of penalties. The Appellant was given several opportunities to respond and did so.

[131] Specifically, the Appellant was provided notice of the allegations in the mandate letter (Material, p 721), the Investigative Report (Material, pp 709-721 plus attachments) and was served with the Notice of Conduct Hearing which consisted of the allegations in detail (Material, pp 1169-1172). The Notice of Conduct Hearing not only advised that the allegations to be established consisted of an infraction of the *Code of Conduct* for engaging in discreditable conduct, but that the conduct consisted of two allegations, the first having taken place on February 13, 2015, and the second having taken place over the next five weeks from February 13, 2015, to March 20, 2015.

[132] After receiving several extensions prior to proceeding to a pre-hearing conference (Material, pp 560-636) the Appellant signed an ASF (Material, pp 1165-1168), which included details of his misconduct (Material, pp 1160-1161).

[133] Subsequently, both Parties were invited to make written submissions to the Board on the allegations. The CAR made a written submission addressing the issue of the Appellant's motivation and personal gain (Material, pp 37-40):

> 4. It is the conduct Authority's position that Cst. Vellani's actions, as they relate to this allegation, were not simply spur of the moment acts. Rather, the facts before the board establish that Cst. Vellani's actions were deliberate and that he intended to mislead [Cst. H] […].
>
> 5. […] I therefore submit that Cst. Vellani's actions should not be viewed by the board as a mere error in judgment, but as self-benefitting act of dishonesty done with the intent to support a fraudulent insurance claim. […]

[134] In the absence of a responding submission by the MR, who indicated after receiving the CAR's submission above (Material, p 580), that "the ASF speaks for itself" and omitted to address the inflammatory nature of the allegations, expounded by the CAR (Material, p 579), the Board inthe decision on the allegations, accepted the CAR's characterization of the misconduct as not made on "the spur of the moment" and "not a mere error in judgment but as self benefitting" and stated (Material, pp 20-22):

> [11] The CAR has suggested his motivation for misleading [Cst. H] was to support a fraudulent insurance claim, and I agree. I will go further, however, and add that additional motivation was to avoid being held accountable for his single-motor-vehicle accident. […]
>
> […]
>
> [16] Constable Vellani embarked upon an extended campaign to deliberately mislead various ICBC employees, ranging from complaint-intake personnel to claims evaluators to investigative staff. He also misled a Notary Public in a solemn affirmation pertaining to this same insurance claim. The CAR's analysis of the various stages at which the Subject Member offered misleading statements in support of his fraudulent insurance claim is comprehensive and need not be repeated here.
>
> [17] The above analysis with respect to Constable Vellani's motivation for his actions applies with equal vigour here. He was acting in self-interested fashion, to avoid paying the deductible amount for a second claim and to evade accountability for his single –vehicle accident.
>
> [18] […] given the motivation for self-benefit underlying his actions, this is a very serious contravention of the code of conduct.

[135] The Board's decision on the allegations was sent to the MR on August 16, 2017 (Material, p 17), giving the Appellant full notice of the Board's characterization of his misconduct.

[136] The Appellant then had the opportunity at the sanctions hearing, which took place on September 20, 2017, to address this characterization by specifically putting forth evidence to support his version of the events, which the Appellant did, by referring to his actions as "impulsive", and describing how they stemmed from a breakdown of his mental health (Appeal, pp 418-427, 453-463). He did so without specifically addressing the issue of personal gain, which had been raised in the CAR's submissions and the Board's decision on the allegations.

[137] I find that the Appellant did not address the finding that his misconduct was motivated by personal gain, which had already been established, and this omission was not due to a lack of notice, opportunity, or because he was not specifically asked in cross examination by the CAR. Simply put, the issue of the Appellant's motivation was not raised as a surprise without time to reply. I agree with the ERC that having omitted to respond to the issue of personal gain, the Appellant is now precluded from arguing that his procedural rights were violated (Report, paras 68-69).

> *Did procedural unfairness result when the Board failed to explain how he determined the Appellant was engaged in an extended campaign to defraud and why he rejected the Appellant's testimony that he acted impulsively?*

[138] The Appellant submits that the Board erred by finding that he engaged in an extended campaign to defraud, and rejecting the Appellant's testimony that he acted impulsively, all leading to the conclusion that the Appellant's "wilful deception showed a "fundamental character flaw which made him unsuitable for further [RCMP] employment" (Appeal, p 294).

[139] The Appellant states that "the Board's reasons provide no explanation for why Mr. Vellani's testimony was rejected" which described the misconduct as an impulsive act as the Board made no negative findings of credibility (Appeal, p 294). The Appellant submits that the Board ought to have demonstrated a higher degree of procedural fairness, since the matter

concerned the Appellant's career, citing *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193 *(Neinstein),* at para 60 (Appeal, pp 29, 710) and that in the absence of reasons, the Appellant's right to procedural fairness was violated (Appeal, pp 294, 756).

[140] The Respondent submits that the Appellant's characterization of the facts, such as the misconduct being impulsive, was not argued at the hearing and any attempt to do so now is to engage in "re-litigation" (Appeal, p 1312).

[141] I accept that when a decision maker omits to provide reasons and the legislative scheme requires it, procedural unfairness results, but when a decision maker provides reasons and the sufficiency of those reasons is at issue, the question is not one of procedural fairness, but whether there has been a manifest and determinative error, due to the lack of justification, transparency and intelligibility, rendering the decision clearly unreasonable. As noted by the ERC, here, the Board provided reasons as obligated under section 11.16.2 of the *Conduct* policy. Having done so, procedural fairness is no longer an issue but instead, as stated by the SCC in *Nurses* (para 22) (Appeal, p 1369) "any challenges to the reasoning/result of the decision should therefore be made within the reasonableness analysis" (Report, paras 73-77). I will examine the sufficiency of the Board's reasons shortly.

Questions stemming from the Appellant's state of mind

[142] I note that the following issues all relate to the Appellant's state of mind:

- Did the Board misconceive evidence relating to the Appellant's mental health and discount the evidence of his mental health as a mitigating factor?

- Did the Board fail to provide sufficient reasons for rejecting the Appellant's testimony that his misconduct arose from an impulsive act?

- Did the Board make a reviewable error in its the conclusion relating to personal gain?

- Did the Board make a manifest and determinative error in overstating and/or misstating aggravating factors by inferring his motivation to avoid liability?

