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File 20183351056 (C-053)

**ROYAL CANADIAN MOUNTED POLICE**

IN THE MATTER OF
an appeal of a conduct board's decision pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (as amended) and
Part 2 of the *Commissioner's Standing Orders (Grievance and Appeals)*, SOR/2014-289

BETWEEN:

**Constable Curtis Barton Rasmussen**
Regimental Number 56116
HRMIS Number 000168777

(Appellant)

and

**Commanding Officer, "E" Division**
Royal Canadian Mounted Police

(Respondent)

(the Parties)

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**CONDUCT APPEAL DECISION**

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**ADJUDICATOR**: Nicolas Gagné
**DATE**: April 8, 2022

**TABLE OF CONTENTS**

**SYNOPSIS**

The Appellant faced nine allegations under various sections of the RCMP *Code of Conduct* for misusing the Gun Amnesty program in order to take personal possession of a prohibited firearm. After the Appellant's supervisor became aware of the matter, a subsequent investigation revealed a second instance of misusing the Gun Amnesty Program and a third incident in which the Appellant failed to properly account for evidence.

The Appellant contested all nine allegations. A Conduct Board (the Board) found six of the nine allegations established, then excluded one based on the *Kienapple Principle* and ordered the Appellant to resign within 14 days or be dismissed from Force. The latter appealed this decision.

On appeal, the Appellant argued that the Board incorrectly relied on derivative evidence that had been excluded based on a *Charter* breach, had committed an error of law by determining that it was bound by a criminal conviction of possessing a prohibited firearm, breached the principles of procedural fairness by refusing cross-examination of a key witness, and imposed a clearly unreasonable conduct measure outside the scope of the parity principle.

The appeal was referred to the RCMP External Review Committee (ERC) for review. The ERC found that the Board did not err by allowing the evidence, did not breach the relevant principles of procedural fairness, did not commit an error law, and that the Board's decision is not clearly unreasonable.

An adjudicator found that the Board's decision was supported by the record, ultimately determining that dismissal was a proportionate conduct measure. The appeal was dismissed.

**INTRODUCTION**

[1] Constable (Cst.) Curtis Rasmussen, Regimental Number 56166 (the Appellant), appeals the decision of an RCMP Conduct Board (the Board), finding that six allegations against the Appellant were established contrary to several sections of the *Code of Conduct.* Based on that finding, the Board ordered the Appellant to resign within 14 days or be dismissed.

[2] The Appellant contends that the decision contravenes the principles of procedural fairness, is based on an error of law, and is otherwise clearly unreasonable (Appeal, pp 4-5). He requests, as redress, that he be reinstated as a member of the RCMP.

[3] In accordance with subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, RSC,

1985, c R-10 [*RCMP Act*], the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report issued on October 21, 2021 (ERC C-2020-019 (C-053)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

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

[5] In rendering this decision, I have considered the material that was before the Board who issued the decision that is the subject of this appeal (Material), as well as the 764-page appeal record (Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA), collectively referred to as the Record.

[6] For the reasons that follow, the appeal is dismissed.

**BACKGROUND**

[7] The ERC summarized the factual background leading to the Board hearing as follows (Report, paras 5-10):

> [5] On October 16, 2016, during the Gun Amnesty Program, the Appellant responded to a service call from an elderly woman, Mrs. M, who wanted to get rid of her late husband's German pistol that he had brought back from World War II (WWII) (*Code of Conduct* Investigation Report, page 2). While attending the call, the Appellant advised Mrs. M that there were other options instead of having the firearm turned over to the RCMP to have it destroyed. These options included turning the firearm over to a museum, rendering it unusable by a gunsmith or giving it to an individual who has the proper licence. Ultimately, instead of processing the firearm under the provisions of the amnesty program, the Appellant kept the firearm for himself and indicated in PRIME that no firearm was seized from Mrs. M.
>
> [6] Upon reviewing the file, Sergeant (Sgt.) N, the Appellant's supervisor, was concerned that the firearm was left with Mrs. M and that it was unclear if she was legally able to possess the firearm. As the Appellant was away on leave, Sgt. N called Mrs. M to inquire if she had a valid firearm licence. Mrs. M told him that the Appellant had actually taken the weapon with him when he had departed her home.

[7] On October 19, 2016, a combined statutory and conduct investigation was mandated to inquire into the circumstances (Material, Notice and Investigation/Combined *Code of Conduct* investigations, page 46). On October 24, 2016, the investigator, Sgt. N and another officer attended the Appellant's residence to serve him with a Notice of *Code of Conduct* Investigation and an "Order to return Items" (Order). The Order was for the WWII firearm. In compliance with that Order, the Appellant went inside his residence and produced said firearm.

[8] Following this incident, management at the Detachment reviewed the Appellant's files (Material, Notice and Investigation/Combined *Code of Conduct* investigations, page 92). It was learned, on January 6, 2017, that the Appellant had behaved in a similar manner when he responded to a service call related to the amnesty program one year prior. On that occasion, he had indicated in PRIME that no firearm was seized because it was an old rusted frame or even possibly a toy from the early 20th century. He further indicated in PRIME that the individual could discard the handgun per her discretion. However, the Appellant had left the residence with the item. Therefore, a second *Code of Conduct* investigation was mandated (Material, Notice and Investigation/Combined *Code of Conduct* investigations, page 110).

[9] The investigator submitted his report to Crown Counsel on November 30, 2016. Criminal charges were laid against the Appellant before the British Columbia Provincial Court. However, most were stayed because the Appellant plead guilty to a sole charge of possessing a prohibited weapon without the proper licence and/or certificate pursuant to section 91(1)(b) of the *Criminal Code*. The Appellant received an absolute discharge for this offence.

[10] The second investigation report relating to the prior incident was submitted to the Conduct Authority on March 1, 2017.

**Allegations**

[8] Nine allegations were filed against the Appellant, based on three separate incidents. Allegations 1 through 6 referred to the WWII firearm, Allegations 7 and 8 referred to the frame of a handgun, and Allegation 9 referred to items seized as evidence in a break-in, but not accounted for by the Appellant. The allegations and their particulars are as follows (Appeal, pp 8-13):

**Allegation 1**

**Between October 14, 2016 and October 24, 2016, inclusive, at or near [X], in the province of British Columbia, [the Appellant] behaved in a manner likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police.***

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On October 12, 2016, [Mrs. M] called the RCMP clerk at [X] detachment to turn in a firearm owned by her deceased husband. On October 14, 2016, while on shift and in response to the request, you attended [Mrs. M]'s residence and took custody of a German Luger P.08 9mm Pistol (the 'firearm');
3. On October 24, 2016, you had possession of the firearm, and upon being served formal Notice of Code of Conduct and Statutory investigations, and written "order to return items", you produced the firearm, from your residence, and turned it over to [the investigator].
4. You committed theft of the firearm. On February 7, 2017, a charge of theft $5000 or under, contrary to section 334(b) of the Criminal Code was laid against you in the British Columbia Provincial Court.
5. You therefore engaged in conduct that is discreditable and likely to discredit the Force.

**Allegation 2**

**Between October 14, 2016 and October 24, 2016, inclusive, at or near [X], in the province of British Columbia, [the Appellant] behaved in a manner likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police.***

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On October 12, 2016, [Mrs. M] called the RCMP clerk at [X] detachment to turn in a firearm owned by her deceased husband. On October 14, 2016, while on shift and in response to the request, you attended [Mrs. M]'s residence and took custody of a German Luger P.08 9mm Pistol (the 'firearm');
3. [Mrs. M] turned over the firearm to you in your capacity as an RCMP member and in furtherance of a local gun amnesty program. You retained possession of the firearm and never processed it in accordance with RCMP Operational Manuals:
    a) Chapter 22.1 Processing of Exhibits
    b) Chapter 22.3 Disposal
    c) Chapter 22.4 Firearms, Prohibited Weapons, Munitions and Explosives

d) Section 4.101 Destruction/Disposal of Firearms, "E" Division Operational Manual

4. You used your position as an RCMP member to obtain the firearm from [Mrs. M];
5. You committed a breach of trust. On February 7, 2017, a charge of breach of trust, under section 122 of the Criminal Code was laid against you in the British Columbia Provincial Court.
6. You therefore engaged in conduct that is discreditable and likely to discredit the Force.

**Allegation 3**

**Between October 14, 2016 and October 24, 2016, inclusive, at or near [X], in the province of British Columbia, [the Appellant] failed to act with integrity and abused his authority, power and position, contrary to section 3.2 of the *Code of Conduct of the Royal Canadian Mounted Police*.**

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On October 12, 2016, [Mrs. M] called the RCMP clerk at [X] detachment to turn in a firearm owned by her deceased husband. On October 14, 2016, while on shift and in response to the request, you attended [Mrs. M]'s residence and took custody of a German Luger P.08 9mm Pistol (the 'firearm');
3. [Mrs. M] turned over the firearm to you in your capacity as an RCMP member and in furtherance of a local gun amnesty program. You retained possession of the firearm and never processed it in accordance with RCMP Operational Manuals:
   a) Chapter 22.1 Processing of Exhibits
   b) Chapter 22.3 Disposal
   c) Chapter 22.4 Firearms, Prohibited Weapons, Munitions and Explosives
   d) Section 4.101 Destruction/Disposal of Firearms, "E" Division Operational Manual
4. You abused your authority and the powers entrusted to you as an RCMP member to unlawfully gain possession of the firearm from [Mrs. M] for your own personal use.

