Protected A

ACMT File Number: 2015-33821

Citation: 2016 RCAD 3

IN THE CONDUCT MATTER PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer, "K" Division

Conduct Authority

- and -

Constable Charles Clarke, Regimental Number 55134

Subject Member

Conduct Board Decision

Inspector James Robert Knopp, Conduct Board

June 6, 2016

Staff Sergeant Jonathon Hart, Conduct Authority Representative

Ms. Nicole Jedlinski and Staff Sergeant Colin Miller, Member Representative

Table of Contents

Summary

The Subject Member faced five allegations arising from an incident where he seized goods after issuing a ticket for unlawful possession of alcohol. He then created a misleading entry in the Police Report Occurrence System and wrote an email falsely stating the goods had been disposed of locally. The conduct measures imposed in this case amounted to a reprimand plus the forfeiture of thirty-five days' pay.

Introduction

[1] A Notice of Conduct Hearing (the "Notice") pursuant to Part IV of the *RCMP Act* was served upon the Subject Member July 26, 2015. The Notice, issued on July 16, 2015, by the Commanding Officer and Conduct Authority for "K" Division, contained five allegations. A hearing was held in Calgary, Alberta from April 12 to 14, 2016, inclusive, at which time all five allegations were established. The decision on the conduct measures was reserved, but a brief synopsis of the decision was released to the parties on April 18, 2016. This is the complete decision, including conduct measures.

Allegations

[2] Following a Code of Conduct investigation, the Subject Member faced five allegations. On October 19, 2015, the Member Representative (the "M.R.") filed the Subject Member's response (italicized) to the allegations. The allegations and the Subject Member's response to each particular are as follows:

> **Allegation 1**
>
> On or between the 17th day of July and the 25th day of July, 2014, at or near Blairmore, in the province of Alberta, [the Subject Member] 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 [Allegation 1]**
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to Crowsnest Pass Detachment, "K" Division, in the province of Alberta.
>
> *Admit.*
>
> 2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Mr. A] and issued several violation tickets to [Mr. A].
>
> *Admit.*
>
> 3. You seized a cooler and its contents from the vehicle associated with [Mr. A]. The cooler contained several items including numerous full bottles of beer.

a) [The Subject Member] did take possession of the cooler and its contents but did not "seize" it, as it was not taken with the intention of being used as evidence.

b) The cooler did contain several items including numerous full bottles of beer (to wit: Coronas).

4. You put the cooler in your police vehicle and drove back to the RCMP Crowsnest Pass Detachment and left the cooler and its contents in the Detachment's storage room.

Admit.

5. On July 23rd, 2014, you put the cooler in [Mr. B]'s truck. You advised that [Mr. B] could keep the contents but that the cooler must be returned.

Deny.

a) [The Subject Member] did not place the cooler in the back of [Mr. B]'s truck

b) [The Subject Member] believes [Mr. B] is a firefighter, but does not personally know who [Mr. B] is.

c) [Mr. C] placed the cooler in the back of a white pickup truck.

d) [The Subject Member] did not know who the white pickup truck belonged to at that time.

e) [The Subject Member] did not tell [Mr. B] that he could keep the contents but that the cooler must be returned. [The Subject Member] told [Mr. C] that the cooler had to be returned.

f) An unknown firefighter spoke to [the Subject Member] and asked if the cooler was for them, to which [the Subject Member] responded that it was for disposal.

g) The unknown firefighter may have been [Mr. B], and if so, that was the only conversation that they had.

6. On July 25th, 2014, you added an exhibit tag to the cooler and returned it to a secure storage area.

Admit.

7. You did not secure and safeguard the cooler and its contents into a suitable secure storage area as soon as practicable, contrary to *OM –ch. 22.1 Processing*, section 3.1.1.5.

a) [The Subject Member] admits he did not take the action as stated in the particular; however, he did not take possession of the liquor as an exhibit, but for disposal.

b) The reason he did not dispose of the liquor at the scene, which was standard practice, was because he needed a bottle opener to open the beer.

8. You did not enter and track the cooler and its contents in the Record management system, contrary to *OM ch. 22.1 Processing*, section 3.1.1.6.

a) [The Subject Member] admits he did not take the action as stated in the particular; however, he did not take possession of the liquor as an exhibit, but for disposal.

b) The reason he did not dispose of the liquor at the scene, which was standard practice, was because he needed a bottle opener to open the beer.

9. You did not hold the liquor seized for a period of 30 days, contrary to *K Division Operational Manual-V9. Gaming and Liquor Act*, section 2.4.1.

a) [The Subject Member] admits he did not take the action as stated in the particular; however, he did not take possession of the liquor as an exhibit, but for disposal.

b) The reason he did not dispose of the liquor at the scene, which was standard practice, was because he needed a bottle opener to open the beer.

10. You did not dispose of the cooler and its contents in conformity with *K Division Operational Manual-V 9. Gaming and Liquor Act*, section 2.5.

a) [The Subject Member] admits he did not take the action as stated in the particular; however, he did not take possession of the liquor as an exhibit, but for disposal.

b) The reason he did not dispose of the liquor at the scene, which was standard practice, was because he needed a bottle opener to open the beer.

Allegation 2

On or about the 23rd day of July, 2014, at or near Blairmore, in the province of Alberta, [the Subject Member] 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 [Allegation 2]

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to Crowsnest Pass Detachment, "K" Division, in the province of Alberta.

Admit.

2. During the night of July 16th, 2014, to July 17th, 2014, you arrested [Mr. A] seized a cooler and its contents from the vehicle associated with [Mr. A]. The cooler contained several items including numerous full beer bottles.

a) During the night of July 16th, 2014 to July 17th, 2014, [the Subject Member] did take possession of the cooler and its contents, but did not "seize" it, as it was not taken with the intention of being used as evidence.

b) The cooler did contain several items including numerous full bottles of beer (to wit: Coronas).

3. On July 23rd, 2014, you authored a supplementary report on PROS, in which you wrote that the alcohol seized from [Mr. A] had been disposed of and that the cooler seized was "still in the garage".

a) On July 23rd, 2014, [the Subject Member] did author a supplemental entry to his general report in which he wrote "alcohol was disposed and cooler is still in garage".

b) [The Subject Member] wrote this entry before he took his course of action. His intent was to dispose of the alcohol after making the entry and was on his way to take that action when he noticed the firefighters training exercise across from the detachment and elected to give it to them as opposed to dumping the alcohol at the detachment.

c) [The Subject Member] intended to return the cooler to the garage once he dumped the alcohol.

4. Your PROS supplemental report contained misleading and/or false information.

a) [The Subject Member] did not intend for his report to be misleading or false, it was written in advance of his proposed action.

Allegation 3

On or about the 25th day of July, 2014, at or near Blairmore, in the province of Alberta, [the Subject Member] 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 [Allegation 3]

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to Crowsnest Pass Detachment, "K" Division, in the province of Alberta.

Admit.

2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Mr. A] and seized a cooler and its contents from the vehicle associated to [Mr. A]. The cooler contained several items including numerous full beer bottles.

a) During the night of July 16th, 2014 to July 17th, 2014, [the Subject Member] did take possession of the cooler and its contents, but did not "seize" it, as it was not taken with the intention of being used as evidence.

b) The cooler did contain several items including numerous full bottles of beer (to wit: Coronas)

3. On July 25th, 2014, you authored and sent an email to your supervisor, Cpl. Kevin McKenna in which you stated that "no one claimed ownership of the alcohol and it was dumped".

Admit.

4. Your email to Cpl. Kevin McKenna contained misleading and/or false information.

a) [The Subject Member] wrote his email relying on the information that had been provided to him by [Mr. C]. [Mr. C] had indicated that he had dumped the alcohol in the back of the fire station and washed it down with the fire hoses.

b) [The Subject Member] did not intend to mislead anyone and/or provide false information.

Allegation 4

On or between the 17th day of July and the 25th day of July, 2014, at or near Blairmore, in the province of Alberta, [the Subject Member] 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 [Allegation 4]

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to Crowsnest Pass Detachment, "K" Division, in the province of Alberta.

Admit.

2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Mr. A] and seized a cooler and its contents from the vehicle associated with [Mr. A]. The cooler contained several items including numerous full beer bottles.

a) During the night of July 16th, 2014 to July 17th, 2014, [the Subject Member] did take possession of the cooler and its contents, but did not

"seize" it, as it was not taken with the intention of being used as evidence.

b) The cooler did contain several items including numerous full bottles of beer (to wit: Coronas).

3. On July 23rd, 2014, you asked [location] Fire Chief [Mr. C] if "the guys" would dispose of the contents of the cooler or something to that effect.

Deny.

a) [The Subject Member] told fire chief [Mr. C] that he had something for him to dispose of and gave him the cooler.

4. On July 23rd, 2014, you put the cooler into [Mr. B]'s truck. You advised that [Mr. B] could keep the contents but that the cooler must be returned.

Deny.

a) [The Subject Member] did not place the cooler in the back of [Mr. B]'s truck.

b) [The Subject Member] believes [Mr. B] is a firefighter, but does not personally know who [Mr. B] is.

c) [Mr. C] placed the cooler in the back of a white pickup truck.

d) [The Subject Member] did not know who the white pickup truck belonged to at that time.

e) [The Subject Member] did not tell [Mr. B] that he could keep the contents but that the cooler must be returned. [The Subject Member] told [Mr. C] that the cooler had to be returned.

f) An unknown firefighter spoke to [the Subject Member] and asked if the cooler was for them, to which [the Subject Member] responded that it was for disposal.

g) The unknown firefighter may have been [Mr. B], and if so, that was the only conversation that they had.

5. You unlawfully gave away exhibits.

a) [The Subject Member admits that he did improperly give away property.

b) However, he did not take possession of the alcohol as an exhibit, but for disposal.

c) The reason he did not dispose of the liquor at the scene was because he needed a bottle opener to open the beer.

Allegation 5

On or between the 23rd day of July and the 25th day of July, 2014, at or near Blairmore in the province of Alberta, [the Subject Member] 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 [Allegation 5]

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to Crowsnest Pass Detachment, "K" Division, in the province of Alberta.

Admit.

2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Mr. A] and seized a cooler and its contents from the vehicle associated to [Mr. A]. The cooler contained several items including numerous full beer bottles.

a) During the night of July 16th, 2014 to July 17th, 2014, [the Subject Member] did take possession of the cooler and its contents, but did not "seize" it, as it was not taken with the intention of being used as evidence.

b) The cooler did contain several items including numerous full bottles of beer (to wit: Coronas).

3. On July 23rd, 2014, you asked [location] Fire Chief [Mr. C] if "the guys" would dispose of the contents of the cooler or something to that effect.

Deny.

a) [The Subject Member] told [Mr. C] that he had something for him to dispose of and gave him the cooler of beer.

4. On July 23rd, 2014, you put the cooler into [Mr. B]'s truck. You advised that [Mr. B] could keep the contents but that the cooler must be returned.

Deny.

a) [The Subject Member] did not place the cooler in the back of [Mr. B]'s truck.

b) [The Subject Member] believes [Mr. B] is a firefighter, but does not personally know who [Mr. B] is.

c) [Mr. C] placed the cooler in the back of a white pickup truck.

d) [The Subject Member] did not know who the white pickup truck belonged to at that time.

e) [The Subject Member] did not tell [Mr. B] that he could keep the contents but that the cooler must be returned. [The Subject Member] told [Mr. C] that the cooler had to be returned.

f) An unknown firefighter spoke to [the Subject Member] and asked if the cooler was for them, to which [the Subject Member] responded that it was for disposal.

g) The unknown firefighter may have been [Mr. B], and if so, that was the only conversation that they had.