[143] Had the Board found that the Appellant suffered from a mental illness which caused him to act out and impulsively engage in the misconduct, or the stressors of life were so overwhelming that the behaviour could be partially explained, the Board may have placed less emphasis on the Appellant's motivation for personal gain.

[144] Instead, the Board found the Appellant's previous issues with depression, anxiety and stress, whether due to his relationship break up and/or his work environment, did not significantly mitigate his actions, particularly since the brief report of his psychologist, whom the MR did not have qualified as an expert (Appeal, p 543), failed to disclose any causal connection between the Appellant's state of mind and his misconduct.

[145] The psychologist report did not discuss how rehabilitation would reduce the chance of a recurrence of the misconduct. Dr. N provided no reassurance that the misconduct was out of character or in other words, did not result from a character flaw. Dr. N's full report, dated July 12, 2016, stated (Appeal, pp 687-688):

> In my capacity as a Registered Clinical Psychologist Constable Vellani has been under my care episodically since August 2013. I saw him fairly regularly from August 2013 until September 2014. I had not contact with him, from September 2014 until after his suspension in March 2015, after which time we have resumed regular contact.
>
> He initially attended therapy as a result of a fairly traumatic relationship breakup which left him anxious and clinically depressed. I placed him ODS for a month period during September through October 2013. After his return to duty we continued on work on relationship management, problem-solving and stress and depression management. Although I did not see [him] in the months prior to the incident which caused his suspension I am aware that his depression and vocational stressors were increasing and that he indicated a recurrence of his symptomatology. **While I cannot clinically state that his psychological state caused his lapse of judgement I am comfortable suggesting that his depression and anxiety could certainly have clouded his judgement and have significantly reduced his resiliency to deal with any stressful situations.**
>
> Since his suspension he has been attending therapy regularly and has also attended external programs on his own initiative. He is a motivated client who clearly wishes to deal with both his psychological and vocational issues in an effective problem-solving manner.

[Emphasis added.]

[146] I find the Respondent correctly points out that "the Board clearly identified the Appellant's mental health as a mitigating factor" but was unable to make a causal link between the Appellant's mental illness and his misconduct from the report provided by his psychologist.

[147] According to the Respondent, the Appellant's "self assessment of his mental health has limited values to the Board's evaluation" (Appeal, p 1323).

[148] The Appellant disagrees and despite the lack of psychological evidence, states (Appeal, p 300):

> The next mitigating factor the Board rejected is Mr. Vellani's psychological health. The Board held that: (1) there was no evidence that the conduct was caused by mental illness; and (2) Mr. Vellani admitted that he was doing "relatively well" psychologically speaking. […]

[149] The Appellant further submits (Appeal, p 300):

> Although he did not maintain he was compelled to commit the misconduct due to his mental illness; the only evidence at the hearing was that his mental health issues were ongoing and were a factor in his misconduct. Mental illness is a mitigating factor even if it did not compel the misconduct.

[150] In support of the notion that a causal connection was not critical to assess the weight of the mitigating factor of the Appellant's mental health, the Appellant cites the ERC (File no. 3200-08-001 (D-122), at para 168) (Appeal, p 771):

> The Board seems to have concluded, relying on the two-part test, that only debilitating stressors causing "*irrational"* behaviour would justify using them as a mitigating factor. However, stressors and psychological problems short of a psychiatric disorder have been found in past cases to mitigate misconduct, without reference to a threshold of "irrational" behaviour: ERC 2800-04-002 (D-099) at paras. 111-112; (2007) 32 A.D. (3d) 292 (Comm.), at paras. 99-100); 20 AD (3d) 10 (Bd.), at p. 20.

[151] On closer examination of D-122, the Commissioner confirmed the adjudication board's order for the member to resign and rejected the ERC's finding, determining:

> [51] The main thrust of the Appellant's argument is to describe a series of unfortunate and adverse occurrences in his life dating back to 2002, all of which in his view created stress and contributed to his "acting out" (sexual relationship with his subordinate's spouse over a five-month period).
>
> [52] At pages 58 and 59 of its decision, the Board made an assessment of all the "stress factors" presented, particularly those identified in Dr. [R]'s testimony. The Board did recognize some stressors in the Appellant's life, but did not see a direct causal link between those stressors and his misconduct. Furthermore, the Board did not see the aggregate amount of stress to be such that it would justify the acts of a normal person who was behaving irrationally, thereby committing the contraventions in question. I find that significant deference is owed to the Board for its findings of fact and weighing of evidence with respect to the assessment of life stressors as described by the witnesses, particularly Dr. [R]. There is no argument from the Appellant which shows how the Board's weighing of the life stressors in the Appellant's life could make the decision unreasonable.
>
> […]
>
> [109] With respect to the two-part test, the Board stated that even if it found that there was a direct causal link, thereby acknowledging this possibility, it "did not see the aggregate amount of stress to be of such a level so as to justify the acts of a normal person being irrational thereby committing the contraventions in question" (Decision, para. 219). The ERC found this conclusion an error as "the Board seems to have concluded...that only debilitating stressors causing "irrational" behaviour would justify using them as a mitigating factor" (para. 168).
>
> [110] I do not agree with the ERC's interpretation of the Board's finding. The Board recognized some stressors but did not see a direct causal link between the stressors and the misconduct. It does not mean that the Board did not use them as a mitigating factor. The Board may not have given these stressors the same weight as the ERC would have, but its assessment is not unreasonable given all the evidence. The Board did not discount the expert opinion. It accepted it and assessed it along with each of the other considerations involved. I do not find that the Board made a palpable and overriding error in this respect.

[152] The Appellant submits that the Board incorrectly found that the Appellant's work environment had improved, while he awaited a transfer (Appeal, 416), even though, as noted by the ERC, the Appellant had testified that he had felt "harassed and 'at wits end'" (Report, para 107).

[153] Just the same, I find that it was not clearly unreasonable for the Board to determine that stress, relating to the Appellant's work, was not an underlying factor in the misconduct, as no expert evidence was presented to substantiate the Appellant's testimony (Appeal, p 458) that stressors - including those which may have been related to his work environment - were causally connected to the misconduct.