**Allegation 4**

**Between October 14, 2016 and October 24, 2016, inclusive, at or near [X], in the province of British Columbia, [the Appellant] behaved in a manner likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.**

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On October 12, 2016, [Mrs. M] called the RCMP clerk at [X] detachment to turn in a firearm owned by her deceased husband. On October 14, 2016, while on shift and in response to the request, you attended [Mrs. M]'s residence and took custody of a German Luger P.08 9mm Pistol (the 'firearm').
3. On October 24, 2016, you had possession of the firearm, and upon being served formal Notice of Code of Conduct and Statutory investigations, and written "order to return items", you produced the firearm, from your residence, and turned it over to [the investigator].
4. The Canadian Firearm Centre confirmed that the firearm is classified as a prohibited weapon; that at the material time you were not licensed to possess or acquire prohibited firearms; and that the firearm was never registered to you.
5. You transported the firearm from [Mrs. M]'s residence to your residence, without lawful authority and without obtaining an Authorization to Transport the firearm.
6. You committed offences of possessing a firearm without a registration certificate and possessing a firearm or prohibited weapon obtained by the commission of an offence. On February 7, 2017, charges of possession of a firearm without a registration certificate and possession of a firearm or prohibited weapon obtained by the commission of an offence under section 91(1)(b) and 96(1), respectively, of the Criminal Code were laid against you in the British Columbia Provincial Court.

7. You therefore engaged in conduct that is discreditable and likely to discredit the Force.

**Allegation 5**

**Between October 14, 2016 and October 24, 2016, inclusive, at or near [X], in the province of British Columbia, [the Appellant] failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties and the conduct of investigations, contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.**

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On October 12, 2016, [Mrs. M] called the RCMP clerk at [X] detachment to turn in a firearm owned by her deceased husband. On October 14, 2016, while on shift and in response to the request, you attended [Mrs. M]'s residence and took custody of a German Luger P.08 9mm Pistol (the 'firearm').
3. Following your attendance at [Mrs. M]'s residence, you accessed the related [X detachment] RCMP PRIME file xxxx-xxxx and authored a synopsis which included in part, the following notations:

   *[Mrs. M] chose to turn over the firearm to someone with a [Possession Acquisition Licence] so that "it would have a good home" as her husband would have wanted that. No firearm seized. File concluded.*

4. You knowingly entered false and misleading information into the synopsis of PRIME file xxxx-xxxx. Specifically, you falsely claimed:
   a) That [Mrs. M] retained the firearm
   b) That you did not seize the firearm
5. You failed to accurately document your actions with respect to the seizure of the firearm into PRIME file xxxx-xxxx.

**Allegation 6**

**Between October 14, 2016 and October 24, 2016, inclusive, at or near [X], in the province of British Columbia, [the Appellant] concealed and failed to properly account for property coming into his possession in the performance of his duties, contrary to section 4.4 of the *Code of Conduct of the Royal Canadian Mounted Police.***

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On October 12, 2016, [Mrs. M] called the RCMP clerk at [X] detachment to turn in a firearm owned by her deceased husband. On October 14, 2016, while on shift and in response to the request, you attended [Mrs. M]'s residence and took custody of a German Luger P.08 9mm Pistol (the 'firearm').
3. You did not document the seizure of the firearm by having [Mrs. M] sign a relinquishment of claim or providing her with a receipt or any documentation.
4. Following your attendance at [Mrs. M]'s residence you accessed the related [X Detachment] RCMP PRIME file xxxx-xxxx and authored a false and misleading synopsis.
5. You retained possession of the firearm and never processed it in accordance with RCMP Operational Manuals:
    a) Chapter 22.1 Processing of Exhibits
    b) Chapter 22.3 Disposal
    c) Chapter 22.4 Firearms, Prohibited Weapons, Munitions and Explosives
    d) Section 4.101 Destruction/Disposal of Firearms, "E" Division Operational Manual

**Allegation 7**

**On or about August 26, 2015, at or near [Y], in the province of British Columbia, [the Appellant] behaved in a manner likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police.***

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On August 26, 2015, you were dispatched at an address in response to a request by [Ms. J], to dispose of a handgun, which belonged to her deceased father. You attended the address and examined the handgun. You took possession of the handgun and failed to have [Ms. J] sign a relinquishment of claim.
3. You took possession of the handgun, without color of right, committing a theft.

4. You therefore engaged in conduct that is discreditable and likely to discredit the Force.

**Allegation 8**

**On or about August 26, 2015, at or near [X] in the province of British Columbia, [the Appellant] failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties and the conduct of investigations, contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police.***

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted at [X] detachment in British Columbia.
2. On August 26, 2015, you were dispatched at an address in response to a request by [Ms. J], to dispose of a handgun, which belonged to her deceased father. You attended the address and examined the handgun. You took possession of the handgun and failed to have [Ms. J] sign a relinquishment of claim.
3. Following your meeting with [Ms. J], you accessed the related [X detachment] RCMP PRIME file yyyy-yyyy and authored a synopsis, including the following entry:

   *[The Appellant] attended and [Ms. J] handed him a rusty frame of an old revolver, possibly even an old toy from the early 20th century, of some sort. There were no serial numbers on the frame. [The Appellant] advised [Ms. J] that the item she had did not constitute a hand gun and could be discarded per her discretion. No further attendance or action. File concluded.*

4. You knowingly entered false and misleading information into the synopsis of RCMP PRIME file yyyy-yyyy. Specifically, you falsely claimed:
   a) That you only met with [Ms. J] and that her sister [name redacted] was not present.
   b) That the handgun was a toy.
   c) That you did not seize the handgun.
   d) That you left the destruction/disposal of the handgun to [Ms. J]
5. You failed to accurately document your actions with respect to the seizure of the handgun into PRIME file yyyy-yyyy.

**Allegation 9**

**Between August 10, 2015 and February 4, 2016, inclusive at or near [X detachment] in the province of British Columbia, [the Appellant] without lawful excuse failed to properly account for property coming into his possession in the performance of his duties, contrary to section 4.4 of the *Code of Conduct of the Royal Canadian Mounted Police*.**

*Particulars of the contravention*

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted in "E" Division, at [X] detachment in British Columbia.
2. On August 10, 2015, you were dispatched to a report of a break-in at a local car dealership, in X, British Columbia.
3. You attended at the car dealership and spoke to [Mr. H], who directed you to a gas jerry can, bolt cutters, and a socket driver with attachments.
4. You contacted [Corporal M], [city redacted] Forensic Identification Service [FIS] to attend and process the scene.
5. [Corporal M] photographed and identified the scene with placards numbered 1-15. At placard #1 he identified:

   > *One plastic fuel container, one pair of black rubber and blue metal Mastercraft 12"/300mm bolt cutters, one chrome Mastercraft 7/8" socket with drill/driver attachment and one chrome Mastercraft 10mm socket attached to a chrome Mastercraft 3" socket extension bar attached to a green metal drill/driver adapter on the round on the east side of [X] adjacent to the dealership..."*

6. [Corporal M] reported the tools at Placard #1 were seized for further processing and the plastic fuel container [jerry can] was turned over to [you], [the Appellant].
7. On October 30, 2015, you authored an occurrence report as follows: "Seven evidentiary items were returned by [city redacted] FIS with no positive results. All items were put in a cardboard box in KTEL 6 for disposal". The related property report, you authored, listed all seven items as one exhibit: "Glass shards, padlocks and tools". On February 4, 2016, the items were marked by [Ms. I], the exhibit custodian, as "destroyed locally". The property report is signed by both you and [Ms. I].
8. The property reference for the car dealership, [Mr. D], never had any property returned to him following the investigation.
9. [Ms. I] reports that containers with flammable liquids, such as the jerry can, recovered as exhibits are not stored in temporary exhibit lockers, and tools, such as those described at Placard #1, would not be destroyed.

10. You failed to itemize and properly account for the tools when they were entered as exhibits in accordance with Chapter 22.1 Processing of Exhibits, RCMP Operational Manual.

11. You did not account for the jerry can, for which there is no documentation since being turned over to you from [Corporal M].

[Emphasis in original.]

**Preliminary motion**

[9] The Appellant's Member Representative (MR) filed a preliminary motion on February 9, 2018, requesting that the WWII firearm be excluded from evidence under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* [*Charter*] (Material, The record / Motion unlawful search). The MR argued that the Appellant's *Charter* rights under section 7 (right to remain silent) and section 8 (right to be secure from unlawful search and seizure) were breached when he was ordered to produce that firearm. The motion also requested that the allegations referring to the firearm be stayed, namely Allegations 1 through 6.

[10] The Respondent's Conduct Authority Representative (CAR) contended in response that excluding the firearm would constitute relitigation and an abuse of process, as it would require the Board to litigate the admissibility of the firearm when it was admitted before the Provincial Court Judge and accepted by the latter (Material, The record / CAR Motion Reply, p 2). The CAR submitted that there was no breach of either section 7 or 8 because the investigators never entered the Appellant's home, and the Appellant was duty bound to comply with the Order to Return Items (Order) by virtue of his Oath of Office. Finally, she stated that, in the event that a breach is found, the evidence should not be excluded based on the legal test set out in *R v Grant*, 2009 SCC 32 [*Grant*].