5. On July 25th, 2014, you told [Mr. C] to provide false information pertaining to the disposal of the alcohol contained in the cooler that was provided to [Mr. B].

Deny.

a) [The Subject Member] did speak to [Mr. C] on or about July 25, 2014, to ascertain the location of the cooler and to advise him that Cpl. McKenna may want to speak with him.

b) [The Subject Member] did not give [Mr. C] any instruction, nor did he suggest that [Mr. C] provide false information pertaining to the disposal of the alcohol.

c) Without prompting, [Mr. C] stated that if anyone asks, he is going to tell them that he dumped the alcohol behind the fire hall and washed it down with the fire hoses.

d) Further, [Mr. C] told [the Subject Member] that he would say that he put the bottles in the recycling.

[*sic* throughout]

[3] The Subject Member provided a statement in advance of the contested hearing, signed and dated October 19, 2015. The statement is reproduced, below:

Statement of [the Subject Member]

• On July 16, 2014, I was on duty in full uniform at the Crowsnest Pass Detachment.

• A 911 call was received by telecoms advising that a pickup truck had gone into the ditch and there were two males walking around it.

• I attended the scene along with Cst. Kelly Willett.

• The occupants of the vehicle had fled into the bush by the time of police arrival.

• I located an unopened bottle of beer in the cab and a cooler of beer in the bed of the truck.

• I used thermal imaging lenses to locate two youths.

• One of the males admitted to operating the truck, which belonged to his grandfather.

• Neither youth appeared to have consumed alcohol.

• I called the parents of the youth who admitted to driving, while the other youth was driven home by Cst. Kelly Willett.

• The driver's parents attended the scene.

• I made inquiries with the youths and the parents and no one took ownership of the cooler.

• The truck was parked in a neighbouring driveway, as it did not have proper documentation.

• I removed the cooler from the truck with the parents' consent, and with the assistance of Cst. Willett placed it in the back of my police vehicle.

• I would have dumped the beer out at the scene, which was my standard practice and standard practice for the detachment, but because the beer was Corona, I needed a bottle opener, which I did not have.

• I issued multiple provincial violation tickets to the driver of the truck and explained the issuance of the tickets to his parents.

• Upon returning to the detachment, I placed the cooler in the garage.

• I did not look at the beer/cooler as an exhibit, as it was not evidence of an offence.

• I left the cooler in the garage pending disposal, as I was too busy for the rest of the night to deal with it.

• I then went on my regular days off.

• Prior to disposing of it, [Ms. D.] mentioned that I should get rid of the cooler, due to an upcoming review.

• On July 23, 2014, I intended to dispose of the beer at the detachment and wrote a supplemental entry documenting my intended actions. I then went outside and noticed that the firefighters were training across the street at the fire department.

• I saw [Mr. C] and asked him to come over to the detachment with me.

• I took the cooler out of the garage and told [Mr. C] that I had something for him to dispose of.

• When I asked [Mr. C] to dispose of the beer, I suspected that it may be consumed, but did not give any specific instructions on its disposal.

• I brought the cooler across the street to the fire department.

• An unknown firefighter asked me if the cooler was for them, to which I replied, "no, that's for disposal".

• [Mr. C] put the cooler in the back of a white pickup truck.

• I did not know who owned the white pickup truck.

• That was the last I saw of the alcohol.

• A day or two later I learned from Cst. Willett that Cpl. Kevin McKenna was looking into the cooler/alcohol.

• On July 25, 2014, I called [Mr. C] to ask where the cooler was and give him a "heads up" that Cpl. McKenna may come see him about the cooler.

• [Mr. C] told me that if anyone asks, he is going to tell them that he dumped the alcohol behind the fire hall and washed it down with the fire hoses.

• I told [Mr. C] that I did not know what he did with the beer after I gave it to him.

• [Mr. C] also told me that he would say that he put the bottles in the recycling.

• I did not give [Mr. C] any instruction to, nor did I suggest that [Mr. C] lie for me.

• [Mr. C] told me that the cooler was at the fire hall and provided the code to enter the building.

• I went over to the fire hall, retrieved the empty cooler and put it back in the garage.

• Cpl. McKenna gave me verbal instruction to tag the cooler and put it into evidence.

• I feel responsible for putting [Mr. C] in an awkward position and regret it.

• [Mr. C] and I were good friends.

• I take responsibility for disposing of the alcohol inappropriately.

• My recollection is that the reference to no case seizures at the unit meeting which occurred on June 11, 2014, was in relation to drugs.

• I do not recall ever making a no case seizure for alcohol during my career.

Preliminary Ruling on Exhibits

[4] Prior to the hearing I requested written submissions on two issues:

1. Whether or not the beer cooler and the beer were exhibits, as alleged in Allegation 4, within the meaning of the RCMP policy in effect at the time, and

2. Whether or not the use of the word *seized*, which appears in all five allegations, implies that the items in question were, in fact, exhibits within the meaning of the RCMP policy in effect at the time.

[5] The Conduct Authority Representative (the "CAR") cited the operations manual, chapter 22.1, which defines *exhibit* as, "[…] any property seized by a member in the course of an investigation which may have evidentiary value". The Subject Member issued a violation ticket because the youth in question was in possession of liquor, contrary to the applicable provincial statute. The cooler and bottles of beer had evidentiary value to support such a charge. Therefore, they must be considered exhibits within the meaning of policy and the law.

[6] With respect to the word *seized*, the CAR made reference to the *Oxford English Dictionary* definition, in the context "(Of the police or another authority) take possession of (something) by warrant or legal right […]". She added the operations manual uses the word *seize* to describe both exhibits and non-exhibits, such as found property. The use of the verb *seize*, therefore, does not necessarily imply that the item seized is necessarily an exhibit.

[7] The MR agreed that the use of the word *seize* does not imply that the items in question are exhibits. With respect to whether or not the beer and the cooler were exhibits, the MR argued that although these items were property, they were not exhibits.

[8] The MR conceded that at first glance, it may appear that the beer and the cooler were obtained in relation to an investigation, but that distinction can be made on the basis of possession and ownership. Neither youth had actual ownership of the cooler or liquor contained therein, and the Subject Member "took control of the cooler and its contents as found property, as no one at the scene of the incident had any colour of right to them". The issuance of the violation ticket did not establish ownership of the property, and hence, notwithstanding that the youth was in possession of the liquor, it can still be considered found property. The Subject Member took possession of the cooler and beer as found property, since the youths could not lawfully be in possession of the alcohol and to leave it with them would permit continuation of an offence.

[9] Based on the research and the pleadings of the two representatives, I agree that on its own, the use of the word *seize* in the allegations does not automatically imply that the items in question are exhibits. This verb is used only to describe the Subject Member's taking possession of the objects in question.

[10] More important is whether or not the beer and cooler can be considered exhibits. I do not accept the distinction drawn by the MR; the ownership of the items is a moot point and of no consequence. The issuance of a violation ticket on the basis of the youth being in possession of the beer and the cooler it was contained in, however, is determinative. If the recipient of the violation ticket were to enter a not guilty plea to the charge, what better item to enter into evidence to prove the charge than the beer and the cooler seized at the scene of the offence? The items in question had evidentiary value. On November 27, 2015, I advised the parties of my findings, namely, that the items in question were, in fact, exhibits within the meaning of RCMP policy in effect at the time.

Witness Testimony

Sergeant Kevin Wayne McKenna

[11] The first witness to testify was Sergeant Kevin Wayne McKenna. He was the Subject Member's supervisor throughout the period in question. A corporal at the time, he was the only non-commissioned officer, and thus the acting detachment commander at Crowsnest Pass, in charge of seven constables.

[12] Sergeant McKenna testified to a detachment meeting held June 11, 2014 at which the Subject Member was present. The minutes of the meeting contain items which reflect this witness's ongoing concern over exhibits and documentation, especially in light of an upcoming audit and are as follows:

> • Managerial review happening in August. Make sure your pre-assigned duties are in order and documentation in place.
>
> • No case seizures MUST be recorded in exhibits on PROS. ANYTHING seized must be recorded and become an exhibit.

> • If you have an exhibit task other than drugs or firearms, deal with it. Report to a Justice MUST be done on all seized items.

[13] Sergeant McKenna explained that a no-case seizure is typically a drug seizure that is not going to be prosecuted. The reason they are recorded and documented is to keep control and continuity. He also related how, at the time, members at this detachment were frequently not filling out the Report to a Justice form pertaining to items they had seized. This form, once completed, is taken to the court, which may permit the destruction of the exhibit, order a 90-day hold, order a return of the item(s) to the owner, or any other disposition.

[14] On July 22, 2014, in preparation for the upcoming managerial review, Sergeant McKenna and two detachment employees, Ms. D and Ms. E, were clearing out a cold storage room in the back of the detachment garage. This is a storage area for crime prevention materials, some stationary storage and other items, and is not used for exhibit storage. They noticed a blue and white Coleman cooler, containing a red plastic cup and a number of bottles of Corona beer, perhaps twenty four of them. There were no tags or other markings to identify it as an exhibit. They left it there and continued to clean the storage area.

[15] On July 25, 2014, Sergeant McKenna went back to the cold room and noticed the blue cooler was no longer there. He suspected it must have been an exhibit, so he went to the exhibit room but did not see it there, either. That morning he sent a blanket email message to every detachment member about the cooler, asking whose exhibit it was, where it was now, and whether or not charges had been laid in connection with it.

[16] Sergeant McKenna was at home on the evening of July 25, 2014, when he received two cell-phone calls. He did not answer as he was out mowing the lawn, but he saw on the call display that they were from the Subject Member, who was on duty that evening. He did not call him back since he noticed the Subject Member had called from his personal phone and not the office.

[17] Sergeant McKenna was back in the office on Sunday, July 27, 2014, and he saw the cooler back in the cold storage room again, this time with an exhibit tag attached, but now the

cooler was empty. The tag carried the Subject Member's name and regimental number as well as the police reporting and occurrence system ("PROS") file number, 2014-863145.

[18] He then spoke to detachment employee Ms. E, who told him about a conversation she had with the Subject Member. She told Sergeant McKenna how the Subject Member had read the blanket email about the cooler and then made a telephone call, after which he told her "Fire had the cooler".

[19] On July 28, 2014, a Monday morning, Sergeant McKenna returned to work and found two email messages from the Subject Member, written in reply to Sergeant McKenna's earlier email. The first, written on Friday, July 25, 2014 at 6:23 p.m. , stated:

> Cpl McKenna
>
> This was my exhibit.
>
> It was removed from the possession of minors for destruction. No one claimed ownership of the alcohol and it was dumped. I have returned the cooler to the garage in case someone come looking for it.
>
> File 2014-863145
>
> If no one claims the cooler in 90 days I will destroy it.
>
> Sorry for the confusion, but [Ms. D] was asking for it to be moved (I am guessing it has to do with the review coming up).
>
> [*sic* throughout]

[20] The second email was sent an hour later, at 7:23 p.m. and stated:

> I added a tag to the cooler and returned it to the cold room. If there is somewhere else you rather it go please let me know. And yes there was a minor in possession ticket issued.
>
> Thanks

[21] On the afternoon of July 28, 2014, Sergeant McKenna called the district advisory non-commissioned officer, Staff Sergeant Haley, to discuss the Subject Member's treatment of the exhibit. Staff Sergeant Haley told him to get more details, and find out exactly where the cooler went.