[154] The bulk of the evidence, relating to the Appellant's state of mind and any connection to the misconduct, originates from the Appellant's testimony before the Board. The Board was present at the time of the Appellant's testimony and observed him respond to the CAR's question of how he could characterize his five-week series of misleading statements as "impulsive" (Appeal, p 456). Without further evidence substantiating his psychological state from his psychologist, the Board's assessment is based on the evidence before him, and in light of this, I find he arrived at a logical conclusion that the Appellant intended to benefit from his misconduct.

[155] The Appellant insists that the decision is clearly unreasonable because there was no inconsistent evidence and the Board made no negative comments about the Appellant's credibility (Appeal, p 294). The Appellant stresses that "an agreed statement of facts stands in the place of evidence" and was the "sole evidence upon which the Board could reach its decision and the Court could not deviate from the ASF or draw inferences". The Appellant submits the ASF "deals explicitly with the Appellant's motivation", cites the ASF at para 17, and contends there is "no statement in the ASF capable of supporting the Board's position about any additional motivation" (Appeal, p 1424).

[156] The Respondent argues (Appeal, p 1313), "the Board is empowered to determine the materiality and necessity of information it requires to render a decision and can make a finding in respect of an allegation based solely on the record," and refers to AM XII.1 *(Conduct)* at section 11.10, and the *CSO (Conduct),* at subsection 23(1) (Appeal, p 1313), and that the Board's reasons properly "permit an assessment of whether the conclusion is within a range of acceptable outcomes", citing *Nurses,* at para 16 (Appeal, p 1368).

[157] I find that the Board's determination that the Appellant engaged in a five-week campaign to defraud, is not clearly unreasonable (as noted by the ERC (Report, para 78)), as there is no other reasonable explanation to be gleaned from the evidence, except to avoid liability.

[158] The Board, having made the finding that there was no causal connection between the Appellant's state of mind and the misconduct, and having noted the series of acts which composed the misconduct over a period of time, is not required to further specify any additional findings. His reasons are intelligible, transparent and justifiable and adequately conform to the standard set by the SCC in *Nurses* (at para 13) (Appeal, p 1368). As noted by the ERC, it is clear why the Board came to the conclusion that the Appellant engaged in an extended campaign to defraud and I agree those reasons were sufficient (Report, para 73).

[159] Likewise, in light of the above, I agree with the ERC (Report, para 107) that the Board's error in finding the Appellant's work environment had improved, is not manifest and determinative, as it does not change the plausible outcome of the decision.

Discounting mitigating factors such as the Appellant's letters of reference and performance evaluations

[160] The Appellant submits that the Board failed to take into consideration the exemplary performance of the Appellant noted in the 2011 performance review, before his mental health declined, which provided that he is a "quick learner", "always has time to help", "embraced his role and continues to grow", "demonstrates strong commitment and compassion" , "has strong self control and courage of convictions", "contributes to the success of the unit" and "doesn't come to work to do the minimums" (Appeal, p 299).

[161] The Appellant adds that the Board's reasons fail to address letters of reference, including those of superior officers, attesting to his "excellent contributions as a police officer". Instead the Board mischaracterized the letters to say they only showed the Appellant was "a tireless supporter of causes he believes in" (Appeal, p 299).

[162] The Respondent notes that it is appropriate to presume the Board considered all the evidence in the record, citing the ERC (File no. 3200-05-005 (D-160), at para 50). The Respondent contends that the Board did not ignore, but referred to the Appellant's performance records, including instances of above average performance and less favourable performance, and concluded the Appellant was an average performer as a result (Appeal, pp 1321-1322). The Respondent submits the Board did not mischaracterize the nature of the letters of reference, noting they were provided by "peers and colleagues" (Appeal, p 1322).

[163] I am satisfied that the Board considered the letters of reference, certificates and awards, volunteer service, the ASF, and the apologies, which all served as mitigating factors (Appeal, pp 66-68, 649-651). Further, the Board, upon his review of the performance evaluations, expressly found that he would not accept the performance evaluations as mitigating factors because average performance (as opposed to above average) was not a mitigating factor.

[164] The Appellant contends the performance evaluations in which his performance was criticized took place in a toxic work environment (Appeal, p 300). The Appellant adds that the Board relied on the most recent performance review to find he was an "average performer", without appreciation that as a result of the toxic work environment, he was suffering from anxiety and depression (Appeal, p 298). The Appellant contends the Board incorrectly held the 2011 performance review corroborated the following conclusion which resulted from the Board extrapolating with his own comments (Appeal, p 299):

> [109] […] From his 2011 review: "[The Subject Member] continues to perform at a satisfactory level." What this tells me is that the Subject Member may have been a bit of an underachiever who, after receiving a talking-to, brought his performance up to an average level. To accept average performance as a mitigating factor would do a disservice to all those who have turned in year after year of above–average work.

[165] I note that although the 2011 performance review contained glowing comments about the Appellant, the actual performance discussion as described was referenced in an evaluation dated and unsigned on September 23, 2012 (Material, p 1181). Even so, I do not regard the Board's error in this regard to be fatal. In my view, the Board's overall assessment of the Appellant's

performance is not clearly unreasonable based on my reading of the few evaluations presented by the MR (Material, pp 1174-1186).

[166] The Board assessed the mitigating and aggravating factors, found the mitigating factors did not outweigh the aggravating factors, and concluded the Appellant breached the terms of his employment with the RCMP (Appeal, p 234). In the absence of a manifest and determinative error, as noted by the ERC, deference is owed to the Board's finding (Report, paras 48-50, 104).

Is McNeil an independent aggravating factor?

[167] The Appellant contends that "any conviction is not a separate factor from the misconduct and does not qualify as aggravating", referring to the ERC (File no. 2400-04-001 (D-094), para 43) assertion that "an aggravating factor must relate to factors outside of the misconduct" (Appeal, pp 301, 764). The Appellant submits that the Board erred in holding that the *McNeil* implications constitute a separate aggravating factor, in addition to lying under oath (Appeal, p 301). The Appellant maintains that in including the latter as an aggravating factor the Board engaged in "double counting" (Appeal, p 301).

[168] The Respondent insists the Board properly considered *McNeil* as an independent aggravating factor. In support, the Respondent cites *Cormier*, 2016 RCAD 2, at para 83, and *Haywood* (2012), 11 AD 4th 67, at paras 172-174, in which the Commissioner found that the effects of *McNeil* must be considered (Appeal, pp 1319, 1374-1375).