[11] The Board determined that the Appellant's *Charter* rights were breached because he was already under investigation by the time he received the mandatory Order and was not cautioned that the seized evidence could be used against him. The Board observed that the Conduct Authority did not exercise his power to obtain a search warrant as provided by the *RCMP Act.* Based on the legal test in *Grant,* the Board excluded the evidence of the firearm, but refused to stay Allegations 1 through 6 because the situation was not the "clearest of cases" warranting a stay. There was also independent evidence supporting the relevant allegations.

**Evidence and witnesses**

[12] The Parties filed their evidence prior to the hearing according to the requirements noted in subsections 15(2) and (3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. The CAR filed the investigation reports, including the statements of Mrs. M to the Appellant's supervisor and to the investigator, both PRIME synopses written by the Appellant, submissions, and the transcript of the criminal sentencing proceedings.

[13] In the MR's response the Appellant denied all allegations but one. The Appellant admitted to Allegation 4, with the caveat that he thought the firearm was restricted, not prohibited (Material, The record/Response to allegations, p 6). However, at the opening of the hearing, the Appellant denied Allegation 4 (Transcript, vol. 1, p 11).

[14] On April 23, 2018, the CAR provided the Board with her final witness list (Material/other material/correspondence, p 33). The CAR explained that Mrs. M was not included because her attendance would only be required to resolve any conflicting evidence. She submitted that Mrs. M was not required based on the particulars admitted to by the Appellant. Meanwhile, the MR insisted that Mrs. M be called as a witness to testify on the particulars of the day the Appellant visited her home. Particularly, the MR stressed that it was necessary to cross-examine Mrs. M. On April 29, 2018, the Board determined that it would not call Mrs. M as a witness, because her statements were sufficient (Material, other material/correspondence, p 38). However, the Board provided a disclaimer that substantiating the charges of theft and breach of trust (Allegations 1 and 2) would be difficult based on Mrs. M's statements.

**CONDUCT BOARD HEARING**

[15] The hearing was held from June 12 to 14, 2018. The Appellant accepted many of the facts, but disputed their interpretation. Five witnesses were called by the Respondent:

1) Sgt. N, the Appellant's supervisor;
2) Ms. I, watch clerk who took the service call from Mrs. M;
3) Ms. J and her sister Ms. J-A J; and,
4) Corporal (Cpl.) M, the Forensic Identification Specialist (FIS) who attended the break-in complaint mentioned in Allegation 9.

[16] The Appellant then testified on his own behalf (Transcript, vol. 1).

**Witness testimony**

[17] The ERC summarized the testimony provided by each witness (Report, paras 19-40):

**Sgt. N**

[19] Sgt. N stated that, as Detachment Commander, he started his mornings by reviewing every new file in the queue. On October 14, 2016, he came across the Appellant's file relating to Mrs. M's service call (Transcripts, Vol. 1, page 20). When he reviewed the PRIME file synopsis, he learned that Mrs. M had called to turn over a firearm as part of the Gun Amnesty Program, but that the Appellant had left the firearm with her. Sgt. N had concerns regarding the safety of the firearm. At that point, he sent an email to the Appellant to obtain more details on what had transpired. However, because the Appellant was away on leave for 10 days, Sgt. N called Mrs. M. She indicated that the Appellant had taken the firearm with him (Transcripts, Vol. 1, page 25). Sgt. N went to see Mrs. M at her residence to get more details.

[20] After relaying the information to his advisory Non-Commissioned Officer (NCO), Sgt. N was advised to review the Appellant's other files. Sgt. N found one similar file where an individual, Ms. J, had called regarding the Gun Amnesty Program and the Appellant had attended the residence. The Appellant had indicated that the item was left with Ms. J. Sgt. N called her and she informed him that the Appellant had actually left with the item.

[21] On cross-examination, Sgt. N explained that his concerns related to the security of Mrs. M's firearm, whether it was safely stored (Transcripts, Vol. 1, page 34). He further indicated that, given Mrs. M's age, he would prefer seeing her in person and ascertain what transpired with the Appellant by taking a statement from her. Sgt. N then stated that he reviewed the Appellant's other files and learned about Ms. J's service call and that it was a similar circumstance.

**Ms. I**

[22] Ms. I was the watch clerk at the Appellant's detachment whom took the service call from Mrs. M. She explained that all forms and documents related to the Gun Amnesty Program are put in the PRIME file when it's created, including the Relinquishment of Claim form and the exhibit form (Transcripts, Vol. 1, page 52). She further indicated that, in regards to the Gun Amnesty Program, once the firearm is in the RCMP's possession, she would register it and put it in the exhibit locker.

[23] Regarding the exhibits related to Allegation 9, the exhibit report indicated that the exhibits, glass shards and a padlock, in KTEL 6 were

destroyed (Transcripts, Vol. 1, page 55). Ms. I explained that members put the exhibits in a temporary exhibit locket and she, as exhibit custodian, would enter them into the main exhibit locker. On February 5, she went into the KTEL 6 and destroyed two or three small boxes of the above-mentioned evidence; however there were no tools or a jerry can in KTEL 6 (Transcripts, Vol. 1, pages 61, 63).

[24] The MR did not cross-examine Ms. I.

**Ms. J**

[25] Ms. J testified that she and her sister were at her father's residence, who had recently passed away, cleaning when they found an item that looked like a handgun (Transcripts, Vol. 1, page 70). She called the RCMP to come and pick it up; and the Appellant attended the service call. She testified that he started laughing when he saw the item because it was not usable and was a "glorified paperweight". Ms. J testified that the Appellant left with the item and did not provide her with documents to sign (Transcripts, Vol. 1, page 73).

[26] On cross-examination, Ms. J clarified that her father had just passed away and she and her sister were clearing out his house. Ms. J reiterated that the Appellant left with the item and no options were discussed with her as to what to do with the item (Transcripts, Vol. 1, page 77).

**Ms. J-A J**

[27] Ms. J-A J is Ms. J's sister and was present when the Appellant attended the service call at their father's residence. She confirmed that the Appellant laughed when he saw the item and left with it when he departed her father's residence.

[28] On cross-examination, she reiterated that her father's belongings were not in the living room when the Appellant attended. She further indicated that the item was part of a handgun, but with no bullet chamber nor trigger.

**Cpl. M**

[29] Cpl. M was the FIS attending the break and enter service call with the Appellant at a car dealership (Allegation 9). He explained his process when attending a scene and documentation he would fill and/or write (Transcripts, Vol. 1, page 92). Regarding the break and enter, Cpl. M indicated that he photographed the items at placard 1 (jerry can and tools); however, since the jerry can could yield no evidence, i.e. fingerprints, he left it there, but seized the tools (Transcripts, Vol. 1, page 95). Cpl. M had indicated on his IDENT Report that the fuel container was turned over to the Appellant. As for the other items, he processed them "at the lab" and documented that he turned them over to the Appellant upon completion

(Transcripts, Vol. 1, page 96). Cpl. M was adamant that he did not take the fuel container because he is very diligent in reporting his tasks when processing a scene.

[30] During cross-examination, Cpl. M explained that the items were turned over to the Appellant because their office does not have the capacity to hold all the exhibits; therefore, they are usually returned to a detachment, except when they are needed for court (Transcripts, Vol. 1, page 102).

**The Appellant**

[31] The only witness called by the MR was the Appellant. He began by giving an overview of his shift on October 14, 2016. Regarding the service call of Mrs. M, the Appellant testified that he attended her residence, in uniform, and she informed him that her husband had passed away five years prior. He had brought some memorabilia from WWII, including a firearm (Transcripts, Vol. 1, page 112). Mrs. M stated that she wanted to part with the firearm. She brought it to the Appellant who examined it; he noticed that "Luger" was written on it.

[32] The Appellant stated that he informed Mrs. M of different options to part with the firearm because she did not want to have it in her possession anymore. When the Appellant informed her that the firearm would be destroyed by the police as per the Gun Amnesty Program, he testified that Mrs. M stated that her husband wouldn't have wanted that (Transcripts, Vol. 1, page 115). They discussed whether she knew of anyone with a valid Possession Acquisition Licence (PAL) who could take possession of the firearm. The Appellant testified that he informed Mrs. M that he had a valid PAL for restricted firearms and she asked him whether he would be willing to take the firearm. They discussed the next steps for her to give the firearm to the Appellant as a private citizen, not in his capacity as a police officer. He measured the firearm and found that it was a restricted firearm. He accepted her offer of taking possession of the firearm because she was a "sweet lady" and she didn't want to see the firearm destroyed and wanted to see it "have a good home" (Transcripts, Vol. 1, page 117).

[33] The MR pointed out that the broadcast of the Gun Amnesty Program stated that members were not to offer resale of the firearms or accept any firearm except for disposal purposes. The Appellant testified that he did not pressure Mrs. M in any way for her to give him the firearm. He then wrote his report from his vehicle and secured the firearm in a lockbox in his truck.

[34] In regards to his PRIME synopsis, the Appellant indicated that he did not think it was relevant to indicate that the individual with the PAL was himself because it was a citizen-to citizen transaction (Transcripts, Vol. 1, page 122). He explained that he indicated that no firearm was seized because

he was not taking it to the detachment and in the exhibit system. He testified that it was not his intention to mislead anyone by writing his synopsis, but conceded that the synopsis was incomplete.

[35] The Appellant then addressed the allegations pertaining to the item given by Ms. J. He testified that when Ms. J presented him with the item, they both laughed given the state the item was in (Transcripts, Vol. 1, page 127). It was rusty and missing most of the essential components. He informed Ms. J and her sister that it could not be considered a firearm and there was no reason for the police to take possession of it. He further told them that they could dispose of the item however they saw fit. He indicated that he left the firearm on the coffee table and left. The MR showed him a copy of his PRIME report and the Appellant confirmed that it was accurate.