[22] The only conversation Sergeant McKenna ever had with the Subject Member about these exhibits occurred at the detachment on the morning of July 29, 2014. The Subject Member stopped by Sergeant McKenna's office door to ask if he received his messages of July 25, 2014. Sergeant McKenna testified to not wanting to discuss the matter with the Subject Member, because the district was going to commence a code of conduct investigation on the matter. The conversation was brief. He asked the Subject Member whose cooler it was. He told the Subject Member this was not how to deal with exhibits, since two members should oversee destruction.

[23] On July 31, 2014, Staff Sergeant McKenna spoke to Constable Willett, who had assisted the Subject Member the night the exhibits were seized. Constable Willett told Sergeant McKenna he had read the blanket July 25, 2014 email message to all detachment members. Constable Willett told Sergeant McKenna the Subject Member took the cooler from the scene in his police vehicle, but from that point on Constable Willett did not know where the cooler went or what happened to it.

[24] On August 1, 2014, Mr. C, the Chief of the fire department, was in the detachment office dealing with a fire related investigation. Sergeant McKenna waited until after Mr. C's meeting to speak to him about the cooler. Mr. C knew exactly what Sergeant McKenna was talking about. He said the Subject Member brought the beer across the street to the fire hall to dump it, because he didn't want the smell of beer in the office. Sergeant McKenna pressed him on this, and soon Mr. C broke down and said "I can't lie to you". Mr. C told Sergeant McKenna how the Subject Member gave the exhibits to the fire fighters as a present on July 23, 2014, right after they had their weekly fire practice. Mr. C told Sergeant McKenna the Subject Member had told him "if anybody asks tell them it was dumped at the fire hall". Sergeant McKenna asked Mr. C to write out a statement for him. Mr. C left the detachment, went across the street to the fire hall, and returned two hours later with a typed statement.

[25] Sergeant McKenna testified to the normal process for dealing with liquor exhibits. When seized on the street, the officer can exercise his discretion to dump the liquor out in front of the person being charged, and put the empties in the trunk or cooler. Thus, he testified, the process is open and transparent, and the term used for disposal of the liquor under these circumstances is

that it was destroyed locally. If, on the other hand, the officer brings it back to the office, then it would have to be processed and secured as an exhibit.

[26] Sergeant McKenna had previously identified several performance issues concerning the Subject Member, particularly issues with completing his documentation on PROS in a timely manner.

[27] Sergeant McKenna noted performance deficiencies in the Subject Member's April , 2014 performance evaluation, for the 2013/2014 reporting period and wrote:

> Supervisor's comments
>
> • [The Subject Member] needs to concentrate on his documentation and submissions in PROS in a more detailed/timely manner. [The Subject Member] needs to work on accepting guidance as part of a learning process.
>
> People Skills Group
>
> • [The Subject Member] at times expresses himself to both his peers and supervisors in a challenging manner, and takes some guidance personally rather then as a guidance and a learning tool.
>
> Ability to Prepare and Present Testimony in Court
>
> • […] packages at times are not completed in a timely manner, which has created some problems for the Crown. This has been discussed and improvement has been noted.
>
> Ability to Conduct Investigations
>
> • Has basic knowledge on how to conduct investigations, and has been given guidance on occasions. He is very good at being a first responder and does not hesitate to be the first on scene at calls for service, however, the follow up and documentation on files is often lacking. [The Subject Member] needs to recognize the importance of timely reports and the need to concentrate on his documentation and submissions in PROS in a more detailed/timely manner. [The Subject Member] is working to improve this.
>
> Performance Narrative
>
> • [The Subject Member] needs to focus and improve on his documentation and submissions in PROS in a more detailed/timely manner. Improvement in this area is anticipated. [The Subject Member] needs to work on accepting guidance as part of a learning process.
>
> [*sic* throughout]

[28] Sergeant McKenna's evaluation of the Subject Member's performance over the 2014/2015 period contained similar commentary. At mid-year review, under the heading "Supervisor's Comments", Sergeant McKenna wrote:

> [The Subject Member] needs to concentrate on his documentation and submissions in PROS in a more detailed/timely manner. [The Subject Member] needs to work on accepting guidance as part of a learning process as he often takes it personally rather then (*sic*) a learning tool.

[29] Sergeant McKenna acknowledged he and the Subject Member do not communicate well. On page 111 of his handwritten notes, Sergeant McKenna wrote, "advise of history with [the Subject Member] on his feelings I was harassing him". Sergeant McKenna testified that he did not believe he was harassing the Subject Member. He felt the Subject Member had performance issues that needed attention. Any guidance or supervision resulted in what he described as "push-back" and arguments frequently resulted, as it seemed the Subject Member was challenging Sergeant McKenna's authority. This state of affairs created a great deal of friction between the two of them.

Mr. C

[30] At the outset of his testimony, Mr. C described the Subject Member as one of his best friends at the time. They got together frequently, both on duty and in their off-hours, and went on family outings together. Their friendship made having to testify at these proceedings very difficult for him.

[31] July 23, 2014 was a Wednesday night, and the members of Crowsnest Pass fire department were doing their weekly training exercise. On this evening, they were playing floor hockey in their self-contained breathing apparatus. Mr. C saw the Subject Member in his duty uniform over by the door of the fire hall and Mr. C went over to him. The Subject Member said, "hey come on, I got a present for you", and he took Mr. C across the street, into the detachment garage, where they went over to a cold room off the garage.

[32] On the cold room floor was a cooler, and the Subject Member said "open that" but Mr. C did not want to, because of the way the two of them tended to joke around. He thought there

might be a dead rodent or something in there. The Subject Member opened the cooler, and there were bottles of beer inside, an empty red cup, and some other items. He said, "Do you have people who could dispose of that for us?" Mr. C replied, "I am sure the guys would get rid of it for him." The Subject Member proceeded to tell him how he had confiscated the beer from minors, who took off into the woods when they saw him coming. Mr. C asked the Subject Member, "is this O.K?" to which he replied they would just be disposing of it anyway", but he said he needed the cooler returned, so it could go back into the evidence room.

[33] Mr. C told the Subject Member he did not want the beer in the fire hall, because he had been obliged to ban liquor from the fire hall owing to unfortunate incidents in the past. One of the fire captains, Mr. B, had his pickup truck parked nearby, so Mr. C described how the Subject Member carried it over, Mr. C lowered the tailgate, and the Subject Member slid the cooler into the bed of the pickup.

[34] Mr. C insisted it was the Subject Member, not he, who carried the cooler of beer and placed it in the back of Mr. B's truck.

[35] Soon afterward, there was a lightning storm and power outage, involving several lightning strikes on the ski hill which required the attendance of the fire department. Mr. C testified to the cooler of beer going home with fire captain Mr. B, who must have brought the cooler back to the fire hall the next day, because it was in the front of the fire hall when Mr. C had someone check for it a couple of days later.

[36] Mr. C testified to not giving the matter a second thought until Friday evening, July 25, 2014, when he was at the Calgary Zoo with his family, and his phone rang. He missed the call but saw from the call display that it was from the Subject Member. Mr. C called him back at 6:06 p.m. The Subject Member asked if the cooler was at the fire station, because the detachment corporal was looking for it. The Subject Member said, "Look, if anybody asks, just say we dumped the beer at the station." Mr. C asked, "Well, what should I say I did with the bottles?" Mr. C asked this question because he knew the bottles of beer had all been taken to the fire captain's residence. The Subject Member replied, "Just say we threw them in the dumpster." Mr.

C testified to wondering at this point what was going on, and feeling uneasy about it. He then called the fire station to confirm the whereabouts of the cooler and gave the Subject Member the four-digit code to retrieve it.

[37] Mr. C insisted it was the Subject Member who suggested, in this telephone conversation, that in the event anyone should ask, Mr. C was to say the beer had been dumped at the fire hall. He insisted he was not the one to raise this suggestion, it was the Subject Member.

[38] On August 1, 2014, Mr. C happened to be at the detachment on a fire related investigation, and he saw Sergeant McKenna, who asked about the cooler and the beer, and what happened to it. Mr. C testified to trying to make up a story to cover for his friend. He had not talked to the Subject Member since the phone call at the Calgary Zoo, so he had no plan in place. He simply said to Sergeant McKenna that he and the Subject Member had dumped the beer at the fire station, down the drain. Sergeant McKenna asked him what they did with the bottles, and he said he put them in the dumpster. Sergeant McKenna responded that he did not see them there.

[39] At this point in their conversation, Mr. C knew from the way Sergeant McKenna was looking at him that he was not buying the story, so Mr. C said, “Look, I can’t lie to you”, and told him the truth about what had happened with the beer and the cooler.

[40] The witness then testified that Sergeant McKenna said it was a good thing he told the truth because he could have put him in handcuffs and charged him with obstruction of justice. The witness did not perceive this as a threat, only as an indication of how serious the matter was.

[41] Sergeant McKenna told Mr. C to have no contact with the Subject Member because he did not know which way the investigation was going to go. Mr. C found this very difficult because he and the Subject Member were best friends.

[42] At Sergeant McKenna’s request, Mr. C went back to the fire station and typed a two-page statement, which he hand-delivered to him two hours later.

[43] As a result of this incident, there has been no friction or animosity between the fire department and the local detachment.

The Subject Member

[44] The Subject Member has nine years of service in RCMP, beginning with general duties in Drayton Valley, and from there to general duties in Crowsnest Pass.

[45] On the evenings of July 16 and 17, 2014, the Subject Member responded to a 911 call about a couple of youths trying to push a truck out of a ditch. When he arrived at the location, the youths were gone. The Subject Member saw a bottle of Corona inside the truck and a blue cooler in the bed of the truck. He sent Constable Willett back for the thermal imaging lenses, with which he was able to locate the youths in a nearby wooded area. The Subject Member dealt with the driver, a young person by the name of Mr. A, and called the driver's parents to attend the scene. Constable Willett drove the passenger home. He issued Mr. A a number of provincial violation tickets, including violation ticket for a contravention of section 87(1) of the *Gaming and Liquor Act* of Alberta.

[46] The Subject Member asked Mr. A and his parents about the beer and the cooler, and no one had any knowledge as to who owned it. Normally he would have dumped at roadside, but Corona beer does not have a twist-off cap, and he had no bottle opener with him, so he took the beer and the cooler back to the detachment for disposal.

[47] The Subject Member testified to the normal practice amongst detachment members in a situation like this, which would have been to dump the beer out at the side of the road, at the scene. On occasion the beer would be brought back to the detachment and it would be dumped there.

[48] When the Subject Member returned to the detachment, he put the cooler in a storage room off the garage. He did not process them as exhibits, because they were not for evidentiary purposes. At 3:30 a.m., that morning before going off-shift at 4 a.m., the Subject Member wrote

the events of the evening in a PROS report. Concerning the beer and the cooler, the Subject Member wrote:

> When asked why they fled into the bush [Mr. A] indicated he has seen a police vehicle go by and he was afraid of being pulled over as he was a GDL learner and did not have permission to take his grandfather truck. The alcohol in the back of the truck was said to have been taken from the grandfathers shop. It has been placed in the east garage and can be returned to the grandfather if requested. In cooler.
>
> [*sic* throughout]

[49] The Subject Member did not tend to the beer cooler that night, and went on leave for a couple of days after that shift. When he returned to work, Ms. D, one of the detachment clerks, asked him to remove it because of the managerial review coming up.