[169] I note *Cormier* illustrates the manner in which *McNeil* is considered (Material, p 413):

> Given the *McNeil* implications, the misconduct imposes a significant but not untenable administrative burden on the Force. While it was double hearsay, at the hearing in Moncton, the MR relayed information she had recently received from the Subject Member of a call with his line officer in which a number of positions suitable for the Subject Member were apparently mentioned. While I must give this little weight, it does resonate, with the submitted case law in which members were retained notwithstanding serious *McNeil* issues.

[170] *Haywood* further shows the manner in which *McNeil* implications are considered:

[172] Although this hearing, the appeal submissions and the ERC report were all completed before the Supreme Court of Canada's decision with respect to the use of police disciplinary records, *R. v. McNeil*, 2009 SCC 3, I find that I must consider the effect of this decision on this matter.

[173] In that decision the Supreme Court of Canada found (at paras. 14-15, 23-25) that, while the roles of the Crown and police are separate and distinct, the police have a duty to participate in the disclosure process, and that the necessary corollary to the Crown's disclosure duty under *R v. Stinchcombe*, [1995] 1 S.C.R. 754, is the obligation of police to disclose to the Crown all material pertaining to its investigation of the accused. Records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the disclosure package due to the Crown from police, where the police misconduct is either related to the investigation or the finding of misconduct could reasonably impact on the case against the accused. Production of disciplinary records which do not fall within this scope are governed by the regime for third party production set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411.

[174] Consequently, I acknowledge that the RCMP may be required to disclose Cst. Haywood's disciplinary file, or that her criminal file may be disclosed.

[175] However, I find that the testimony of Crown Attorney [PS] (see paragraphs 151-152, supra) addresses this issue. [PS] was asked how Cst. Haywood's conviction would impact her utility as a witness in the future. He said it would not be problematic, as defence counsel would be seen ahead of time, and most defence counsel would not raise it as an issue once the background was revealed. He also stated that judges have experience with and understand the dynamics of family violence and how people react to it. While it would be something that would be addressed, [PS] did not think it would affect her credibility (Transcript, pp. 36-37). Regarding matters involving a jury, he stated, "[i]f some Defence wanted to take a run at her ... given what I know ... by the time you've finished explaining where this came from they'd probably be calling her Saint Julie" (Transcript, p. 40). [PS] also stated:

> 99 per cent of the time officers are testifying as to finding something in the sense of real evidence, it's going to be there. They're usually in tandem with another officer. All those are situations are where a court's going to have other touchstones to look at as well. ... it would be a minor problem ... readily handled. (Transcript, pp. 37-38)

[171] Clearly, the extent of *McNeil* as an aggravating factor varies and may even be minimized, depending on the evidence brought forward in the circumstances. In my view, the Board did not err in considering *McNeil* disclosure implications as an aggravating factor.

Admissibility of the opinion evidence of Insp JM

[172] The Appellant submits that Insp JM's opinion ought to have been ruled inadmissible as she was not qualified as an expert under subsection 19(1) of the *CSO (Conduct)* (Appeal, p 296), did not have knowledge of the full record before the Board, had no expertise beyond the trier of fact and because the prejudice of the opinion greatly outweighed its probative value (Appeal, pp 296-297), citing *R v Mohan*, [1994] 2 SCR 9 (*Mohan*), at para 25 (Appeal, pp 296, 734), and *R v Threefingers*, 2016 ABCA 225, at para 99 (Appeal, pp 296, 737).

[173] The Appellant argues that when the CAR asked Insp JM's opinion on the severity of the Appellant's misconduct, the MR properly objected. The Board overruled the objection, choosing to admit the evidence and then rule on its weight, having acknowledged there were concerns (Appeal, pp 295-296, 362).

[174] The Respondent submits the opinion was admissible, contending that the Board has "broad" authority to receive and accept relevant evidence, as unlike a criminal court, the Board does not serve a "gatekeeping function" restricted by the *Mohan* criteria, and may accept evidence inadmissible in Court and hear from "any witness". The Respondent relies on subsections 24.1(3), 45(2), and 46(2) of the *RCMP Act*, section 13 and subsection 24(1) of the *CSO (Conduct)*, and *Farrar v Bojan High End Kitchens Inc*, 2013 BCSC 1881, at paras 30-34 (Appeal, pp 1318, 1371-1372).

[175] I accept the Respondent's submission that under the *RCMP Act*, conduct boards, as boards of inquiry are permitted to consider evidence which otherwise may be inadmissible in Court:

> Role of conduct board

> 45(2) A conduct board has, in relation to the case before it, the powers conferred on a board of inquiry, in relation to the matter before it, by paragraphs 24.1(3)(a) to (c).
>
> Powers of board of inquiry
>
> 24.1(3) A board of inquiry has, in relation to the matter before it, power […] (c) to receive and accept on oath or by affidavit such evidence and other information as the board sees fit, whether or not such evidence or information is or would be admissible in a court of law;

[176] I agree with the ERC finding that the *Mohan* criteria, relating to an assessment of expert evidence on probative value versus prejudice, does not apply in these circumstances because Insp JM was not qualified as an expert and for that reason, it was necessary to focus on the admissibility of non expert opinion. The ERC quoted *The Law of Evidence in Canada* (2nd ed.) which delineated the conditions for acceptance of non expert opinion, stating (Report, para 84):

> Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge; (2) the witness is in a better position that the trier of fact to form the opinion; (3) the witness has the necessary experimental capacity to make the conclusion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about. But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree.

[177] Accordingly, I note that the CAR asked for Insp JM's opinion on direct examination and at that point, the information before the Board was that Insp JM was the "gatekeeper" of *McNeil* adherence for a detachment and then the division, was approached by staffing and HR with concerns in placing members with *McNeil* issues and had discussions with Crown counsels who wished to obtain *McNeil* disclosure at the onset, prior to a charge, to assess the impact on the prosecution. At that juncture, it appeared that Insp JM's non expert opinion met the requisite test, as it related to a matter which Insp JM had "personal knowledge", "was in a better position" than the Board, had "experimental capacity" and was giving the opinion "as a compendious mode of speaking".

[178] Cross examination by the MR later revealed the lack of personal knowledge and experience on the part of Insp JM, information not elucidated at the time of the objection, since the Board operates as an administrative tribunal and not a Court, and a full *voir dire* did not take place to fully assess the experience of Insp JM as a non-expert. That said, as permitted under paragraph 24.1(3)(c) of the *RCMP Act*, the Board had the authority to admit the opinion evidence of Insp JM.