[36] Regarding the break and enter incident, the Appellant testified that when Cpl. M arrived, he walked around with him. Then Cpl. M indicated that the Appellant could attend to other tasks while he processed the scene. He then left the scene and was later called regarding some tools and a jerry can that were found "up the road from the scene". He called Cpl. M who came and indicated that he would be processing the tools, but not the fuel container. The Appellant stated that he gave the fuel container back to the staff of the car dealership since it would not be needed in the investigation.

[37] On cross-examination, the CAR pointed out that the Appellant, by letting Mrs. M retrieve the firearm herself and providing her with options to dispose of the firearm, was contravening the Gun Amnesty Program directive (Transcripts, Vol. 1, page 144). The Appellant stated that receiving proper direction not to accept an offer from a citizen would have been appropriate. In his view, accepting the firearm from Mrs. M was not accepting a gift, but a citizen-to-citizen transaction where he was doing a favour for an elderly woman. Although he arrived in uniform and was on duty, the Appellant testified that he explained to Mrs. M that she was not giving the firearm to him as a police officer, but as a private citizen (Transcripts, Vol. 1, page 152). The Appellant explained that he made the distinction because he knew that accepting the firearm while on-duty could be viewed as using his position to do so. Although the Appellant disagreed, the CAR pointed out that he did in fact receive a benefit.

[38] Regarding the PRIME report, the Appellant acknowledged that there was no notation regarding the "citizen-to-citizen" transaction (Transcripts, Vol. 1, page 157). Nor did he make any notes in his notebook regarding the events with Mrs. M. The Appellant stated that it was not his intention to include just enough details in order for Sgt. N to conclude the file (Transcripts, Vol. 1, page 167). The Appellant reiterated that he did not "seize" the firearm because he did not take it as part of his duties.

> [39] The CAR then questioned the Appellant in relation to Allegations 7 and 8. The Appellant conceded that he didn't take any notes of the service call that day (Transcripts, Vol. 1, page 172). The Appellant was adamant that he did not take possession of the item described in those allegations.
>
> [40] Regarding Allegation 9, the Appellant indicated that he left the fuel container with a staff member of the car dealership (Transcript, Vol. 1, page 178). He didn't take note of it because he believed it was not relevant to the investigation. He explained that he was told by Cpl. M that it was not needed as an exhibit. As for the tools seized, the Appellant testified that when Cpl. M gave them back to him, he put them in a temporary exhibit locker at the detachment. Although Ms. I stated that there were no tools in this locker, the Appellant disagreed but could not tell where those tools went. In his view, since Cpl. M had already itemized the tools, it was not his responsibility to do so (Transcripts, Vol. 1, page 193).

**Submissions from the Parties**

*MR's submissions*

[18] The MR argued that the Appellant did not commit theft of either the firearm or the rusted firearm frame. According to the MR, the evidence showed that both Mrs. M and Ms. J willingly provided the items to the Appellant and so neither Allegations 1 or 7 could be established. The MR also noted that ownership of the firearm had never been transferred to the RCMP, so the Appellant could not have stolen the items from the RCMP either (Transcripts, vol. 2, pp 2-8). The MR then contended that the evidence did not demonstrate that the Appellant had used his position as a police officer to obtain the firearm; accordingly, the MR submitted that neither Allegations 2 (discreditable conduct by committing a breach of trust) nor 3 (abuse of authority) could be substantiated (Transcripts, vol. 2, pp 14-19). The MR stated that the Appellant did not display malicious intent or bad faith because Mrs. M had offered the firearm to the Appellant.

[19] The MR then pointed out that the Appellant admitted to the particulars of Allegation 4 (discreditable conduct by possessing a prohibited weapon without a license). However, the MR claimed that the classification of the firearm as a prohibited weapon should be excluded as a result of the Board's *Charter* finding (Transcripts, vol. 2, p 20) (*sic* throughout):

> The classification of the firearm was determined by way of communication with the Canadian Firearms Centre, which was after the breach. The Conduct

> Authority may argue that the firearm classification as prohibited is confirmed by the Provincial Court Judge, which is accurate. However, the Judge in the criminal proceeding did not have before his submissions on the Charter Rights, which could have possibly resulted in exclusion of that evidence.

[20] At that point, the Board interrupted the MR's submissions to note that it was bound by the Provincial Court Judge's findings that the Appellant was in possession of a prohibited weapon. While the MR agreed that the Board was bound by the *CSO (Conduct)* to respect the Judge's findings, she declared that the Board was also bound by its own decision to exclude the firearm and derivative evidence that came from the Order. The MR explained that, without that evidence, there was nothing else to show that the firearm was prohibited (Transcripts, vol. 2, p 22).

[21] The MR acknowledged that the Appellant presented an incomplete synopsis, which formed the particulars of Allegation 5, but stated that the error was made without an intent to provide false or misleading information. The MR argued that the name of the person who took possession of the firearm was not relevant and that the evidence submitted by the CAR was insufficient to support the claim that the Appellant falsely declared that Mrs. M had kept the firearm.

[22] The MR asserted that Allegation 7 was not substantiated either, as there was no evidence provided that the Appellant left with the firearm frame, even though both witnesses were adamant that the latter had left with it. The MR suggested that perhaps the item was packed up in a box while the sisters were cleaning their father's residence. Regarding Allegation 8, the MR stated that there was nothing false in the Appellant's reporting, since he left the item at the property (Transcripts, vol. 2, p 28).

[23] Finally, the MR indicated that the Appellant fulfilled all responsibilities with respect to Allegation 9 and noted that any misunderstanding would be better addressed as a performance issue.

*CAR's submissions*

[24] The CAR began her submissions by noting that not all particulars need to be established to find that the overall allegation was established. She argued that Allegations 1, 2, and 7 were supported by evidence of both theft and breach of trust. The CAR submitted that, but for being a

police officer, the Appellant would not have been in a position to gain possession of either the firearm or the gun frame. For that reason, the CAR argued that the Appellant was not acting for the public good, but rather for his own personal interest (Transcripts, vol. 2, p 41). The CAR claimed that, even if the Board did not find Allegation 2 (breach of trust) to be established, Allegation 3 (abuse of authority) could still be found established because the Appellant had no authority to take himself off duty and become a "citizen" to receive the firearm personally. With respect to Allegation 1, the CAR opined that the theft was against the RCMP, not Mrs. M, because the RCMP had a lawful property interest in the firearm once an officer attended under the auspices of the Gun Amnesty Program (Transcripts, vol. 2 p 66).

[25] Finally, in regard to Allegation 4, the CAR submitted that the classification of the firearm as a prohibited weapon was established independently of the Order to produce the weapon and the evidence that derived from the Order. The Provincial Court Judge found the weapon to be prohibited based on the Appellant's own submissions in that matter. The CAR argued that the Board was not precluded from relying on the findings of the Judge and, in fact, was obligated to.

**Board decision on the allegations**

[26] After adjourning for the afternoon, the Board issued an oral decision on the allegations. It found six of the nine established (Transcripts, vol. 2, pp 81-94). Allegation 3 (abuse of authority) was stayed, in accordance with the *Kienapple* principle, because it relied on the same set of facts as Allegation 2. The principle, derived from *Kienapple v R*, [1975] 1 SCR 729, states that a person cannot be convicted for two separate offences based on the same act.

*Firearm allegations*

[27] The Board found that Allegation 1 was not established because the five elements of theft were not proven. According to the Board, theft against the RCMP could not be found, as the ownership of the firearm never passed from Mrs. M to the RCMP (Transcripts, vol. 2, p 82). The Board found that the particulars of Allegation 2 established a finding of discreditable conduct, though they did not reach the threshold for criminal breach of trust. The Board determined that it was bound by the findings of the Provincial Court Judge and therefore, Allegation 4 was established based on the Appellant's submissions and criminal conviction (Transcripts, vol. 2, p 85). The Board did not

accept the Appellant's characterization of the exchange as a citizen-tocitizen transaction. For Allegation 5, the Board found that a reasonable police officer would infer from the Appellant's PRIME synopsis and that the firearm was left in the care and control of Mrs. M. The Board found that the synopsis was incomplete, inaccurate, and deliberately misleading. Accordingly, the Board found Allegations 5 and 6 (failure to properly account for property coming into his possession) to be established as well.

*Firearm frame allegations*

[28] The Board found that there was no evidence that the item referred to in Allegations 7 and 8 was an operational firearm as was described in the particulars. The Board also determined that the Appellant left with the item, with the acknowledgement of Ms. J and her sister, so Allegation 7, theft of a handgun, was not established (Transcripts, vol. 2, p 89). While not all particulars of Allegation 8 were established, the Board found that the Appellant left with the item, but crafted a PRIME synopsis, indicating that he left the item with Ms. J. The Board concluded the synopsis to be false and misleading; therefore, Allegation 8 was established.

*Jerry can allegation*

[29] Finally, the Board found that the Appellant's documentary shortcomings, referred to in Allegation 9, did not amount to the degree of misconduct captured by section 4.4 of the Code of Conduct and dismissed the allegation (Transcripts, vol. 2, p 92).