[50] On Wednesday, July 23, 2014, shortly after commencing his evening shift, the Subject Member intended to dump the beer out at the detachment. Before doing so, he added the following to his PROS report:

> [Mr. A] did not take ownership of the alcohol. Alcohol was disposed and cooler is still in the garage.

[51] The Subject Member then went to dispose of the beer, and on his way, he saw Mr. C and went across the street to talk to him. The fire fighters were doing their weekly training. The Subject Member said to Mr. C, "Come on over, I want to show you something", and took him into the cold room, showed him the cooler of beer, and said, "I have something to dispose of, can you dispose of that for me?" He told him it had been in a truck, and no one claimed ownership of it.

[52] The Subject Member testified to his motivation for giving the beer to Mr. C. He meant it to be a gesture of goodwill, to strengthen the bond between their organizations. He expected the beer was going to be consumed.

[53] The cooler had wheels and the Subject Member towed it across the road. Mr. C picked it up and put it in the back of a white truck, because he did not want it in the fire hall as there have

been incidents in the past, and alcohol had been banned from the fire hall. At that point there was a lightning strike and a power outage.

[54] The Subject Member did not modify his PROS report and claims he was busy and side-tracked.

[55] The Subject Member was working the same 6 p.m. to 4 a.m. shift on Friday, July 25, 2014, when he learned from Constable Willett upon arrival at the office that Sergeant McKenna was "on the warpath", and had issued an email to the whole detachment about the cooler. After he read the email, he attempted to contact Sergeant McKenna on his cell phone, twice, to discuss this file. Sergeant McKenna did not answer the calls.

[56] After giving the cooler to Mr. C, the only conversation the Subject Member had with him was on the phone. The Subject Member called Mr. C and asked him where the cooler was, and told him Sergeant McKenna was going to come and talk to him about how the alcohol was disposed of. Mr. C told the Subject Member the cooler was in the fire hall, and provided the four digit security code. Mr. C told the Subject Member that if anyone asked, he would say he had dumped it and washed it down drain with a fire hose. The Subject Member went across the street and retrieved the cooler.

[57] The Subject Member insisted that he never asked Mr. C to lie or instruct him on what to say. Mr. C volunteered to say he dumped it in back of the fire hall. One of the detachment clerks, Ms. E, asked the Subject Member who he was talking to, and the Subject Member said, "Fire". She asked him where the cooler was, and the Subject Member told her, "Fire has it".

[58] After this call, the Subject Member went across the road, retrieved the cooler and brought it back to the detachment. He completed a property tag for the item. He didn't know if it should be put in the lost and found or not. He emailed Sergeant McKenna on July 25, 2014 asking him how he wanted to treat the cooler.

[59] The Subject Member testified to the acrimonious relationship between him and Sergeant McKenna. Communication was difficult between them. The Subject Member characterized it as a hostile relationship.

[60] On July 29, 2014, the Subject Member went to see Sergeant McKenna about his concerns. They talked about how the alcohol should have been disposed of, and Sergeant McKenna said there should have been two members disposing of it.

[61] When questioned on the stand as to whether or not it was his beer to give away, the Subject Member said:

> It was my file, and in my possession and care. Giving it away was my mistake, and a poor decision on my part. I do not believe I stole the beer. It was going to be thrown out, and instead of dumping it, it went to another location. It was a gesture on my part meant only to improve esprit de corps.

Submissions on the Allegations

Conduct Authority Representative

[62] The CAR opened his submissions by making reference to the well-known principle first articulated by the RCMP's External Review Committee (the "ERC"), to the effect that not every element of each particular need be proven for an allegation of misconduct to stand.

[63] The CAR then summarized the findings of the Supreme Court of Canada, in *Wood v. Schaeffer,* 2013 SCC 71. Among other things, this case stands for the proposition that when police officers do their work they have a duty to document their efforts accurately.

[64] Several RCMP disciplinary decisions deal with the difference between mere performance issues and disciplinary matters. In neglect of duty cases brought forward under the previous *RCMP Act*, what might otherwise be characterized as a performance issue is elevated to a disciplinary matter if it can be proven the member intended to neglect a duty he was required to perform. The Ontario Superior Court case *R. v. Hansen*, 2016 ONSC 548, dealt with the issue of whether or not the accused intended to mislead the court. In its analysis, at paragraph 35, the court found, "The intent to mislead can be inferred from the evidence that establishes that the

false evidence was given knowing it to be false, in the absence of other evidence as to his intention."

[65] To infer intent, then, one may examine the actions undertaken. This analysis is conducted against an objective standard, articulated in the Supreme Court of Canada case of *Hill v. Hamilton- Wentworth Police Services Board*, 2007 S.C.C. 41. As articulated in paragraphs 68 to 73, the standard is that of the "reasonable police officer, in similar circumstances".

[66] The Subject Member's actions, in authoring the PROS report, the email message and in instructing Mr. C to provide misleading information collectively and individually betray a deliberate intention to mislead. Allegations 2, 3 and 5 should be established on this basis. The evidence of Mr. C is to be preferred over that of the Subject Member, whose version of events lacks an air of reality. Mr. C had no motivation to lie on behalf of the Subject Member. The only reason Mr. C initially told Sergeant McKenna he had simply dumped the beer was because he had been told to by the Subject Member.

[67] With respect to Allegations 1 and 4, pertaining to the Subject Member's treatment of exhibits, the advance ruling of November 27, 2015, puts the issue to rest. According to the CAR, these two allegations should be established on the basis of the advance ruling alone.

Member Representative

[68] The MR submitted none of the allegations should be established.

[69] With respect to Allegations 1 and 4, the simple mishandling of an exhibit cannot, in and of itself, amount to discreditable conduct. In RCMP Adjudication Board decision, (2008), 1 AD (4th) 382, a member had agreed to keep three antique handguns for safekeeping for the members of a family whose mother had passed away, pending the settlement of the estate and the proper registration of the weapons. The member kept the weapons at his office until the offices were moved, at which time he took them to his residence. The weapons were stolen when the member's house was broken into, but were subsequently seized by the municipal police force investigating the break-in. The member had never intended to reap any personal gain from

keeping the weapons; his good faith and honourable intention had not been placed into question. The reasonable person apprised of all of the relevant information and circumstances, would not be offended or scandalized by the conduct of the member, and would not find his conduct to have been disgraceful. This same analysis, submitted the MR, should be brought to bear upon the Subject Member's actions. His mishandling of the items, as per Allegations 1 and 4, were more performance issues than they were disciplinary.

[70] With respect to Allegation 2, the Subject Member's intentions were clearly stated; he had every intention of dumping out the beer at the detachment. He was in the process of doing precisely that when he spied the firefighters at their weekly training, and made a spur of the moment decision to give the beer to them instead of simply dumping it out at the detachment. There was evidence of a lightning strike immediately afterward, which knocked out all the power. He could not have amended his PROS entry at the time, and by the time the power came back up, he had moved on to other tasks, and simply did not make the amendment.

[71] Allegation 3 concerns the email message, written following a telephone conversation with Mr. C who told the Subject Member, "Look, if anyone asks me, I will just tell them I dumped the beer at the fire hall". The Subject Member had no reason to believe this would not be the case, and his email message reflects that. To his credit, the Subject Member attempted to have a discussion with Sergeant McKenna about the beer. He called Sergeant McKenna twice at his residence, and did not receive a response. He dropped by Sergeant McKenna's office first thing upon his return to duty, but by this time, Sergeant McKenna had gone to the district advisory non-commissioned officer, who instructed him not to discuss the matter with the Subject Member. It is clear the Subject Member needed guidance and direction, but was not going to receive it at the hands of Sergeant McKenna, owing to their long-standing conflict. The Subject Member had no intention to mislead. He was forthright by stating, "Fire had it" to the detachment clerk.

[72] Allegation 5 comes down to the credibility of Mr. C. The Subject Member's testimony was clear, and should be believed. He did not ask Mr. C to lie; this was something Mr. C came up with on his own, without prompting.

Decision on the allegations

[73] The CAR and MR agreed with me on the difference, or lack thereof, in the substantive effect of the word *discreditable* as opposed to *disgraceful* conduct. Stated succinctly, the tests applicable under the previous legislation to a finding of *disgraceful* conduct continue to apply with equal vigour to the amended version of the *RCMP Act*.

[74] These tests, articulated by the RCMP's External Review Committee have been considered and approved by higher courts and I find they continue to provide a useful framework. The first aspect of the test involves ascertainment of the identity of the member in question. At no point was the identity of the Subject Member in issue in these proceedings.

[75] The second aspect involves a determination of whether or not the facts alleged actually took place. The standard of proof applicable to administrative proceedings was a central issue in *F.H. v. McDougall,* [2008] 3 S.C.R. 41, 2008 SCC 53 ("*McDougall*"). Proof must be made by way of sufficient clear, convincing and cogent evidence on the balance of probabilities.

[76] The third aspect consists of the analysis of the acts found to have taken place, in the context of whether or not they bring the RCMP into disrepute. The applicable test for this analysis hearkens back to Lord Bowen`s invocation of "the reasonable man on the Clapham omnibus" and has been articulated by the ERC as being whether or not the reasonable person, with knowledge of all of the facts of the case, as well as knowledge not only of policing in general but policing in the RCMP in particular, would find the conduct in question to be disgraceful, and bring the reputation of the RCMP into disrepute.

[77] Lord Devlin's treatment of the word "disgraceful" in the case of *Hughes v. Architects Registration Council of the United Kingdom*, [1957] 2 All E.R., at page 442, is instructive. The word *disgraceful* is by no means a term of art, and must be given its natural and popular meaning. The acts must be seen, by the reasonable person, to be such as to disgrace the Subject Member in his capacity as a police officer.

Allegations 1 and 4

[78] In my ruling of November 27, 2015, I found that by virtue of the Subject Member's having issued violation ticket A21842096 on July 17, 2014 to Mr. A for a contravention of section 87(1) of the *Gaming and Liquor Act* (minor possessing liquor), and by virtue of his having taken lawful possession of the beer and the cooler in which it was contained, he effected a seizure. I ruled the items seized were exhibits, because they had evidentiary value in support of the charge. As exhibits, they therefore had to be treated in accordance with the law and applicable policy guidelines.

[79] Special statutory power is conferred upon police officers, permitting them to seize property in the course of their investigations when circumstances permit. Police are accountable to the public they serve. To maintain the public trust, the seized property must be handled properly, in a transparent and orderly manner. To ensure this is done, specific policy is created which members are expected to know and follow.

[80] I will elaborate further on the issue of roadside dumping when I will assess the conduct measures. I do not feel the opening of sealed bottles and the emptying of them at the side of the road is in keeping with the spirit of "K" Division policy, which on my reading, permits the exercise of discretion with respect to only the container relating to the charge. If the charge happens to be unlawful possession of open liquor, this policy sensibly permits the roadside disposal of the contents of the open container. There is nothing in policy or in the *Gaming and Liquor Act* which explicitly authorizes opening sealed containers and dumping their contents.