Assessment of the opinion evidence of Insp JM

[179] The question remains whether the Board made an manifest and determinative error in assessing the evidence presented by the CAR to determine how the Appellant's misconduct is affected by *McNeil*.

[180] The Appellant submits that the Board misconceived and overstated Insp JM's testimony. The Appellant claims the errors influenced the outcome because the considerations relating to *McNeil* "factored heavily in its final analysis" (Appeal, p 295), "as an aggravating factor weighing in favour of dismissal" (Appeal, p 297).

[181] The Respondent submits the Board only summarized the evidence but it was not included in the decision (Appeal, p 1318):

> In paragraphs 230-32 the Board is summarizing the evidence and providing background regarding *R. v. McNeil*; these paragraphs do not form part of the Board's Decision on Conduct Measures.

[182] Further, the Respondent argues that while the Board accurately summarized Insp JM's testimony, the Board "placed little weight" on it and resulting in "no material impact" on the Board's treatment of *McNeil* considerations (Appeal, p 1318-1319).

[183] I accept that the Board set out Insp JM's evidence elicited by the CAR on direct examination, without the qualifications revealed by the MR later in cross examination (Appeal, p 638).

[184] I accept, like the ERC, that the Board misconceived Insp JM's evidence in stating that British Columbia Crowns sought earlier *McNeil* disclosure to ascertain the substantial likelihood of conviction (Appeal, p 638). The ERC noted that Insp JM testified that only one regional Crown expressed concern. The ERC held that the error was not determinative (Report, para 87). I agree.

[185] Further, I accept the Appellant's assertion that other discrepancies contained in Insp JM's testimony, revealed on cross examination (Appeal, p 295), were not expressed in the decision (Appeal, p 638), including:

- The testimony that Crown withdrew charges or refused to lay them in the first place upon learning of a police witness *McNeil* history was later qualified by Insp JM, who admitted knowing of only one instance in which this took place and there, the charges related to the same case in which the misconduct occurred (Appeal, pp 295, 368, 372, 389). I note that a charge cannot be readily sustained if there is an issue relating to police misconduct in which an accused's *Charter* rights may have been infringed, and in that regard, the *McNeil* disclosure itself was not the reason for the withdrawal of the charges.

- The testimony that many unit commanders or line officers in BC refuse to accept a member with a *McNeil* related issue, was later clarified, as Insp JM's knowledge in this regard originated from a conversation with only one commander and the conversations were generally about concerns rather than refusals of placement of members, which was a staffing issue, not in Insp JM's domain (Appeal, pp 295, 367, 370).

- The testimony that placing the Appellant would be difficult due to the severity of the misconduct, despite Insp JM admitting she was not involved in staffing (Appeal, pp 295, 384). Insp JM testified that there were members with *McNeil* issues in administrative positions and others who remain in operational positions (Appeal, p 360).

[186] However, as pointed out by the Respondent, in assessing the *McNeil* implications as an aggravating factor, the Board made no mention of Insp JM's opinion, but rather a general finding that (Appeal, p 652):

> [123] The fifth aggravating factor resides in the so-called McNeil considerations. Stated plainly, the obligation to proactively disclose a relevant disciplinary history creates a burden that would simply not exist in the absence of a disciplinary record. By definition, this is an aggravating factor.
>
> [124] The burden is borne not only by the member implicated, but by the Force and by the Crown. The severity of this aggravating factor, however, is still somewhat undecided because of the inconsistent application of the principles arising out of the McNeil decision. Some provinces seem to have a less risk-averse approach than is the case in British Columbia, and are more willing to manage the adverse fallout from placing a police witness on the stand who must account for a disciplinary history. Still, the fact remains that disclosure would not be necessary in the absence of a police disciplinary record, and the attendant problems of deployment create an administrative burden on the Force. Thus, the McNeil considerations are to be treated as an aggravating factor.

[187] I agree with the ERC (Report, para 87) that the Board did not make a manifest and determinative error in omitting to explicitly assess Insp JM's opinion. I find in not expressly detailing the discrepancies revealed on cross examination, no reviewable error resulted, as the Board did not subsequently rely on the evidence of Insp JM to determine how the *McNeil* implications relate to the Appellant (Appeal, p 652).

Comments of the Provincial Court Justice

[188] The Appellant maintains that the Board was obligated to give deference to the comment of the Provincial Court Justice that the Appellant's misconduct consisted of an isolated act since although the Court did not have the ASF, it had the same factual matrix as the Board in all material respects, with the Crown having provided the Court a detailed account of the Appellant's actions (Appeal, p 297). The Appellant argues that by making a different finding on the same facts, the Board engaged in re-litigation, undermining the integrity of the adjudicative system, citing *Toronto (City) v Canadian Union of Public Employees (CUPE) Local 79*, 2003 SCC 63 (*Toronto (City)*), at para 51 (Appeal, p 743), and the ERC (File no. 2900-11-002 (D-125), at para 76) (Appeal, p 778). According to the Appellant, "CUPE principles apply to re-litigation of findings in reasons for sentencing" (Appeal, p 297).

[189] The Respondent contends that in coming to the conclusion that the misconduct consisted of an "isolated" event, the Provincial Court Justice was not presented with the same facts as the Board and in contrast to the Board decision, the Court's "minimal reasons" reflect a "joint submission" suggesting a fine for a regulatory offence based on a "limited record" (Appeal, pp 1319-1320). The Respondent argues "the same robust inquiry" did not occur, and unlike the Board, the Provincial Court did not consider the full investigative report, the allegations in the Notice of Conduct hearing and ASF, hear *viva voce* evidence and review jurisprudence. The Respondent noted (Appeal, p 1320):

> […] in addition, the Board, was required to assess the Appellant against the higher standard of ethical behaviour expected of RCMP members.

[190] The Respondent refers to *Prettie*, 2017 RCAD 4, at para 75, in which the conduct board found it was not bound by the findings of the trial judge in the corresponding criminal matter (Appeal, p 1396).

[191] The Respondent further submits that an additional public mischief charge against the Appellant was stayed by the Crown but at the sanction hearing, the Board took into consideration the misconduct stemming from it (Appeal, p 1320). She adds that the Justice was referring to the commission of an offence as an isolated event in the Appellant's life, while the Board found that repeated occurrences of misconduct could not be characterized as isolated (Appeal, p 1320).