**Conduct measures**

[30] The Board then held an in-person hearing on June 14, 2018, to determine the appropriate conduct measures to impose. The MR provided documentary evidence, summarized by the ERC (Report, para 52):

> - The [Appellant's] Performance Evaluations for 2015-2016 (Material / To be disclosed to the Board, pages 1-3), 2014-2015 (Material / To be disclosed to the Board, pages 4-7), 2012-2013 (Material / To be disclosed to the Board, pages 8-10), 2008-2009 (Material / To be disclosed to the Board, pages 11-19); as well as a Progress Report after Depot and his Cadet Training Report;

- Several reference letters from RCMP colleagues and members of the community (Material / To be disclosed to the Board / all support letters); and
- Six certificates of completed online courses in the field of coaching.

[31] The MR also called the Appellant to testify. The latter spoke on his background, reasons for joining the RCMP, and his career with the Force (Transcripts, vol. 3, pp 4-30). The Appellant acknowledged that he has received some negative performance feedback (Form 1004 – *Performance Log*) early in his career, but noted that he had never received formal discipline or performance feedback related to the handling of evidence.

[32] The Appellant then spoke to the impact that the Conduct Board proceedings have had on his family and health. He shared that he has been diagnosed with situational anxiety and depression, for which he takes medication (Transcripts, vol. 3, p 34). The Appellant also stated that he has experienced a financial impact because his legal expenses were not covered by the Members Legal Fund or the Legal Assistance at Public Expense Directive.

[33] Finally, the Appellant apologized for his mistakes and stressed his desire to remain employed with the RCMP (Transcripts, vol. 3, p 58). Then, in cross-examination, the Appellant declared that he did not intentionally display a lack of honesty and integrity. Instead, he argued that his actions demonstrated a lack of judgement (Transcripts, vol. 3, p 66).

*CAR's submissions*

[34] The CAR began her submissions by stating that dismissal is a potential outcome based on the lack of honesty and integrity demonstrated by the Appellant (Transcripts, vol. 3, p 68). She then outlined the aggravating factors, which were summarized as follows by the ERC (Report, para 58):

- the misconduct involved members of the public;
- the Appellant's actions were planned and deliberate;
- the evidence demonstrated a pattern of behaviour, it was not an isolated incident;
- the Appellant attempted to obtain a personal benefit in the form of the Luger firearm; and
- the Appellant now has to make a McNeil disclosure.

[35] The CAR noted that the only reason the misconduct allegations related to the firearm frame came to light was because of a file review by his supervisor. Accordingly, she submitted that the Appellant remains a risk to the organization because he may provide false or misleading information in pursuit of his own interests and has not accepted responsibility for his actions (Transcripts, vol. 3, p 74).

*MR's submissions*

[36] The MR began by presenting cases that she felt were similar to the facts, but did not result in dismissal (Transcripts, vol. 3, pp 75-82). She then outlined the following mitigating circumstances, which were summarized by the ERC (Report, para 61):

- the Appellant's *Charter* rights were breached in the course of the investigation;
- there was a negative finding that his supervisor discussed the proceedings in a public setting;
- the Appellant sought medical and counselling help;
- there was no evidentiary value to the exhibit (jerry can) and no investigation was compromised;
- the Appellant had no malicious intent;
- his overall performance is positive;
- the Appellant is greatly involved in the community;
- he has been involved in many important files that attracted media attention;
- he has received numerous letters of support;
- the Appellant has the ability to be rehabilitated;
- he collaborated throughout the proceedings; • the Appellant does not have prior discipline; and
- he apologized and showed remorse.

[37] The MR argued that dismissal would be disproportionate as a conduct measure in light of the case law, mitigating factors, and parity of sanction principle (Transcripts, vol. 3, p 91). The MR did not recommend a more appropriate conduct measure. She left the final determination with the Board, though she did state that a transfer would be inappropriate in light of the Appellant's family's circumstances.

*CAR's reply*

[38] The CAR echoed the Board's assessment that the Appellant's misuse of the Gun Amnesty Program was an aggravating factor (Transcripts, vol. 3, p 94). The CAR also contended that cases involving joint submissions on sanctions should not be contemplated by the Board, nor could the Appellant rely on being the subject of the proceedings as a mitigating factor. She also noted that the Appellant did not cooperate because he refused to provide a statement to investigators. Finally, she submitted that the aggravating factors outweighed the mitigating factors, thereby supporting dismissal as the appropriate measure to impose.

**Board decision on conduct measures**

[39] On that same day, June 14, 2018, the Board issued its decision on conduct measures. The Board reiterated the allegations it had found to be established and explained the framework for identifying appropriate conduct measures. The Board determined the appropriate range of measures, laid out the aggravating and mitigating circumstances, and then imposed the conduct measures.

[40] The Board found that the case law supported a range from significant forfeiture of pay to dismissal in light of the dishonesty, lack of integrity, and pursuit of personal gain displayed by the Appellant (Transcripts, vol. 3, p 105).

[41] The Board accepted the Appellant's 10 years of service with good performance, as well as support from RCMP members and the community as mitigating factors. The Board also acknowledged the Appellant's apology and remorse; however, it did not attribute full credit to the apology, as the Appellant characterized his dishonest reporting as a product of laziness.

[42] The Board did not accept the *Charter* breach as a mitigating factor because the Appellant had already received the benefit of excluding evidence that derived from the breach. It also refused to accept the Appellant's health and financial circumstances as mitigating factors since they flowed directly from his own actions.

[43] The Board then found the following aggravating factors (Transcripts, vol. 3, 109):

- The misconduct involved members of the public;
- The misconduct was not an isolated incident considering the same circumstances occurred with Ms. J;
- The criminal conviction regarding the Luger firearm; and
- The *McNeil* disclosure obligation of the Appellant's discipline record, a burden imposed not only on the Appellant, but the Force and Crown as well.

[44] The Board found that the aggravating factors outweighed mitigating factors and ordered the Appellant to resign within 14 days or be dismissed.

**APPEAL**

[45] On November 20, 2018, the Appellant was served with the Board's decision (Material/The Record/Decision). On November 30, 2018, the Appellant submitted a Statement of Appeal to the Office for the Coordination of Grievances and Appeal (OCGA) (Appeal, pp 3-5). The Appellant argues that the Board erred in law when it relied on the Provincial Court's findings despite the clear breach of the Appellant's *Charter* rights. The Appellant also submits that the decision was reached in a manner that breached the principles of procedural fairness because the Board refused to allow cross-examination of Mrs. M, and that the conduct measures imposed are clearly unreasonable. As redress the Appellant seeks reinstatement.

**Appeal submissions**

[46] On July 17, 2019, the Appellant provided his written appeal submissions (Appeal, pp 328340). The ERC summarized the grounds of appeal raised by the Appellant as follows (Report, para 72):

1. The Board issued contradictory reasons in finding that the breaches of the Appellant's Charter rights required that the related evidence be excluded from the conduct hearing, while simultaneously turning to the Criminal Proceedings involving that very evidence to determine if Allegations 1 through 6 were established;
2. The Board relied on evidence that was not obtained independently of the *Charter* breach;
3. The Board breached the Appellant's right to procedural fairness by not permitting the cross-examination of Mrs. M;
4. The Board erred in stating that it was bound by the criminal trial judge's findings;

5. The Board erred in finding that Allegation 8 was established even though it had found that it could not find that the object was a handgun; and
6. The Board did not properly observe the principle of parity of sanction

[47] On September 12, 2019, the CAR filed a written response to the Appellant's appeal submissions (Appeal, pp 518; 532-540). On October 10, 2019, the Appellant filed his rebuttal (Appeal, pp 694; 697-701).

**ANALYSIS**

**Timeliness of the appeal**

[48] According to section 22 of the *CSO (Grievances and Appeals)*, an appeal must be submitted to the OCGA within 14 days after the Appellant is served with the decision being appealed:

> 22 An appeal to the Commissioner must be made by filing a statement of appeal with the OCGA within 14 days after the day on which copy of the decision giving rise to the appeal is served on the member who is the subject of that decision […]

[49] The Appellant was served with a copy of the Board's written decision on November 20, 2018, and filed his appeal with the OCGA on November 30, 2018. I therefore find that the Appellant has filed his appeal within the statutory time limit.

**Considerations on appeal**

[50] The appeal process in conduct matters is not one where the appellant has the opportunity to have their case reassessed *de novo* in front of a new decision maker. Rather, it is an opportunity to challenge a decision already made. When considering an appeal of a decision rendered on a conduct matter, the adjudicator's role is governed by subsection 33(1) of *the CSO (Grievances and Appeals)*, which stipulates:

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

[51] The adjudicator's role will be confined to determining if the appealed decision was reached in violation of the applicable principles of procedural fairness, is tainted by an error of law, or is clearly unreasonable.

[52] Moreover, when it comes to an appeal of findings and conduct measures made by a Board, subsections 45.16(1) and (3) of the *RCMP Act* provide the potential outcomes:

> 45.16 (1) The Commissioner may dispose of an appeal in respect of a conduct board's finding by
>
> (a) dismissing the appeal and confirming the finding being appealed; or
> (b) allowing the appeal and either ordering a new hearing into the allegation giving rise to the finding or making the finding that, in the Commissioner's opinion, the conduct board should have made.
>
> […]
>
> (3) The Commissioner may dispose of an appeal in respect of a conduct measure imposed by a conduct board or a conduct authority by
>
> (a) dismissing the appeal and confirming the conduct measure; or (b) allowing the appeal and either rescinding the conduct measure or, subject to subsection (4) or (5), imposing another conduct measure.