[81] The obvious problem with this practice, brought into sharp relief by Sergeant McKenna, is the charge will have to be withdrawn if the charged person happens to plead not guilty and the police have no evidence to present. This is an obvious miscarriage of justice, but of little importance to Allegations 1 and 4, because with his next breath, Sergeant McKenna addressed the core issue: once you have chosen not to exercise this discretion and have chosen to seize the liquor and bring it back to the detachment, it should be treated like any other exhibit and disposed of only in keeping with what is supposed to be strict policy. In the present case, the

Subject Member laid the charge and he quite properly seized the Corona and the cooler it was contained in, and brought the items back to the detachment. From that point on, his actions should be governed by law and policy, and the exercise of discretion should not be an option.

[82] Therefore, I find the Subject Member's intentions with respect to the eventual disposal of the beer to be of little consequence in determining whether or not Allegations 1 and 4 are established.

[83] After showing the cooler and its contents to Mr. C, the Subject Member brought these items across to the Fire Hall. A great deal of time and effort was spent in direct and cross examination on precisely who placed the cooler of beer into the white pickup. Paragraph 5 specifically alleges the Subject Member did so. I do not find it makes any difference. The CAR correctly pointed out the ERC's recommendation, which is a generally accepted principle in RCMP conduct and disciplinary proceedings, to the effect that not each and every aspect of each and every particular need to be proven in detail in order to make a finding of misconduct.

[84] The second part of paragraph 5, Allegation 1, alleges the Subject Member advised the firefighter could "keep the contents but the cooler must be returned". The testimony of witnesses proved this to be true. The Subject Member must have stated from the outset he wanted the cooler back, because when Mr. C called to check on its whereabouts, it was back at the fire hall.

[85] It is not as though the Subject Member did not know what needed to be done. He demonstrated proper procedure in the PROS reports by making reference to a waiting period before destruction, as well as with the attachment of an exhibit tag.

[86] The Subject Member admitted making a voluntary and conscious decision to give the beer to the firefighters in a gesture of goodwill, in furtherance of *esprit de corps*. He did not believe it would be dumped, he believed it would be consumed, and he said as much in his testimony. He also admitted this is not the proper way to deal with an exhibit. Therefore, particulars 7, 8, 9, and 10, of Allegation 1, which have to do with the deliberate deviation from policy related to exhibits, are established by way of clear, convincing and cogent evidence, as is Allegation 4.

[87] I had some initial concerns about duplicity and the potential application of the *Kienapple* principle against multiple convictions for the same act. This was not argued or even mentioned in the pleadings, but I feel it merits some treatment. Posed rhetorically, the question is this: how can giving away an exhibit (as per Allegation 4) be anything but a deviation from policy (as per Allegation 1)?

[88] Upon further analysis, Allegation 1 specifically pertains to deviation from RCMP policy and Allegation 4 deals with disposal of an exhibit in the absence of court-ordered authority. The evidence of witnesses, the submissions of the representatives, and the application of judicial notice are sufficient to create a very clear picture of what is required once the items have been seized. A report to a Justice form must be created, describing the items and the circumstances under which they were seized. A Form is then taken to a justice of the peace, who upon subsequent application may order the destruction or other disposition of the items. I do not find it fatal to Allegation 4 that this painstaking degree of detail was lacking in the particulars.

Allegation 2

[89] The gravamen of this allegation is contained in paragraphs 3 and 4 of the particulars. The Subject Member's general report, written on July 23, 2014, in advance of his intended actions, was misleading and contained false information. The alcohol seized from Mr. A was not disposed of, and the cooler was not still in the garage. The cooler of beer had been placed in the back of a firefighter's pickup truck, for their general refreshment. The Subject Member had ample opportunity to change or modify this PROS entry, including after the thunderstorm had passed and electricity was restored. He did not.

[90] The Force has a legitimate expectation that what its members write in their reports is accurate and true. If the Force was not able to rely on such information as being accurate, the organization could not properly govern itself. The Subject Member's deliberately misleading PROS report clearly discredits the Force, and as a result Allegation 2 is established in its entirety.

Allegation 3

[91] This same analysis must be brought to bear upon Allegation 3. When the Subject Member wrote, in the response to the detachment commander's query about the cooler and its contents, "no one claimed ownership of the alcohol", and it had been "dumped", this was wholly untrue. The Subject Member had, by his own admission, given the beer and the cooler to the fire department in a gesture of goodwill, expecting the beer would be consumed, not dumped.

[92] I find the Subject Member intended to mislead Sergeant McKenna. I asked him directly what his reaction might be had he truthfully told him he had given the beer to the firefighters. He replied that Sergeant McKenna's reaction would have been beyond merely negative, it would have been "nuclear". I find, therefore, ample motivation for not telling the truth, in both the email message and in the PROS report. Allegation 3 is therefore established in its entirety.

Allegation 5

[93] The reliability and credibility of witnesses was a central issue in this allegation. In my experience, the following cases provide a useful framework for the analysis of witness credibility:

Wallace v. Davis [1926] 31 O.W.N. 202, ("*Wallace*"), at page 20:

> . . . the credibility of a witness in the proper sense does not depend sole upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the firmness of his memory to carry in his mind the facts observed, his ability to resist influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind....all these are to be considered in determining what effect to give to the evidence of any witness.

MacDermid v. Rice (1939) R. de Jur. 208 (*"MacDermid*"), Archambault, J. stated at page 210:

> ...when the evidence of an important fact is contradictory....the Court must weigh the motives of the witnesses, their relationship or friendship with the parties, their attitude and demeanour in the witness box, the way in which

> they gave evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one.

Faryna v. Chorney [1952] 2 D.L.R. 354 ("*Faryna*"), at page 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

[94] The Supreme Court of Canada in *McDougall* had occasion to consider issues of witness credibility and reliability which were very relevant to the present proceedings. At paragraph 86:

> 86. […] in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case.

[95] On the facts alleged in Allegation 5, Mr. C and the Subject Member take opposite sides. Mr. C obviously lied to Sergeant McKenna in their initial encounter at the detachment office. The central issue to be decided is whether this story originated with Mr. C or the Subject Member? Both point their fingers at each other. In *McDougall*, the Supreme Court of Canada understood the difficulties associated with assessing the credibility and reliability of witnesses in such circumstances. At paragraph 100:

> 100. An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. V. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanour. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization [para. 49].
>
> Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

[96] I found Mr. C to be a wholly credible witness. His version of events did not waver. There was one point, in the midst of a very effective and thorough cross examination by the MR, at which Mr. C offered that "perhaps" the MR's suggestion was true. The suggestion was to the effect that Mr. C, and not the Subject Member, had come up with the story about the beer being dumped at the fire hall. To be fair to Mr. C, at that precise moment in his cross examination, I am not convinced he knew exactly which suggestion he admitted was perhaps true. I cannot find this one moment of possible weakness on the stand to have damaged his credibility beyond repair.

[97] Mr. C testified under very difficult circumstances, giving evidence under oath against a man he once considered his best friend. They met during work hours, met outside of work, and their families socialized together. Despite his friendship with the Subject Member, his oath compelled him to tell the truth.

[98] Whether or not the Subject Member told him to lie, whether or not Mr. C took it upon himself to lie, he did lie to Sergeant McKenna when first questioned about what really happened with the beer. Very soon, though, Mr. C read Sergeant McKenna's body language, which plainly indicated "he's not buying this". From that point on, Mr. C told the truth.

[99] I find it outside the realm of "the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances" as stated in *Faryna*, that Mr. C would have embarked upon another fanciful excursion. He told

the truth from that point on. He had no motivation to lie after he quickly decided to come clean to Sergeant McKenna.

[100] Mr. C testified that when the Subject Member called him, he was at the Calgary Zoo with his family. The Subject Member called to give him a "heads-up" about the detachment commander asking around about the beer. I find Mr. C was telling the truth when he said the Subject Member told him that when he does come asking, to respond "Just say you dumped the beer out", or words to that effect. When Mr. C pondered, "What should I say I did with the bottles?" or words to that effect, the Subject Member replied, "Just say you tossed them in the dumpster".

[101] Mr. C's version has an air of reality about it. The Subject Member phoned him in the first place because he was worried about Sergeant McKenna's quest for the truth about what really happened with the seized beer. Mr. C was not worried. He said he initially asked, "Is it OK to accept this?" and when the Subject Member replied it was, he trusted that information, and never gave it a second thought.

[102] It makes more sense that the Subject Member suggested the story to be provided to Sergeant McKenna, not the other way around. On that basis, Allegation 5 is established in its entirety.

[103] In summary, I find a reasonable person, with knowledge of all of the circumstances of the case, with knowledge not only of policing in general but policing in the RCMP in particular, would find the following behaviour to be discreditable, and to tarnish the reputation of the Force:

- The deliberate and conscious deviation from policy pertaining to the handling of an exhibit, as per Allegation 1;
- The deliberate attempt to mislead in the PROS report, as per Allegation 2;
- The deliberate attempt to mislead in the email message, as per Allegation 3;
- The unlawful giving away of exhibits, as per Allegation 4, and;

- The instructions given to Mr. C to provide false information pertaining to the disposal of the beer, as per Allegation 5.

[104] The reasonable person would find all of these actions to be sufficiently related to the Subject member's duties to give the Force a legitimate interest in imposing conduct measures.

Evidence on Conduct Measures

[105] The CAR called no evidence, and did not present any record of prior discipline. The Subject Member testified on his own behalf in support of the imposition of conduct measures falling short of dismissal. He described his nine-year career in the Force, beginning in Drayton Valley, Alberta, where he arrived with a specialized skill set in coaching football, rugby and lacrosse. The local high school had no rugby program, so he set one up, and the program carries his name to this day. In the six years he was there, the school, which had never had a team before, qualified for the provincial finals tournament three times.

[106] The Subject Member apologized for his actions, saying he never intended to discredit the Force. His intentions, although admittedly misguided, were to support the good working relationship between the Crowsnest Pass fire department and the local detachment. He has been forthright in disclosing the presence of these allegations to his peers and members of the community, and is convinced he continues to enjoy their support.

Submissions on Conduct Measures

Conduct Authority Representative

[107] The conduct measure sought by the Conduct Authority, to be globally imposed for all five contraventions, is dismissal from the Force. This was apparent from the outset by virtue of the statutory mechanism under which these proceedings were initiated.

[108] Once the deliberate attempt to mislead has been established, dismissal is warranted. Where the core values of honesty and integrity have been compromised, the member's character is brought into issue.

[109] When a person in authority, such as a police officer entrusted with the proper care of exhibits, tampers with those exhibits, those actions are characterized as a breach of trust. Several criminal cases involving breach of trust were presented by the CAR:

- *R. v. Cook*, 2010 ONSC 5016, in which the accused, a police officer on active duty, stole from a crime scene fifteen packages of what he believed to be cocaine and concealed them in his garage.

- *R. v. Hunt*, (1978) B.C.J. No. 92, BCCA (CA 780862). The accused was a 16-year member, a corporal with the RCMP, who was found guilty in provincial court of theft of $11,000 in cash that he had seized in the course of his duties as a drug squad investigator.

- *R. v. LeBlanc,* (2003), N.B.J. No. 398, 2003 NBCA 75, involved a police officer who pleaded guilty to a charge of breach of trust. He responded to a fire in progress at a local residence. While there, he rummaged through the owner's effects, including a private diary, and stole personal property, including $83 that the owner, a single mother of modest means, had saved to purchase Christmas gifts for her two children.