[192] I agree with the Respondent and note the ERC found no inconsistency in the result (Report, paras 93-94). *Toronto (City)* is distinguishable, both in facts and in reasoning. There, a city employee was convicted of sexual assault by a criminal court, after a contested trial. Subsequently, upon being dismissed by the City of Toronto, he successfully appealed his dismissal after obtaining a finding by the appellate tribunal that he never committed the crime despite the conviction (Appeal, p 739). The SCC found that by failing to defer to the finding of the criminal court re-litigation ensued, which consisted of an abuse of process, bringing the administration of justice into disrepute. The SCC concluded at para 56 (Appeal, p 744):

> I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor

> was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. […]

[193] In contrast, it is not the ultimate finding of guilt that is at issue here, but comments made by the Provincial Court Justice on sentencing based on minimal facts presented by the Crown prosecutor amounting to two and half pages on the guilty plea and sentencing proceedings transcript (Appeal, pp 1387-1390), and approximately six minutes in the audio recording (Audio, 00 minutes and 50 seconds). I note that the Appellant's counsel at those proceedings confirmed "[w]e don't dispute the facts as stated by the Crown" and went on to say that the Appellant "made an unfortunate snap decision to tell a lie" and, "[a]fterward[s], he felt trapped by that lie and he perpetuated it" (Appeal, p 1390; Audio, 08 minutes and 42 seconds). It is not lost on me that although the Appellant's counsel told the Court that he had actually perpetuated the lie, the Justice stated, "I think it is to your credit that you did not perpetuate the lie" (Material, p 1337; Audio, 17 minutes and 20 seconds).

[194] Moreover, as I previously noted, the Justice recognized that there would be repercussions no matter what his view (Appeal, 1377):

> So it is a long way of me saying I think this is an extremely isolated act. In my view it does not really, it should not derogate very much from the strong record you have as a peace officer. I think the problem you are going to face is this is an act of dishonesty as opposed to beating somebody up.

[195] Clearly, the Justice distinguished his role on sentencing for a regulatory offence from the manner in which the Force must discipline members for acts of dishonesty in the face of the higher standards expected under the *Code of Conduct* and by the public. This is also reflected by the Board's decision, in which he characterized the Appellant's misconduct on the basis of having the benefit of more fulsome details (Appeal, p 651):

> [118] There are, however, several compelling aggravating factors to consider. First, the misconduct cannot be viewed as a one-time lapse in judgement, because there are two similar contraventions involving three different institutions: the RCMP in Allegation 1, the ICBC and the office of a Notary Public in Allegation 2. This was a very harmful and destructive pattern of behaviour over a five-week period.

[196] In short, I find that the Board was not bound by the comments of the Provincial Court Justice and was permitted to make his own determination, especially given the more detailed evidence and the *Code of Conduct* considerations before him. In my view, the Board did not place the administration of justice into disrepute by way of re-litigation.

Rejection of cases presented by the MR

[197] The Appellant claims the Board made an error of law in rejecting cases involving joint sanction submissions (Appeal, p 298).

[198] The Respondent states that the Board was not bound by the decisions of other conduct boards, although parity of sanctions seeks to ensure fairness and lends predictability to conduct measures, and the Board appropriately considered the relevant provisions of the *Conduct Measures Guide* (Appeal, p 1321).

[199] As I will explain next, I find the Board acknowledged and gave due consideration to the cases presented by the MR (Appeal, pp 26-32, 643-649).

Consideration of the cases presented by the MR

[200] The Appellant submits the Board ought not to have distinguished the cases presented by the MR, noting his case is somewhat similar to a joint submission as he made concessions in the ASF (Appeal, p 297). The Appellant confirms that "all but one of the 10 cases cited by [the MR] resulted from joint submissions" (Appeal, p 297). The Appellant maintains that distinguishing the joint submission cases gives "undue power" to the Respondent and that "cases based on joint-submissions may be instructive where the decision-maker provides an analysis as to why the joint submission is suitable", "given the large number of decisions that supported discipline short of dismissal" they were informative, and cites *R v Kane*, 2012 NLCA 53, at para 29 (*Kane*) (Appeal, pp 297-298).

[201] I note that the Newfoundland and Labrador Court of Appeal (NLCA) said the following in *Kane*:

> [27] A statement that sentences based on joint submissions are, as a general rule, not of much assistance is found in *R. v. Johnston*, 2011 NLCA 56, 311 Nfld. & P.E.I.R. 129:
>
> > [58] … It is noted that sentences resulting from an accepted joint submission are considered to have little or no precedential value. …
> >
> > [59] Neither **Butler** nor **Barrett** can stand for any more than what was decided: that the joint submission did not "bring the administration of justice into disrepute" and was not "contrary to public interest". …
>
> [28] Underlying these comments is the fact that, in a sentencing decision based on a joint submission, the judge is presented with a conclusion that he or she must assess for acceptability, applying considerations related to the administration of justice and the public interest. This is a different focus from the ordinary case where the judge, with the assistance of counsel, determines a fit sentence.
>
> [29] However, this is not to say that a decision based on a joint submission is of no value for particular purposes. For example, a joint submission may be indicative of an appropriate range of sentence (*R. v. Johnson*, 2010 ABQB 546, at paragraph 28, appeal dismissed, 2010 ABCA 392, 265 C.C.C. (3d) 443, referenced in the *Johnston* decision at paragraph 58). Most often, the sentence will indicate the lower end of the range since the defendant would have no reason to accept a sentence that did not provide him with a *quid pro quo* for his agreement to forego a trial, plead guilty, and agree to a particular sentence. (See: *R. v. Druken*, 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271, at paragraph 19.) Indeed, for this reason, a joint submission may, depending on the circumstances, fall below the lower end of the ordinary range. Such a sentence would be of little assistance. Nonetheless, sentences based on a joint submission may prove useful where the trial judge has provided reasons for accepting the submission, and in so doing gives valuable guidance for future courts. (See, for example, *R. v. Bremner*, 2005 NSSC 163, 234 N.S.R. (2d) 95.)
>
> [Emphasis in original.]