[53] In accordance with the *Administration Manual*, Chapter II.3 "Grievances and Appeals", section 5.6.2, when fulfilling this role, the adjudicator must consider the following documents in their decision-making:

> 5. 6. 2. The adjudicator will consider the appeal form, the written decision being appealed, material relied upon and provided by the decision maker, submissions or other information submitted by the parties, and in those instances where an appeal was referred to the [ERC], the [ERC]'s report regarding the appeal.

[54] As I have previously noted, the Appellant indicated on his Statement of Appeal that he is of the opinion that the Board's decision was reached in violation of the applicable principles of procedural, was based on an error of law, and is clearly unreasonable. I will now assess each ground of appeal in the order listed by the ERC and, where necessary, I will provide the respective standard of review.

**Did the Board issue contradictory reasons in finding that the breaches of the Appellant's *Charter* rights required that the related evidence be excluded from the conduct hearing, while simultaneously turning to the criminal proceedings involving that very evidence to determine if Allegations 1 through 6 were established?**

*Submissions*

[55] The Appellant argues that the *Charter* remedy to exclude derivative evidence, stemming from the Order, had no tangible impact because the Board determined that it was bound by the criminal sentencing proceedings. He submits that the Board knew that the evidence could be relied upon, despite awarding the remedy (Appeal, p 333):

> The [Appellant's Representative] submits that despite the fact that a serious *Charter* breach led the Board to exclude what the Board calls, a "German Luger pistol", that remedy has no legal or practical impact in the first instance, given the Board's simultaneous opinion that it was bound by the related criminal sentencing proceedings. That the Board was aware that the excluded evidence was still going to enter the proceedings through another avenue is unquestionable on the face of its ruling on the preliminary motion […]

[56] Meanwhile, the Respondent contends that the Board's decision to rely on the criminal findings does not represent a contradiction of the *Charter* remedy (Appeal, p 534). He notes that the Appellant decided not to raise the *Charter* issue before the Provincial Court in exchange for the ability to plead guilty to only one charge. The Respondent submits that there is no contradiction in acknowledging that the Appellant pled guilty to possessing a prohibited firearm.

[57] The Respondent claims that if the Board had ruled that the sentencing hearing evidence was inadmissible, as part of the *Charter* remedy, it would have constituted an abuse of process. The Respondent pointed out that it would be self-serving for the Appellant to negotiate a mitigated plea from the Provincial Court Judge in exchange for not raising the *Charter* issue and then ask the Board to exclude the Court's findings because it did not deal with the *Charter* issue.

*Findings*

[58] I agree with the ERC and reject this ground of appeal. There is no contradiction in the Board's decision. The evidence derived from the Order and the Provincial Court findings are distinct and separate. The Board did not rely on the firearm itself or the expert report to determine whether it

was prohibited, relying instead on the Appellant's guilty plea acknowledging the same. The guilty plea has no connection to the Order. Other evidence referred to by the Board stemmed from the testimony of Sgt. N and the Appellant himself before both the Court and the Board.

[59] Furthermore, the Appellant chose not to object when the CAR filed the Provincial Court proceedings as evidence and not to raise the *Charter* issue before the Provincial Court Judge. These distinct streams of evidence may demonstrate the same truths, but it is not contradictory to allow evidence that was not excluded as a *Charter* remedy.

**Did the Board rely on evidence that was not obtained independently of the *Charter* breach?**

*Submissions*

[60] The Appellant argues that the following evidence, as summarized by the ERC, was relied upon by the Board, but not obtained independently of the *Charter* breach (Report, para 90):

- Mrs. M's statement taken by the investigator, after the seizure of the firearm, was modified by the information relating to the type of firearm. Mrs. M. had no knowledge regarding the type of firearm her husband had brought back; therefore she could not have known it was a "prohibited weapon";
- The expert report which assessed the firearm and identified it as a prohibited firearm; and
- The Relinquishment of Claim document refers to the type of firearm.

[61] The Respondent did not specifically address the evidence referred to by the Appellant. Instead, he reiterates that the Appellant decided not to address the *Charter* issue in court in exchange for a favourable plea (Appeal, p 536).

*Findings*

[62] I agree with the ERC and reject this ground of appeal. I will adopt the ERC's approach of first considering the nature of potential derivative evidence and then examining the specific evidence the Appellant seeks to exclude.

[63] Derivative evidence is evidence that is obtained consequent to a breach of one's *Charter* rights and therefore, should be excluded (*Grant*). Subsection 24(2) of the *Charter* states the following:

> 24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter* the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[64] The Supreme Court of Canada stated in *R v Strachan,* [1988] 2 SCR 980, that evidence is obtained in a manner that infringes or denies *Charter* rights if the violation of a right precedes discovery of the impugned evidence and the discovery is not too remote from the breach (*R v Ross*, [1989] 1 SCR 3). The determination of whether the evidence derives from the breach should focus on the entire chain of events; the mere presence of a temporal connection is not determinative in and of itself (*Strachan; Grant;* and *R v Burlingham,* [1995] 2 SCR 206). If the evidence derives from a *Charter* breach, and could not have been obtained but for the participation of the accused, it would render the trial process unfair if it were to rely on that evidence (*Ross*). Assessment of the discoverability of the evidence in question, independent of the breach, will be used to assess the causal connection between the breach and the evidence in determination of whether it should be excluded as derivative (*Grant; R v Cote,* 2011 SCC 46), which brings us to the question, did the Board rely on derivative evidence?

Mrs. M's second statement

[65] I agree with the ERC that the Board did not rely on Mrs. M's second statement, which was influenced by the breach and is therefore derivative evidence. The first statement, which was relied upon, preceded the *Charter* breach. The first statement was used to confirm the misleading nature of the PRIME report and that the Appellant had left the premises with the firearm.

[66] In submissions, the Appellant argued the following (Appeal, p 333):

> Mrs. [M]'s statement, which was key to the hearing being instigated, cannot support the Allegation that the firearm which she gave to the [Appellant] was a prohibited firearm.

[67] However, Mrs. M stated that she did not know the firearm was prohibited and her statement was not relied upon to establish Allegation 4 (discreditable conduct by virtue of possessing a prohibited weapon.). Accordingly, I agree with the Appellant that the Board could not rely upon

Mrs. M's second statement to determine the nature of the firearm because Mrs. M lacked that knowledge and the statement was derivative.

[68] The Board established Allegation 4 instead by relying on the Appellant's admission and the judge's finding in Provincial Court that the firearm was a prohibited firearm. I agree with the ERC that the Appellant's admission is not derivative of any *Charter* breach. While the admission came following the breach, there was no causal connection. The Appellant made the admission months after the breach, with the guidance of counsel, and earned a negotiated plea as a result. The Appellant deliberately declined to raise the *Charter* issue in exchange for a benefit he has already accrued.

[69] Furthermore, in testimony the Appellant noted that the firearm bore the name "Luger" (Transcripts, vol. 1, p 116) and the MR acknowledged in submissions that the firearm was accurately classified by the Provincial Court Judge (Transcripts, vol. 2, p 22).

[70] Meanwhile, Allegation 2 was established based on the fact that the Appellant abused his authority in order to take possession of the firearm for himself. Evidence thereof was already discovered prior to the second interview and bears no connection to the classification of the firearm.

[71] While the Appellant argues that the investigation into these matters was a direct consequence of Mrs. M's second statement, the record demonstrates otherwise. The investigation was initiated by Sgt. N based on concerns with the PRIME synopsis. All established allegations were supported without reliance on Mrs. M's excluded second statement.

Expert report/Relinquishment of Claim Document

[72] The Appellant argues that the expert report and the Relinquishment of Claim Document should not be relied upon, to prove that the weapon was prohibited, due to the *Charter* breach.

[73] I agree with the Appellant that these documents are derivative evidence. I also agree with the ERC that the Board did not rely on these documents in determining the appropriate classification of the firearm. As noted above, the firearm was independently classified based on the Appellant's

statements before the Provincial Court and the Board. There is no clear line of causation between these statements, made with the assistance of counsel for a benefit, and the *Charter* breach.

[74] The Appellant is right to say that the report and the document should have been excluded, and I find that they were not improperly relied upon to establish any allegations. As noted in *Ross*, derivative evidence must follow the breach and not be too remote. The evidence that the Board did rely on, unlike these documents, is not derivative.

**Did the Board breach the Appellant's right to procedural fairness by not permitting the cross-examination of Mrs. M?**

[75] I agree with the ERC's re-characterization of this ground of appeal. The dispositive issue is whether the Appellant's right to procedural fairness was breached by the Board's decision not to allow Mrs. M to be called as a witness according to the Appellant's request. In order to determine whether this is the case, I will first consider the standard of review for procedural fairness, then the Parties' submissions.

*Standard of Review*

[76] When he claims that the Board's decision does not respect the applicable principles of procedural fairness, the Appellant must demonstrate that the Board did not follow an adequate procedure in reaching its decision. He must establish that the following rights have been breached:

- The right to know what matter will be decided and the right to be given a fair opportunity to state his case on this matter;
- The right to a decision from an unbiased decision maker; • The right to a decision from the person who hears the case;
- The right to reasons for the decision.

[77] On appeal, procedural fairness is afforded a strict standard of review of correctness, as illustrated by the Federal Court of Canada in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial

> review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: see *Canadian Pacific Railway Company v Canada Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 (Rennie, JA) ("CPR"), esp. at paras 49, 54 and 56; *Baker*, at para 28. In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).