- *R. v. Read*, 2016 BCCA 111 ("*Read*"). The accused had been employed as an exhibit custodian, and stole almost one kilogram of cocaine from an exhibit box stored in the secure drug locker. The cocaine had been marked for destruction. The accused initially denied responsibility for the offence. After being told he failed a polygraph test, the accused confessed to the theft and claimed that he had taken the cocaine home and flushed it down the sink. He denied being a seller or user of drugs.

- *R. v. Smith*, (2015), 2015 BCSC 1267, in which the accused, an RCMP exhibit custodian, stole $116,012 from ninety-nine police files to finance a chronic gambling habit.

- *R. v. Tiller*, 2016, BCSC 187. The accused was an exhibit custodian with the RCMP who stole $2,800 due to serious financial difficulties. As a result of the missing funds, several criminal charges had to be stayed.

- *R. v. Whitney*, 2015 BCPC 27. The accused, a member of an RCMP drug section, was suspected of having misappropriated cocaine, so he was set up in a sting operation. In this operation, he stole $650 in marked Canadian fifty-dollar bills.

[110] In each of these cases, criminal charges for breach of trust were brought against employees of the RCMP entrusted with the care of exhibits. Although no criminal charges were contemplated in the present matter, the principle remains the same, and the underlying theme, that a breach of trust is more severe when committed by a police officer, is articulated at paragraph 46 of the *Read* matter, as follows:

> The sentencing judge accepted the appellant's position that the breach of trust inherent in the commission of the offence was not quite as severe as it would have been had the offence been committed by a police officer.

[111] The CAR submitted the following RCMP Adjudication Board decisions tending to support dismissal in situations involving compromised honesty or integrity:

- (2014), 14 A.D. (4th) 389

  The member in question misused an American Express Travel Card and also defrauded the RCMP of $256 by using a covert TD Visa card for his own personal use. The member was ordered to resign. The CAR made specific reference to the last sentence of paragraph 17 of this decision, in which the board held "In any case where the misconduct involves honesty, I believe dismissal is in order absent of any significant mitigating factors" (*sic*).

- (2014), 15 A.D. (4th) 331

  Four allegations of disgraceful conduct and two allegations of making a false, misleading, or inaccurate statement were found to be established after a contested hearing. All involved deception, in that the member claimed to be working at specific times when in reality he was not. The Board accepted a joint submission on sanction and forfeitures of pay were imposed.

- (2013), 13 A.D. (4th) 267

The member admitted one allegation of disgraceful misconduct for having defrauded the RCMP of $30 by using an ARI government fuel card issued for a specific police vehicle for his own personal use to fuel a vehicle he had borrowed from a friend. The parties submitted a joint proposal on sanction for a reprimand and the forfeiture of ten days' pay. The Board rejected the joint proposal and instead directed the Subject Member to resign.

- (2013), 13 A.D. (4th) 468

  The member admitted allegations he had given insufficient attention to an impaired driving investigation, and then prepared a report about the incident knowing it included inaccurate information. A global sanction of ten days' forfeiture of pay was imposed following a joint submission on sanction.

- (2013), 14 A.D. (4th) 269

  The member admitted having temporarily converted $2000 in project funds for his own personal use and then forged his wife's signature on a loan application without her knowledge or consent. In accepting a joint submission, the Board imposed as sanction a reprimand and the forfeiture of ten days' pay.

  and;

- RCMP Conduct Board decision 2016 RCAD 2

  The member wished to return driving privileges to a driver whose breath samples were 90 milligrams per cent and 100 milligrams per cent. The member believed the driver would lose his employment if a charge was filed, so he forged an e-mail exchange with a local Crown prosecutor supporting not laying a charge. He also made oral and electronic file reports reflecting or repeating the gist of the e-mail. The forged email was created so a supervisor would conclude the file, but it was accidentally transmitted to a Crown prosecutor. The member pleaded guilty to a criminal charge of forgery and received a conditional discharge. The Conduct Board found "absent any motivation for self-benefit,

loss of employment was considered disproportionate", and a total of sixty days' forfeiture of pay was ordered on the four contraventions.

[112] In addition, the Alberta Court of Queen's Bench case of *Kube v. Edmonton (Police Service)*, 2014 ABQB 126was submitted. The case made its way through the Alberta Court of Appeal, and is cited at 2013 ABCA 438. This case dealt with the suspension and ultimate dismissal of an Edmonton police constable following a conviction in criminal court for obstruction of justice. The constable in question had produced a cancelled insurance certificate to another police officer, representing that the vehicle in question was insured when it was not. The disciplinary tribunal of jurisdiction found his conduct inconsistent with his continued employment as a police officer, and ordered his dismissal.

[113] Many, if not all of the RCMP cases treat the implications of the Supreme Court of Canada decision in *R. v. McNeil*, 2009 SCC 3 ("*McNeil*"). This case imposes a positive duty to disclose a police witness's relevant disciplinary history. Issues of honesty and integrity, submitted the CAR, are always relevant, and must always be disclosed in the first instance.

Member Representative

[114] The MR opened by addressing the case law introduced by the CAR in support of dismissal. The criminal cases mentioned involved exhibits such as cocaine, which is an illegal substance. The criminal cases all dealt with accused who had misappropriated the exhibits for personal gain. These facts distinguish those cases from the present matter.

[115] With respect to the recent RCMP Conduct Board decision 2016 RCAD 2, the member in that case came before the conduct board with a criminal conviction for forgery, a serious criminal offence. The case can be distinguished from the present circumstances on those grounds alone, but it is noteworthy that despite the criminal conviction, the member in that case was not dismissed, primarily because his unlawful act was not done for reasons of personal gain. The conduct board in that matter was quoted at paragraph 110, "However, where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors are absent."

[116] The MR turned to the conduct measures guide to determine a suitable frame of reference for appropriate conduct measures. Failing to follow policy regarding exhibits is not specifically mentioned. The failure to be diligent is discussed on page 23 of the conduct measures guide. The mitigated range would attract remedial measures consisting of a forfeiture of pay of anywhere from two to eight days. This would seem to apply to Allegation 1, which is a failure to follow policy. It seems to have been a common occurrence at Crowsnest Pass detachment. The detachment commander noted his members were failing to complete the Report to a Justice form, and he was taking steps to rectify the situation.

[117] Allegations 2 and 3 pertain to misleading or false information. The Conduct Measures Guide provides no specific instruction. Reference can be made to section 8.1 of the Code of Conduct, which concerns false police reports, and is discussed at page 66 of the Conduct Measure Guide. The mitigated range for completing a false police report is eleven to twenty-nine days. The MR submitted the appropriate conduct measure for Allegation 2 should be should be twenty days, because the Subject Member's actions did not compromise an investigation, nor did they adversely affect the rights of a third party. Nor was the relationship between the local detachment and the fire department compromised or affected in any way. Therefore, for similar reasons, with respect to Allegation 3, the appropriate conduct measure should be fifteen days.

[118] Allegation 4, the giving away of exhibits, is similar to Allegation 1 in that the conduct measures guide does not specifically make reference to this form of misconduct. Section 4.4 of the Code of Conduct concerns the handling of money, property, and documents. Section 4.2 has to do with careless or reckless disregard to duty. Keeping in mind no investigation was jeopardized, conduct measures in the neighbourhood of ten days' forfeiture of pay would seem to be appropriate.

[119] Allegation 5 can be compared to lying to a supervisor, and since it has been established that the Subject Member instructed Mr. C to lie to his supervisor, page 64 of the conduct measures guide would seem to be the closest fit. The normal range is fifteen to twenty-one days, and the aggravated range is twenty-one days to dismissal. Where a member displays a gross lack

of judgment or where the behaviour is an isolated incident in an otherwise fully satisfactory career, the proposed normal range would be fifteen to twenty days.

[120] The MR submitted several RCMP Adjudication Board decisions for consideration, including:

- (2007), 1 A.D. (4th) 246

  The member admitted several allegations. Having been instructed he needed explicit permission to sign out a detachment vehicle to travel to a regimental funeral, the member took one without permission. While in his possession, the vehicle was struck and sustained $3600 damage. When he returned the police vehicle to the post garage, he informed the transport clerk he had reported the damage, when he had not. The Board imposed a reprimand plus the forfeiture of five days' pay. In a second (unrelated) incident, the member took a detachment vehicle, again without authorization, to attend a baseball tournament. Enroute, the member was contacted by his supervisor who inquired as to his whereabouts, and the member lied, saying he was enroute to Winnipeg to prepare for a planned emergency response team takedown. The board imposed a reprimand and the forfeiture of four days' pay. In a third allegation (related to the second one) while at the baseball tournament in question, in a different conversation with his supervisor, the member again misled his supervisor by telling him he was still tied up in Winnipeg, preparing for the emergency response team takedown. For this allegation, he received a reprimand plus the forfeiture of five days' pay. All sanctions were the subject of a joint submission which was accepted by the Board.

- (2008), 3 A.D. (4th) 257

  The member, a corporal with the forensic identification section, attended a double homicide, seized the suspected murder weapon, and wrote in her notebook there were no rounds inside. Later, it was discovered there were in fact two live rounds loaded in the weapon. The member admitted rewriting her notes so they reflected the presence of live ammunition in the weapon. When questioned about the two sets of notes, the member

advised the first notebook had been contaminated by blood at the crime scene, and this was why she re-wrote her notes in a new notebook. The member sent in her first notebook so it could be retained as an exhibit, at which time it was learned that she had painted the notebook with red paint to simulate blood. The Board seriously considered dismissal, but deferred to the joint submission on sanction, and imposed a reprimand, noting she had voluntarily accepted a demotion and a transfer which removed her from the forensic identification section.

- (2011), 7 A.D. (4th) 202

  The member admitted having made false statements to internal investigators when she denied having attended the residence of a suspected criminal and subject of interest to the Ottawa Police Service. In fact, she attended and socialized with the spouse of the subject of interest. In all, she made two separate and distinct false statements to investigators from the Ottawa Police Service and two separate and distinct false statements to RCMP internal investigators. The board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of five days' pay.

- (2012), 11 A.D. (4th) 419

  The member admitted three allegations, two of which pertained to his creation of false PROS reports on two separate files. A prior record of informal discipline was accepted as an aggravating factor. A global sanction was imposed following acceptance of a joint submission, and the member received a reprimand plus the forfeiture of ten days' pay.

- (2010), 5 A.D. (4th) 264

  The member admitted one allegation of having provided a false or misleading statement to ICBC, the provincial insurance agency. She claimed in her written statement to ICBC investigators to have been struck from behind by a car, but parking-lot video footage clearly showed the opposite was true: she was the one who backed into the vehicle behind her. She was found guilty in provincial court of providing a false or misleading

statement under the applicable provincial statute. The board accepted a joint submission and imposed a sanction consisting of a reprimand plus the forfeiture of ten days' pay.

- (2012), 13 A.D. (4th) 246

  The member admitted two allegations of having made misleading statements to the member investigating her Code of Conduct matter. She also falsified entries in her notebook. Sanction was contested, with the AOR seeking eight days and the member seeking five. The board imposed a reprimand plus the forfeiture of six days' pay.

- (2009), 5 A.D. (4th) 69

  The member, entrusted with processing exhibits seized from a suspect in a child pornography case, was found to have viewed images of child pornography on a seized laptop computer. The board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of eight days' pay.