[202] The Respondent argues, correctly in my view, that an ASF is not the same as a joint submission, although the ASF was a mitigating factor, which was considered, and contends the Board properly attached little weight to discipline cases based on joint submissions, highlighting the following excerpt from the decision (Appeal, p 1320):

> Joint submissions place a sanction hearing in a unique context. A decision maker is not bound by a joint submission, but must pay great deference, and can only reject it in extreme circumstances. They are frequently, if not always, the result of considerable negotiation and compromise, involving

> factor both tangible and intangible known only to the parties themselves, and not the decision maker. […]

[203] The Respondent further distinguishes the cases presented by the MR, on the basis that the members involved did not derive personal gain from their misconduct or they had the support of the appropriate officer (Appeal, p 1321).

[204] Although I accept the notion that cases involving joint submissions may be instructive when the reasons fully explain the appropriateness of the proposal, arguing that the sheer number of cases presented by the MR where the sanction imposed was less than dismissal should have been persuasive enough, without more, is not helpful. As pointed out by the NLCA, and alluded to by the Board, most often, joint submissions reflect sanctions lower than the ordinary range.

[205] Clearly, the cases presented by the MR involve lenient sanctions, short of dismissal, in response to comparable misconduct, similarly demonstrating a lack of integrity. Even so, based on my review of those cases, and the analysis by the Board, I accept that whatever informative instruction can be derived readily leads to distinguishing the instant circumstances beyond the obvious absence of a joint sanction submission. For example, the Appellant: did not have the support and confidence of the commanding officer; lied for the purpose of personal gain; did not demonstrate a longstanding, consistent laudable performance history; and did not establish a causal link between his recorded depression and anxiety, and the misconduct.

[206] I will now turn to a brief examination of the comparable cases and the distinguishing factors.

[207] In *Frechette* (2010), 4 AD 4th 264 (*Frechette*), (Materials, pp 262-268), mentioned by the Board in the decision (Appeal, p 644), the misconduct was strikingly similar. There the member's vehicle collided with the vehicle of an employee of Crown counsel, known from "past associations", in the courthouse parking lot. The member insisted for more than a year that her vehicle had been stationary when the collision occurred and blame rested on the other driver, despite video which the Crown counsel employee had obtained from the courthouse parking lot showed that the member's vehicle collided with the vehicle of the employee while the employee's vehicle was stationary. The member persisted with her false account of the incident

to ICBC, colleagues during an investigation of the collision, superiors and after a contested trial, was convicted of the same offence as the Appellant, under section 42.1(2) of the *Insurance (Vehicle) Act* of British Columbia (Material, p 265). Following the trial, an ASF was entered in the discipline proceedings with the adjudication board finding that the member behaved in a manner that brought discredit to the Force. With a joint submission on sanction, the member received a reprimand and forfeiture of 10 days pay (the maximum allowed at the time). The adjudication board there noted (at para 14) that it "seriously considered that dismissal or demotion could constitute an appropriate sanction" (Materials, p 267).

[208] Frechette was found to have a performance history described as "laudatory" (Material, p 266) and her continued employment in the RCMP was supported by the commanding officer (Material, p 267):

> [10] […] Corporal Frechette was praised for her superior performance, among which were her strong work ethics. She had an excellent work file is career driven and dedicated. […]

[209] As noted by the Board, joint submissions contain "unknowns", but in the Appellant's case, as mentioned previously, the Board did not find the Appellant's performance to be "laudatory" and the Respondent did not support his continued employment in the RCMP.

[210] The adjudication board in *Frechette* relied on *Legault* (2009), 5 AD 4th 1 (Material, p 250), not specifically mentioned by the Board, but submitted by the MR. Although most cases presented by the MR were mentioned by the Board, I am prepared to accept that all of them were considered. The SCC in *Nurses*, at para 16, noted that not every case considered must be referenced in a decision (Appeal, p 1368). The misconduct in *Legault* was serious, but distinguishing it from the present case is the causal connection found between that member's mental condition and his misconduct, established by the direct expert evidence of the treating psychiatrist (Material, p 259).

[211] In *Badeau* (2011), 7 AD 4th 202 (Appeal, p 522; Material, p 462), noted by the Board (Appeal, p 643), the member lied in an interview which was part of an internal investigation into an officer from the Ottawa Police Service (OPS). In reviewing the joint submission, the

adjudication board in *Badeau* noted there was no personal benefit to the member in perpetuating the dishonesty (Material, p 467).

[212] In *Nault* (2013), 13 AD 4th 246 (Appeal, p 523; Material, p 270), noted by the Board (Appeal, p 643), dismissal was not sought, the misconduct was not as serious, personal gain was not an issue, and the misconduct was out of character (Material, p 277).

[213] In *Simpson* (2014), 14 AD 4th 269, noted by the Board (Appeal, p 644), a joint submission was put forward suggesting a reprimand and the forfeiture of ten days pay (Material, p 313). Although personal gain was an aggravating factor, there was evidence of a causal connection between the mental state of the member, who had been in psychotherapy throughout, and his misconduct. Moreover, he had the confidence of the commanding officer and presented 17 years of consistent laudatory performance (Material, p 315).

[214] In *Cormier*, 2016 RCAD 2 (Material, pp 390-418), noted by the Board (Appeal, p 645), a member falsified an email from the Crown in order to conclude a file involving breathalyzer readings over the legal limit, but not comprising two samples of at least 100mg of alcohol in 100ml of blood necessary for charge approval, out of concern for the impaired driver's career in the transportation industry. The member was criminally convicted and received a conditional discharge. The motivation was accepted by the conduct board as an act of altruism, as opposed to personal gain. There was no joint submission and the sanction proceedings were contested. The conduct board determined that absent any motivation for self-benefit, loss of employment was disproportionate in the circumstances (Material, p 391).

[215] In *Clarke,* 2016 RCAD 3 (Materials, pp 419-460), noted by the Board (Appeal, p 645), the member had seized a cooler, containing closed containers of beer from a vehicle, after issuing a ticket, in respect to which he was required to dispose of the alcohol or file it as an exhibit. Instead, he gifted the beer to the local fire station, and made a false written statement that he had disposed of the beer. The hearing was contested on both the allegations and the conduct measures. The commanding officer sought dismissal for breach of trust in the mishandling of the exhibits. The MR in *Clarke* distinguished many of the cases presented by the CAR, as they

involved exhibits such as cocaine and other illegal substances, in which members misappropriated the items for personal gain (Material, p 448). The case stands in stark contrast to the circumstances of the Appellant, due to the lack of personal gain, and the accepted negative public and stakeholder perception of dismissal in those circumstances (Material, p 458).