[78] The Appellant's argument is most accurately captured by the first right. He argues that he has not been able to make a full defense, so he has not been heard in making his case.

*Submissions*

[79] More specifically, the Appellant contends that the Board should have summoned Mrs. M as a witness based on Sgt. N's view that he needed to visit Mrs. M based on her age and presence in a care facility. Therefore, the Board should have also ascertained her credibility (Appeal, p 334).

[80] The Appellant submits that it was not in accordance with the law of evidence to rely on a witness statement without providing the opportunity for cross-examination. He opines the following (Appeal, p 334):

> [T]he critical issue on the Board's ultimate findings is not so much the fact that [Mrs. M]'s statement to [the investigator] rebuts any contention that [Mrs. M] did not actually willingly give the pistol to the [Appellant] to do with as he liked (i.e. there was no theft or breach of trust), but the fact that she clearly had no idea that it was a prohibited firearm, let alone a German luger - a fact that the Board derives from her evidence, in conjunction with the expert report, and the criminal proceedings.

[81] The Respondent claims that the *CSO (Conduct)* and the Conduct Board Guidebook afford boards great discretion when determining which witnesses they will summon to testify. He submits that the Board was justified in not calling Mrs. M after assessing the credibility of her statement and considering the totality of the evidence.

*Findings*

[82] I agree with the ERC that the Appellant cannot succeed on this ground of appeal. As noted by the Respondent, the *CSO (Conduct)* grants the Board significant discretion in proceedings:

> 13 (1) Proceedings before a conduct board must be dealt with by the board as informality and expeditiously as the principles of procedural fairness permit.
>
> (2) The conduct board may adapt these rules of procedure if the principles of procedural fairness permit.

[83] Subsections 18(3) and (4) note that the Board has the authority to determine which witnesses will testify:

> (3) The board must establish a list of the witnesses that it intends to summon, including any expert in respect of whom a party has indicated an intention under subsection 19(3) to question, and may seek further submissions from the parties.
>
> (4) The board must provide the parties with the list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.

[84] In *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, at 568-569, the Supreme Court of Canada ruled that "[a]s a general rule, [administrative] tribunals are considered to be masters in their own house" and that "they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice"; this includes the ability to restrict witnesses. However, as noted by Macaulay & Sprague, in *Hearings Before Administrative Tribunals* (3rd Edition), 2007 (pages 12-118/119), that ability cannot be exercised unfairly:

> However, that authority cannot be exercised in such a way as to lead to unfairness. Thus, it is unlikely that an agency could refuse to hear a witness who had material and relevant information which was not otherwise already before the agency. However, agencies can stop the calling of witnesses who are to provide only repetitious evidence or irrelevant evidence.

[85] Calling a witness for potential cross-examination is not always required in order to satisfy the principles of procedural fairness; nonetheless, circumstances, such as conflicts in evidence and

credibility issues, may make cross-examination necessary (*Willette v Royal Canadian Mounted Police Commissioner*, [1985] 1 FC 423).

[86] Here, I do not find any error on the Board's part in determining that there is no evidentiary dispute that would necessitate cross-examination of Mrs. M and that her testimony would have been redundant. The evidence provided by Mrs. M merely confirms that the Appellant left with the Luger firearm, which the Appellant himself has already confirmed before the Board and the Provincial Court. The Board did not rely on Mrs. M's classification of the firearm to prove that it was prohibited, so there would be no benefit calling her. The Board, and I, already accept the Appellant's contention that Mrs. M. "had no idea that it was a prohibited firearm".

**Did the Board err in stating that it was bound by the Criminal Trial Judge's findings?**

[87] Here, the Appellant submits that the Board made an error in law when it determined that it was required to abide by the findings of the Provincial Court. Accordingly, I will first consider the standard of review for questions of law, then the Parties' submissions.

*Standard of Review*

[88] An error of law is an error in the application or interpretation of the law applicable to a case. For example, it involves examining whether the decision was based on a legal disposition or case-law that does not apply to the case at hand. An error of law could also stem from either using the wrong legislation, or applying or interpreting the appropriate legislation, however erroneously. It also includes the application of the incorrect legal test.

[89] The Supreme Court established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], that there is a presumption that reasonableness is the applicable standard of review of administrative decisions (*Vavilov*, paras 16-17, 23-32). The Court confirmed, nevertheless, that this presumption can be rebutted, and a different standard of review applied, in two types of instances.

[90] Firstly, the presumption can be rebutted and a standard of review other than reasonableness can be applied when the legislator has indicated that such a different standard of review should apply (*Vavilov*, paras 33-52). Here, subsection 47(3) of the *CSO (Grievances and Appeals)* does

not expressly state what standard of review to apply to errors of law. Thus, the common law standard of review prevails if the presumption is not rebutted.

[91] Secondly, the Supreme Court established that the presumption that reasonableness is the applicable standard of review will be rebutted when the matter pertains to certain types of questions of law, in which case the standard of review of correctness is to be applied: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between two or more administrative bodies (*Vavilov*, para 53). The Court then provided specific examples of general questions of law of central importance, where the correctness standard applies (*Vavilov*, para 60):

> For example, the following general questions of law have been held to be of central importance to the legal system as a whole: **when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process** (*Toronto (City [CUPE])*, at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17).
>
> [Emphasis added.]

[92] The Appellant contends that the Board erred in law when it found itself bound by the criminal court decision determining that the Appellant was in possession of a prohibited firearm. The Appellant contends that this is at odds with the Board's own finding of a *Charter* breach and its exclusion of the firearm as evidence in the conduct proceedings. The Appellant submits that the Board had to consider the findings of the criminal court and make its own determination based on the evidence, or lack thereof, in front of the Board and in light of its own finding regarding the *Charter* breach and the remedy. I note that the court determined the pistol to be a prohibited firearm (Material/other material/additional material, p 78; *Reasons for sentence*, para 2)

[93] The Respondent compared the Appellant's request to *Toronto (City) v CUPE*, Local 79, 2003 SCC 63 [*CUPE*], at paragraph 29, where the Supreme Court stated that relitigation of a criminal conviction would constitute an abuse of process because doing so would undermine the integrity of the adjudicative system, thereby bringing the administration of justice into disrepute. I find that the question of whether the Board is bound by the findings of a provincial judge that the

Appellant was in possession of a prohibited firearm or whether this can be relitigated in the Conduct process pertains to a question of *res judicata* and abuse of process, which falls within the category of question of law of central importance, as contemplated in the above excerpt from *Vavilov*. I therefore determine that it is to be considered based on the standard of correctness.

[94] Where a ground of appeal is to be assessed on a standard of correctness, no deference is required. A reviewing adjudicator will undertake their own analysis of the question and substitute their own view if they are in disagreement with the decision maker (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, para 50). In other words, when considering a question of law, that is of central importance, an appellate body has the discretion to replace the original decision maker's decision with their own (*Vavilov, Housen v Nikolaisen*, 2002 SCC 33, at para 8).

*Submissions*

[95] Once again the Appellant states that reliance on the criminal sentencing decision was in contravention of the remedy for the *Charter* breach. He argues that it is inconsistent to first exclude evidence that gave rise to the proceedings, and then rely on the outcome of the proceedings. The Appellant also notes that the *Charter* breach was not put before the Court.

[96] The Appellant then quotes subsection 23(2) of the *CSO (Conduct)*, which states that "[t]he conduct board may rely on a finding by a court in Canada that a member is guilty of an offence under an Act of Parliament or of the legislature of a province to decide that the member has contravened the *Code of Conduct*." The Appellant argues that the use of the word "may" conveys that a board is not bound by a finding of guilt. He suggests that, as no evidence was submitted before the Provincial Court, the Board should have exercised its discretion and not found itself bound by the proceedings.

[97] In rebuttal, the Appellant first argued that abuse of process does not apply because the Judge did consider the *Charter* issue, but then argued that it does apply and it would constitute an abuse of process not to relitigate the classification of the firearm (Appeal, pp 697-701).

[98] The Respondent submits that the Trial Judge did consider the *Charter* issue. He indicates that the Judge clearly considered it because the Appellant negotiated a more lenient conviction in exchange for not raising the issue.

[99] As noted above, the Respondent also raised the issue of abuse of process and breach of the *res judicata* doctrine. He contends that the Board was correct not to relitigate the Trial Judge's findings, which were based on statements made by the Appellant.

*Findings*

[100] I agree with the ERC that the Board was bound by the Provincial Court's findings. To do otherwise would be to relitigate an issue decided by the Provincial Court Judge. The ERC found the matter at hand to be synonymous with the context of *CUPE.* In that case, a municipal employee was convicted of sexually assaulting a child under his supervision, and later an arbitrator determined that the conviction was admissible but not binding at tribunal, then finding that the employee had not committed the sexual assault. In that instance, the Supreme Court found that it would constitute an abuse of process to allow relitigation of the Court's findings to occur and doing so would bring the administration of justice into disrepute. Relitigation would violate such principles as judicial economy, consistency, and finality, if the new decision creates a situation where the respective findings are inconsistent, unfair, and inaccurate (*CUPE,* para 37).

[101] Justice Arbour did indicate circumstances where relitigation may be acceptable or even desirable (*CUPE*, para 53):

> There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness indicates that the original result should not be binding in the new context.