- (2008), 1 A.D. (4th) 382

  The member was an exhibit custodian and admitted having misrepresented to another member that a shotgun had been destroyed when in fact it was at his residence. He wrote a PROS entry to the effect that the weapon had been destroyed when it had not. The board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of five days' pay.

[121] The MR submitted the Subject Member's motivation throughout this incident was not to seek personal benefit but to strengthen relations with the fire department.

[122] The MR concluded his submissions by drawing attention to mitigating factors. The Subject Member's performance assessments were positive, and highlighted his community involvement and the many contributions he has made over the years. Reference was made to the many letters of support tendered by members of the community and by co-workers. Not only

have relations with the fire department not suffered, but the Subject Member is still highly regarded despite this incident.

[123] The MR suggested an appropriate sanction, given all of the factors at play, would be a reprimand plus the forfeiture of forty-five to sixty days' pay.

[124] A certificate of appreciation was also submitted for consideration. The Subject Member testified that it related to a time when he was on duty and received a call of what appeared to be an armed robbery and hostage-taking. A pursuit ensued, during which the suspect vehicle went into a ditch and caught fire. The driver fled into the bush nearby. The Subject Member and his partner arrested the passenger, but by this time the vehicle was now fully engulfed in flames. There was an unconscious person in the back seat. The Subject Member and his partner returned to the flaming vehicle and pulled the person to safety. The Subject Member then pursued the driver into the bush and arrested him.

Decision on Conduct Measures

[125] Having established contraventions of the Code of Conduct, I am statutorily obliged to impose appropriate and proportionate conduct measures. 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".

[126] The Subject Member gave away beer he had seized, beer that was destined for the detachment drainpipe. He gave it to the local fire department in a gesture of goodwill. He knew it was the wrong thing to do, which was why he did not accurately document his actions and which is also why he said to the Mr. C, "Look, if anyone asks, just say you dumped it". My task is to assess whether or not these actions betray an irredeemable character flaw and a degree of moral

turpitude so extreme that the only conscionable choice is to terminate his employment after nine years of satisfactory service.

[127] Although these proceedings arise under recent amendments to the *RCMP Act*, the test for the imposition of an appropriate conduct measure remains unchanged from the test which applied to appropriate sanctions. First, the range must be considered, and then aggravating and mitigating factors must be taken into account. The range of sanctions applicable to the misconduct involving issues of honesty and integrity most certainly includes dismissal. However, I disagree that dismissal is a starting point in every such case.

[128] I am particularly at odds with the approach taken by the chairperson of the case cited at (2013), 14 A.D. (4th) 269, who stated at paragraph 17, "In any case where the misconduct involves honesty, I believe dismissal is in order, absent of any significant mitigating factors." Issues of honesty and integrity are never black and white, and it is overly simplistic to characterize them that way. In considering issues of honesty and integrity, the individual's motivation for his or her actions must be closely examined, and the degree of moral turpitude inherent in the activity must be assessed.

[129] I prefer the approach taken by the conduct board in RCMP Conduct Board decision 2016 RCAD 2, in paragraphs 108 to 110, under the heading "Previous Disciplinary Case Law":

[130] After review of the cases submitted by both parties, it is apparent that the range of sanctions imposed by previous adjudication boards for cases involving dishonesty is from a reprimand and the imposition of a significant forfeiture of pay to an order for resignation.

[131] It is important to emphasize, however, that in all of the cases submitted by the parties, the act or acts of dishonesty involved some sort of gain or advantage being sought or accruing to the member. Dishonesty was used in order for the member to obtain personal financial gain or benefit, to conceal the member's work-related deficiencies, to thwart investigation of the member, or to alter deficient documents to further an investigation. Self-benefitting dishonesty was at the root of misconduct matters where:

> • the RCMP was defrauded of gas,
>
> • operational funds were converted for personal use and accompanied by a forged loan application,
>
> • forged prescriptions were uttered to obtain anabolic steroids,
>
> • numerous and repeated false and deceptive statements were given to supervisors and investigators that were ultimately rejected after a contested hearing,
>
> • one day of imprisonment was imposed for an attempted defrauding of a provincial vehicle insurance system,
>
> • a finding of guilt was imposed for a false statement to a provincial vehicle insurance system,
>
> • a Continuation Report was created two years after the fact differing from the original used for a search warrant, to respond to allegations warrants were obtained by misrepresentation,
>
> • homicide crime scene notes were concealed, and false notes disclosed,
>
> • numerous and repeated false statements were made to conceal willful investigative neglect, and
>
> • after being observed masturbating in a surveillance vehicle, efforts were made to influence another police force's treatment of the complaint, misleading and false statements were made, and inappropriate data bank checks were requested.

[132] However, where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors are absent.

[133] Following my own analysis of the cases provided by both parties, I find I must agree with the observations of the conduct board in paragraph 110 of the decision cited immediately above. Dismissal tends to occur where there has been some form of personal gain sought or obtained, and where significant mitigating factors are absent. First, I do not find the Subject Member to have either sought or received any personal benefit from his actions, at any stage of the events giving rise to these proceedings. Second, there are significant mitigating factors at play, which I will expand upon.

[134] The above case, cited 2016 RCAD 2, is comparable to the present matter. The summary of the case in question reads as follows:

> The Subject Member faced four allegations, arising from his wish to return driving privileges to a driver whose breath samples were 90 milligrams percent and 100 milligrams percent. The Subject Member believed the driver would lose his employment if a charge was filed. A charge would trigger an extended license suspension and the driver's employment required driving.
>
> The Subject Member forged an email exchange with a local Crown prosecutor supporting not laying a charge, and made oral and electronic file reports reflecting or repeating the gist of the email. The forged email was created so a supervisor would conclude the file. It was accidentally transmitted to the Crown prosecutor. Criminally charged with forgery, the Subject Member pleaded guilty and received a conditional discharge.
>
> A motion to merge the two allegations of discreditable conduct and the two allegations of inaccurate account was denied at a pre-hearing. The Subject Member admitted his actions and all four allegations were found established. Absent any motivation for self-benefit, loss of employment was considered disproportionate. The Subject Member's dishonesty affected law enforcement and put the RCMP's relationship with the Crown at risk, warranting very significant forfeitures of pay. In total, the Subject Member was ordered to forfeit sixty days of pay, lose eligibility for promotion for two years, receive appropriate psychological treatment, and be transferred or reassigned as the Conduct Authority considered necessary.

[135] In that case, as in the present matter, the member was not motivated by self-benefit. In fact, both courses of action carry an underlying tone of altruism, which unfortunately found expression in an unacceptable manner. On the whole, I find the Subject Member's misconduct to be less serious than that demonstrated in the case cited above: the Subject Member did not face criminal charges, his actions did not compromise numerous criminal investigations, and he did not jeopardize the RCMP's relationship with an important policing partner. All the witnesses in the present matter pointed out how relations between the local detachment and the fire fighters were not negatively affected.

[136] In applying the principle of parity of sanction, I am mindful of the test for determining parity, as set out by the RCMP's External Review Committee in a recommendation cited at 2700 99 001, (D 067):

> The question for the arbitrator will be whether, in an individual case, the penalty represents "a departure from an established pattern of discipline", to

> use the term found in *Re MacMillan Bloedel Ltd. (Powell River Division)* and *C.E.P. Local 76 (Lentz)* (1997), 65 L.A.C. (4th) 240 at 249.

[137] The principle of parity of sanction would therefore suggest dismissal to be a disproportionately harsh course of action in the present case owing to the lack of any motivation for self-benefit.

[138] Ours is intended as a positive and progressive system of discipline, the underlying philosophy of which is discussed by Brown and Beatty in *Canadian Labour Arbitration*, 4th Edition, at 7:4422 under the heading "Rehabilitative potential":

> The principle of progressive discipline evolved from an employer's duty to warn employees of the seriousness with which it viewed their behaviour and is based on the idea that, along with deterrence, correction and rehabilitation are the primary purposes of industrial discipline. The theory, very simply, is that by progressively increasing the severity of conduct measures for persistent misconduct, an employee will be encouraged to reform. Such a system enhances the fairness and efficacy of discipline as a corrective tool by ensuring that employees are not punished more harshly than necessary and are not caught by surprise.

[139] The Subject Member has no record of prior discipline. There can be no discussion of the lack of effectiveness of a sequential imposition of increasingly weighty conduct measures. This is the only time he has contravened the Code of Conduct.

[140] Nonetheless, the Subject Member could still be dismissed if his blameworthy conduct is seen to irretrievably damage the viability of the employment relationship, as per *Ennis v. Canadian Imperial Bank of Commerce*, 1986 CanLII 1208:

> The exact standard of misbehaviour to be shown varies with the nature of the business engaged in by the employer, and with the position of responsibility and trust held by the employee. 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 behaviour must show that he is repudiating the contract of employment, or one of its essential ingredients.

[141] Dismissal can only be considered in the most serious of cases. The Ontario Court of Appeal had occasion to consider the circumstances under which dismissal is warranted in the case of *Trumbley and Fleming*, 1986 CanLII 146 (ON CA):

> A police discipline matter is a purely administrative internal process. Its most serious possible consequence makes it analogous to a discipline matter in ordinary employer/employee relationships, even though the procedure governing it is clearly more formal. The basic object in dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or possibly to extract some form of modern retribution) but rather, to rid the employer of an employee who has shown that he or she is not fit to remain an employee.

[142] The RCMP's External Review Committee, in its recommendation cited at 2800-04-002, (D 099) observed:

> Termination of the employment relationship is considered to be a final resort in the context of positive discipline. It can be ordered only when rehabilitation is highly unlikely, or when the risk to the employer of maintaining the employment relationship is too great.

[143] I find the Subject Member's actions, in giving away the beer and in failing to be forthright about having done so, to be a serious error in judgement rather than behaviour indicative of an irredeemable character flaw. I have been shown no other indication, at any point in his career, of a tendency towards dishonest or deceptive behaviour. On this basis, I have no reason to suspect he will again act in similar fashion. The organization is not at a point of final resort regarding the Subject Member's rehabilitation. The risk of recurrent behaviour is minimal. His rehabilitation, given all of the factors I will outline at length, is so highly likely it is virtually assured.

Aggravating factors

[144] I found only two. Allegations 2, 3, and 5 each describe three separate instances, albeit in a short period of time, of deliberate attempts to mislead. This cannot be described as a solitary act of indiscretion.

[145] The second aggravating factor is the continuing disclosure obligations implied by *McNeil*. Issues of honesty and integrity are always relevant, thus the Subject Member's disciplinary history will always be the subject of discussion and disclosure any time he is involved in a criminal investigation. It will remain to be seen whether or not the Force's ability to deploy him is compromised given the implications of *McNeil.*

Mitigating factors

The nature of the exhibit

[146] There are many mitigating factors, but one of the most troubling, and therefore one of the most important, is the nature of the exhibit itself. I made a point of mentioning, in my reasons for establishing the allegations, how my difference of opinion with respect to the interpretation of "K" Division policy would not factor into my decision on the allegations. It is, however, highly relevant when it comes to the imposition of conduct measures. To be clear, the policy in question attempts to provide direction when dealing with offences under Alberta's *Gaming and Liquor Act.*

[147] At "K" Division Operations Manual, V.9 (*Gaming and Liquor Act*), at section 3.2:

> 2.3 **Exhibits**
>
> 2.3.1 Member
>
> 2.3.1.1 When a charge is laid relative to possession, conveyance, or consumption of liquor, in lieu of seizing the liquor you may:
>
> 2.3.1.1.1 Pour out the contents of only the container relating to the charge, and provide the offender with an opportunity to observe the disposal of the contents of the container.
>
> 2.3.1.1.2 Record a full description of the container and its contents in the officer's note portion of the Violation Ticket.
>
> 2.3.1.1.3 Return the empty containers to the violator.