[216] In *Redford* (2009), 3 AD 4th 257 (Appeal, p 529), noted by the Board (Appeal, p 644), the member voluntarily accepted a demotion and transfer, the main goal having been a chance for rehabilitation. The member had not ensured that a seized weapon had no live rounds and subsequently stained her old notebook with paint, to make it resemble blood and then started a new notebook in order to cover up her error. The misconduct would affect the pending criminal trial. Stress played a role, but the decision does not provide details of whether medical or psychological evidence was before the adjudication board (Material, p 246). The sanctions hearing proceeded on a joint submission with the support of the commanding officer, despite the facts which illustrated a degree of misconduct that the adjudication board conceded that in future the member would not receive a second chance.

[217] In *Beauchesne* (2002), 15 AD 3rd 147 (Material, pp 334-348), noted by the Board (Appeal, p 644), a senior member with 28 years of service, gave false information to another member to obtain a warrant. The resulting sanction, obtained from a joint submission consisted of a forfeiture of 10 days pay and reprimand (Material, p 346). There was no motivation for personal gain and the misconduct was an isolated incident. The adjudication board was satisfied that, "[the misconduct] seems to be more a deviation from the course, a spontaneous and momentary misconduct which does not reflect a significant character flaw" (Material, p 345).

[218] In *Pizarro v Canada (AG)*, 2010 FC 20 (*Pizarro*) (Material, p 1278), the member committed virtually the same misconduct, having made a false insurance claim for a motor vehicle accident. His actions resulted in a *Criminal Code* conviction after he pled guilty. He was dismissed by the initial adjudication board after entering into an ASF and a contested sanction hearing on the basis that there was insufficient expert evidence to make a causal connection linking his state of mind to the misconduct. The member appealed to the Commissioner, who dismissed the appeal. The member then made an application for judicial review in Federal Court.

Emphasizing the expert evidence, the Federal Court found strong evidence of a causal connection by the psychologist who had testified before the adjudication board and sent the matter back (Material, pp 1291, 1298-1299). From a joint submission, a different adjudication board (*Pizarro* (2010), 7 AD 4th 101), noted by this Board (Appeal, p 644), acknowledged the causal connection, accepted the joint sanction proposed, and ordered a forfeiture of 10 days pay in lieu of dismissal.

[219] I find *Pizarro* is distinguishable based on the expert testimony made in support of the member at the sanction hearing, where the psychologists were qualified as experts, gave detailed expert opinion which supported a causal connection to the misconduct from the member's "acting out" as a result of anxiety, and reassured the adjudication board that, having been successfully treated, a relapse leading to further misconduct would be highly unlikely (Material, pp 1255-1256).

[220] In my view, the distinguishing factors of the cases that were before the Board limit their application. It follows that the Board was justified in cautiously assessing their informative value.

The Appellant has no "criminal" conviction

[221] The Appellant submits that the Board erred in finding that he had a criminal conviction which "is an indication of the gravity of the misconduct", as the Appellant has no criminal record, having been convicted of a provincial regulatory offence (Appeal, pp 300-301).

[222] The Respondent concedes that the Board incorrectly stated that the Appellant received a criminal conviction, but the Board was aware of the elements of the misconduct as a whole and the mischaracterization "did not materially affect the Board's consideration of the Appellant's actions" (Appeal, p 1323).

[223] In his rebuttal, the Appellant disagrees with the Respondent in relation to the effect of the error. The Appellant submits the criminal conviction was noted as an aggravating factor in itself and there is no reference to the regulatory nature of the offence for which the Appellant entered a

guilty plea. According to the Appellant, the Board was unaware that the Appellant did not have a criminal conviction (Appeal p 1426).

[224] I accept the following finding of the ERC (Report, para 110):

> [110] I agree with the Appellant that the Board erred in identifying the provincial court conviction as a criminal conviction. However, in my opinion, although it was an incorrect choice of words, it is an understandable error in the circumstances that had no determinative value on the overall Board decision. First, the parties themselves used the term "criminal conviction/criminal matter" within their submissions during the conduct measures hearing (Material, pages 1523, 1551, 1558). The Appellant was charged criminally, but the charge was abandoned because the Appellant plead guilty to a regulatory offence. Second, the Appellant was in fact convicted of a penal offence under the BC Insurance (Vehicle) Act for which a term of imprisonment could have been imposed. In my view, although it is not a criminal conviction, the underlying infraction is penal in nature. And when read as a whole, the decision shows that the Board was aware of the nature of the conviction. Further, during the hearing, the Board discussed whether this regulatory offence would prevent a Criminal Code charge because it may constitute double jeopardy; showing that the Board was alive to the penal and regulatory nature of the offence (Material, page 1523).

[225] For completeness, on this latter point, here is the noted exchange (Material, pp 1522-1523) (*sic* throughout):

> [MR] Okay. Oh, well, I guess my concern is that she should – what – what she's managing to – what My Friend is – is suggesting is that my – Constable Vellani committed a Criminal Code offence and thus should be treated accordingly.
>
> But there's been no conviction on the record, and he's never saw a courtroom. There's no evidence to support that. She's applying her own meaning of the facts to the – the Code, and that's not her role.
>
> [Board] Well, okay. And my – my problem with it is that he was charged with fraud. It just isn't called that. It was a Provincial statute. Does a laying of that charge under the Provincial statute preclude proceeding under the Criminal Code?

Would it not be double jeopardy?

[226] I am therefore satisfied that the Board fully understood the nature of the conviction that resulted from the Provincial Court proceedings. As noted in *Laroche v Canada (AG)*, 2013 FC 797, at para 62, "[w]e do not live in a perfect world, and cannot expect the reasons of a decision to be perfect either."

[227] In sum, applying the clearly unreasonable standard means the Board is owed significant deference on the question of appropriate conduct measures. While the decision is not perfect, I find that the Appellant has not established that the Board made any manifest and determinative errors. The Board acted within his jurisdiction, and having heard and assessed the evidence directly, deliberated, and issued a decision, first orally, and then, nearly seven months later, in writing, that is justifiable, transparent, and intelligible. I am satisfied that the Board identified the appropriate range, considered the relevant mitigating and aggravating factors, and ordered a sanction that is not clearly unreasonable in the circumstances.

DISPOSITION

[228] Accordingly, I dismiss the appeal and confirm the conduct measures imposed by the Board.

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

Steven Dunn Date

Adjudicator