[102] I find that none of these circumstances apply to the matter at hand. In fact, I believe that the present case is more akin to the Court's observation that "[w]hat is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum" (*CUPE,* para 46). In that regard, I adopt the following reasoning of the ERC when it comes to findings made on sentencing (Report, para 117):

> […] The *CUPE* principles apply not only to relitigation of the fact of a criminal conviction itself, but also to relitigation of facts in reasons for sentencing (*Morel v. Canada* (F.C.A.), [2009] 1 F.C.R. 629 (*Morel*), at para. 52). In *British Columbia (Worker's Compensation Board) v. Figliola* 2011

> SCC 52 (*Figliola*), at paras. 31-33, 46, the SCC confirmed the applicability of the *CUPE* analysis.

[103] I understand the Appellant's frustration that the *Charter* remedy afforded to him by the Board is not entirely shielding him; however, the Board never suggested that it would. The present case contains a specific set of facts that result in findings made regarding the firearm in another forum imported into another forum, despite a ruling made on this firearm in the latter.

**Did the Board err in finding that Allegation 8 was established even though it had found that it could not determine that the object was a handgun?**

*Submissions*

[104] The Appellant argues that it is inconsistent that the Board found that Allegation 7 could not be established, by virtue of being unable to classify the rusted frame as a firearm, but found that Allegation 8 (being untruthful about the item in PRIME) was established (Appeal, p 339, para 23):

> The AR submits that Allegation 8 cannot properly be established for like reasons provided by the Board with respect to Allegation 7. Specifically, the Board is not satisfied that Ms. J. gave the Appellant a "handgun", and thereby determines that Allegation 7 is not proven. Yet, there is no question that the particulars of [Allegation] 8 hinge on the very fact of that very same "handgun" existing. The AR submits that the Board's reasons are inconsistent. That is, the Board's inability to conclude that the subject of Allegation 7 is actually a handgun is irreconcilable with the Board's conclusion that Allegation 8 is proven on the basis that the [the Appellant]'s report did not indicate that the [the Appellant] 'left with the item in his hands.'

[105] The Respondent stresses that there is a distinct difference between Allegations 7 and 8. The particulars of Allegation 7 required that the Respondent find that the Appellant took "possession of the handgun, without colour of right, committing a theft". In so far as Allegation 8 is concerned, the particulars required that the Board determine that the Appellant "failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities...". In other words, the Respondent submits that Allegation 7 requires the existence of a firearm, but Allegation 8 does not.

*Findings*

[106] I agree with the ERC and dismiss this ground of appeal. Allegation 8 did not require a finding that the item in question was a firearm. The allegation only required improper reporting by the Appellant. According to the Appellant's PRIME report, he did not seize the item in question. The evidence demonstrates otherwise. The characteristics or nature of the item are not relevant as to whether the Appellant accurately conveyed that he left the premises with said item.

[107] Case law notes that not all particulars of an allegation must be demonstrated to establish misconduct (Paul Ceyssen, "Legal Aspects of Policing"). Only the essential elements of the allegation must be proven, enough to establish the elements of the misconduct. I find that they were established here.

**Did the Board improperly observe the principle of parity of sanction?**

[108] As noted above, subsection 33(1) of the *CSO (Grievances and Appeals)* stipulates that in circumstances where there is no breach of procedural fairness or presence of an error in law, I must determine whether the decision is "clearly unreasonable".

[109] In disputing the conduct measure imposed by the Board, the Appellant is asking me to determine whether the Board's decision to dismiss the Appellant is clearly unreasonable. In order to do so, I will first consider the standard of review for clearly unreasonableness, then the Parties' submissions.

*Standard of Review*

[110] In *Canada (Attorney General) v Zimmerman*, 2015 FC 208 [*Zimmerman*], at paragraph 45, Justice McVeigh of the Federal Court postulates that "[r]easonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir; Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12)."

[111] While considering the Supreme Court decision in *Vavilov,* Justice Norris of the Federal Court, in *Bell Canada v Hussey*, 2020 FC 795, examined the concept of reasonable decision, underlining the following at paragraph 30:

> Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The decision maker's reasons should be read in light of the record and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-95). When considering whether a decision is reasonable, "the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[112] However, subsection 33(1) of the *CSO (Grievances and Appeals)* dictates that I must determine whether the decision is "clearly unreasonable", as opposed to simply "unreasonable". What exactly is this "clearly unreasonable" standard? The Federal Court, in *Kalkat v Canada (Attorney General)*, 2017 FC 794, and the Federal Court of Appeal, in *Smith v Canada (Attorney General)*, 2021 FCA 73, both accepted that the term "clearly unreasonable" used in the *CSO (Grievances and Appeals)* is effectively the same as the "patently unreasonable" standard, which has long been recognized in jurisprudence.

[113] There is a distinction to make between an "unreasonable" decision and one that is "clearly unreasonable", the latter being the threshold applicable to conduct appeals under the *CSO (Grievances and Appeals)*. In *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, the Supreme Court commented as follows on the difference:

> [56] I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary

> foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
>
> [57] The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada (Attorney General) v Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem […] But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

[114] The Supreme Court stated in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paragraph 52, that a patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand."

[115] In their Recommendation C-013, the ERC held that "whether a decision on appeal was clearly unreasonable for the purposes of subsection 33(1) of the *CSOs (Grievances and Appeals)* in the context of an alleged error of fact or mixed fact and law by a conduct authority is a consideration of whether the error was a clear or manifest error that was determinative to the decision on appeal". The ERC therefore recognizes the deference that needs to be afforded to a decision maker achieving conclusions based on an appreciations of the facts.

[116] When considering the clearly unreasonable standard in the context of conduct measures, and reasons that are provided, significant deference is owed to the adjudicator. In *R v Lacasse*, 2015 SCC 64, at paragraphs 43-44, the Supreme Court expanded on the deference owed in a review of sanctions, albeit in a criminal context. Those same principles apply here:

> I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges.
>
> […]
>
> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

[117] Accordingly, a conduct appeal adjudicator should only intervene where the conduct measure "is unreasonable, fails to consider all relevant matters (including important mitigating factors), considers irrelevant aggravating factors, demonstrates a manifest error in principle, is clearly disproportionate with the conduct and the sanction in other previous similar cases, or would amount to an injustice" (see D-115, Commissioner's decision, at para 44).

[118] In other words, conduct measures should rarely be overturned on appeal.

*Submissions*

[119] The Appellant submits that the Board did not observe the principle of parity in sanctions because it did not consider that the Appellant had received an absolute discharge from the criminal sentencing Judge. The Appellant adds that if the Board is bound by the Judge's findings, then the Board is also bound by the finding that the Appellant made a "mistake" and this should have factored into the conduct measure imposed (Appeal, p 340).

[120] The Respondent states that the parity principle applies between conduct measures and not to criminal proceedings. The Respondent mentions that the RCMP conduct process does not have the same goals as the criminal justice system and is not bound by sentencing precedents. The Respondent argues that the Board appropriately considered the range of potential conduct measures, the mitigating and aggravating circumstances, and the severity of the Code of Conduct breaches. Accordingly, the conduct measure is in line with the principle of parity.

*Findings*

[121] I agree with the ERC that the Board's conduct measures are not clearly unreasonable and appropriately considered the principle of parity.

[122] The RCMP and ERC have long utilized a three-part process to identify appropriate conduct measures:

- Determine the appropriate range of sanction, given the seriousness of the conduct;
- Determine any mitigating and/or aggravating factors; and
- Select a penalty that best reflects the severity of the misconduct, and the nexus of the misconduct and the requirements of the policing profession.

[123] I find that the Board accurately described the procedure for determining conduct measures and the range of sanctions available (Appeal, pp 28-29):

> In making my determination of the appropriate penalty, I must first consider the appropriate range of measures and then take into account the aggravating and mitigating factors present in this case. I am not bound by the decisions of other conduct boards, but previously decided cases of a similar nature do help to establish the range of sanctions applicable. The principle of parity of sanction seeks to ensure fairness, so that similar forms of misconduct are treated in similar fashion. This lends predictability to conduct matters. In addition the *Conduct Measures Guide* is available for guidance on considerations around the imposition of conduct measures. However, it is not binding or determinative.
>
> […]
>
> The established contraventions of the Code of Conduct are very serious and, in my view, can be characterized as involving dishonesty and deception. Having reviewed the cases presented by both parties, when it comes to misconduct involving those factors, the range of sanction is fairly narrow, extending from a substantial forfeiture of pay to dismissal.

[124] Not only did the Board accurately describe the process for determining conduct measures, it also accurately captured the spirit of the parity principle. As noted by the Federal Court in *Rendell v Canada (Attorney General),* 2001 FCT 710, the parity sanction cannot fetter an adjudicator's discretion to decide cases on an individual basis:

> [13] Furthermore, while the principle of parity of sanctions is certainly relevant in the context of disciplinary proceedings within the RCMP, it cannot be applied in such a manner as to fetter the discretion bestowed upon the Commissioner by the legislation […]

[125] Simply put, the absolute discharge the Appellant received in Provincial Court has no bearing on his conduct measures, as the concept of parity of sanction finds application within the conduct forum, and not between it and criminal proceedings. I find that the conduct measures imposed were well supported and adhere to the principle of parity. The Board was never required to apply that principle to the criminal proceedings. These conduct measures are exclusive to the employment context. Accordingly, I dismiss this final ground of appeal.

**DISPOSITION**

[126] Pursuant to section 45.16 of the *RCMP Act*, the appeal is dismissed and the conduct measures imposed by the Board are confirmed.

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

April 8, 2022

Nicolas Gagné
Recourse Appeals & Review Adjudicator

Date