[*Emphasis mine*]

[148] All the witnesses at the hearing described as standard detachment practice the "dumping out" of seized liquor at the roadside. Constable Kelly Willett also made reference to this standard

practice in his statement. Members do not limit themselves to dumping the liquor in the open container relating to the charge, as per my interpretation of the underlined section of the policy above, they also dump unopened containers. Nor do they always empty them at the side of the road, at the scene of the alleged infraction. Sometimes, they bring it back to the detachment for disposal.

[149] At line 560, page 21 of Constable Kelly Willett's statement, he is asked by the internal investigator, "[…] how do we normally handle alcohol exhibits in your experience?" Constable Willett replied, "Ah the way that I have handled alcohol exhibits ah is either I would dump them or get the people to dump them out ah right there. And or once you get back to the detachment dump them down the sink." Later, at line 587, page 22, the discussion over dumping practice continued as follows:

> Q: (posed by the internal investigator) ". . . what's the process to dump them if you had of seized them?"
>
> A: (from Constable Willett): "I would have dumped them in the drain here.
>
> Q: OK, by yourself or with someone else?
>
> A: No, I would have had somebody with me.
>
> [*sic* throughout]

[150] This practice was confirmed by the Subject Member, in his testimony, and was unchallenged. Sergeant McKenna told the Subject Member, who was at the doorway to his office the morning of July 29, 2014, "this is no way to deal with exhibits" and "there needs to be two members dumping the beer". These comments betrayed the attitude that it is acceptable and indeed standard practice to dump the beer prior to the accused's first appearance in court, prior to conviction, and certainly prior to the expiration of the appeal period.

[151] Disposal of seized liquor, under the provisions of the *Gaming and Liquor Act*, is supposed to be tightly controlled. Under section 110, "When a conviction under this Act becomes final, any liquor and containers in respect of which the offence was committed that were seized are, as part of the penalty for the conviction, forfeited to the Crown", and under section 114(1), "Liquor that is forfeited to the Crown under this Act must be disposed of or destroyed under the direction of the Minister of Justice and Solicitor General." Nowhere does it

provide for immediate roadside disposal, nor the transportation of seized liquor to the detachment for immediate disposal, yet these were standard practices at Crowsnest Pass detachment.

[152] The problem this practice creates is obvious. I posed a question to Sergeant McKenna, the detachment commander, about what would happen in the event the person from whom the liquor has been seized under the *Gaming and Liquor Act* were to plead "not guilty" to the charge. Sergeant McKenna testified the charge would simply be withdrawn. I find this approach risks bringing the administration of justice into disrepute, and assigns a "second-tier" status to liquor exhibits. Exhibits of any other description, especially the exhibits mentioned in the cases submitted in support of dismissal, namely, cocaine, firearms or seized cash, would never be dealt with in such a cavalier fashion.

[153] I am not equating the practice of dumping seized liquor either at the roadside or back at the detachment with giving it away. I merely wish to highlight a divergent practice when dealing with liquor-related exhibits versus other types of exhibits. To be fair, the imposition of conduct measures for mishandling exhibits must take this divergent practice into account. Mishandling liquor-related exhibits is still wrong, but it should not be treated as seriously as mishandling other exhibits, because liquor exhibits do not seem to be as important to the administration of justice as other exhibits since the liquor-related charges are simply withdrawn in the event of a not-guilty plea.

The acrimonious relationship between the Subject Member and Sergeant McKenna

[154] Sergeant McKenna's notes reveal an entry which reads, "advise of history with [the Subject Member] on his feelings I was harassing him". Sergeant McKenna testified to a long-standing acrimonious relationship with the Subject Member.

[155] At a detachment meeting which took place only approximately a month before the incidents giving rise to the Notice of Hearing, Sergeant McKenna addressed a serious shortcoming in exhibit handling. When asked about the minutes of the June 11, 2014, detachment meeting which read "If you have an exhibit task other than drugs or firearms, deal

with it. Report to a Justice MUST be done on all seized items", Sergeant McKenna testified that members of the detachment were frequently not filling the Report to a Justice form. This form eventually results in court-ordered authority to dispose of exhibits. The Subject Member was obviously not the only one at this detachment whose exhibit-handling practice left something to be desired, but he was singled out for special attention, likely because of this acrimonious relationship.

[156] Demeanour on the witness stand is not singularly determinative of credibility, but it is certainly a reliable indicator of other things. Sergeant McKenna's dislike for the Subject Member was palpable, and I do not find it surprising he immediately brought the situation involving the cooler of beer to the attention of the district advisory non-commissioned officer rather than deal with it himself at the detachment level.

[157] On Friday evening, July 25, 2014, the Subject Member made two telephone calls to Sergeant McKenna, who did not respond because he saw the calls were from the Subject Member's personal phone. Sergeant McKenna knew the Subject Member was on duty when the calls were made. Had their relationship not been so acrimonious, an earlier discussion would have taken place and the situation would not have escalated to the point where the Subject Member's job was in jeopardy.

Rehabilitative potential

[158] His obvious dislike for the Subject Member notwithstanding, Sergeant McKenna nonetheless recognized his many good qualities in recent performance evaluations. In his 2013/2014 assessment, the Subject Member's willingness to volunteer for training, his commitment to continuing education and learning, and his immediate response to all calls for service were documented. In fact, every performance category contained positive comments. The Subject Member's lapse of common sense and good judgment do not outweigh his years of consistently satisfactory service. Dismissal is reserved for those who are beyond rehabilitation. These events are a thing of the past; I see every indication of the Subject Member's willingness to pick up where he left off and continue to provide solid, reliable service.

Consistent community involvement

[159] The Subject Member, as a father of four, is busy bringing his own children to and from their various community activities. In dedicating what limited free time he has left to the betterment of others, he earns admirable credentials. He is a fixture in the rugby, football and lacrosse coaching community, with a long history of dedication. In Drayton Valley, he was the catalyst behind the creation and development of a successful high school rugby program. His influence was such that despite his transfer years ago, the school still associates this program with his name.

[160] This degree of dedication to the communities we serve must be taken into account in assessing suitability for continued employment with the Force. These are qualities we look for in every member, especially in our senior constables, who are role models for junior members. The Subject Member has always been prepared to devote his time to the community in areas where he feels he can truly make a difference. The nature of his misconduct must be such that it would shock the conscience of this same community, should his services be retained. To the contrary, in this case there is every indication of acceptance, not shock.

[161] I understand the CAR's point that up until now the community has been hearing only the Subject Member's side of the story. I must assess whether the release of my decision will make any difference to the current state of affairs, and I find it will not. The parents in Crowsnest Pass whose children are currently being coached by the Subject Member would not be appalled to learn the few details they do not already know about his misconduct. They would, however, be upset should his dismissal bring about his having to leave, to find other employment in a different community.

[162] One important community player worthy of special note in this particular regard is the Crowsnest Pass fire department. The uncontradicted evidence brought forward at the hearing has proven these events to have had no effect whatsoever on the healthy working relationship between the fire department and the local detachment. This factor works in favour of the Subject Member. Cases resulting in termination frequently make reference to significant damage to a

relationship of trust with an important policing partner. The present circumstances indicate the contrary, a strong degree of acceptance by the members of the local fire department, as testified to by their former Chief, Mr. C.

[163] On a closely related point, given the emotional references to the depth and breadth of their former friendship provided by both Mr. C and the Subject Member himself, I feel there is no conduct measure I could impose that could weigh heavier upon him than the loss of this friendship.

Letters of reference

[164] The many letters of reference submitted for consideration describe the Subject Member as a compassionate and caring individual. One letter in particular is worthy of special mention because of its heartfelt and personal nature. The handwritten note stated:

> As a friend I find [the Subject Member] to be the kind of person I am honoured to know. His personality and character is that which does not just step up to the plate to help a friend he goes beyond. In January, my son suffered a severe skiing accident and was hospitalized for almost 3 weeks. [The Subject Member] and his wife gave up free time to help my family during this stressful time. He did it in such a way that I never felt a burden and I always knew I could turn to him and his wife at any time of day or night, as my son recuperates I am truly thankful and grateful to know someone of his caliber. His honesty and people skills are what make him a very special person. I cannot think higher of anyone than this man.

Past instances of bravery

[165] The Subject Member, on June 26, 2010, demonstrated a selfless act of strength, courage and bravery on the job, for which he was formally recognized by his commanding officer. He also volunteered for relief duty during the flood disaster in High River, and did two tours of duty there. Sergeant McKenna noted he was the only member of Crowsnest Pass detachment to volunteer for flood relief.

[166] In deciding whether to retain him as a member of the Force, I must predict, given all I have seen and heard about his character, given the specific deterrent of a reprimand accompanied

by the forfeiture of thirty-five days of pay, given the continuing inconvenience and humiliation of *McNeil* disclosures, and given the loss of his friendship with Mr. C, whether or not he will again engage in deceptive practices. I find the chances of this to be virtually non-existent.

[167] On the other hand, should the situation ever arise where he might be called upon to sacrifice his own safety for the safety of others, on or off the job, I predict he would once again unflinchingly run in where others might be inclined to walk out.

Conduct Measures Imposed

[168] The net effect of the following conduct measures will be a reprimand plus the forfeiture of thirty-five days' pay, which represents a significant financial penalty that does not fall far short of the forty-five-day benchmark described by the conduct measures guide as being perhaps the harshest penalty shy of dismissal. The cumulative effect of these five conduct measures is meant to act as both a specific and general deterrent, reflecting the severity of his misconduct. For each contravention, I believe the measure imposed is consistent with the range described by the cases submitted. I also believe each conduct measure imposed is in keeping with the spirit of the conduct measures guide, and within the range of conduct measures contemplated therein.

- For Allegation 1, pertaining to the handling of exhibits in a manner inconsistent with RCMP policy, I impose as conduct measure a reprimand and order the forfeiture of three days' pay.

- For Allegation 2, pertaining to a false or misleading PROS entry, I impose as conduct measure a reprimand plus the forfeiture of eight days' pay.

- For Allegation 3, pertaining to the false or misleading email message, I impose as conduct measure a reprimand plus the forfeiture of eight days' pay.

- For Allegation 4, pertaining to giving away exhibits, I impose as conduct measure a reprimand plus the forfeiture of three days' pay.

- For Allegation 5, pertaining to instructions to provide false information, I impose as conduct measure a reprimand plus the forfeiture of thirteen days' pay.

[169] I have taken the Subject Member's submissions into account, alongside the evidence presented at the hearing and contained in the documents of record. He and his family seem well placed in the community, his children are happy in their schools, and I have no reason to believe there would be any negative effect accompanying his return to work in Crowsnest Pass. His chief detractor, Sergeant McKenna, has moved to another detachment. Consequently, I am not ordering a transfer.

June 6, 2016

Inspector James Robert Knopp — Date

Conduct Board