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File 202233558 (C-082)

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF
an appeal of a conduct board decision pursuant to subsection 45.11(1) of the
Royal Canadian Mounted Police Act, RSC, 1985, c R-10

BETWEEN:

Commanding Officer, "C" Division, Conduct Authority
Royal Canadian Mounted Police

(Appellant)

and

Constable Judith Nolin
Regimental Number 53349
HRMIS Number 000146316

(Respondent)

(the Parties)

CONDUCT APPEAL DECISION

Caroline Drolet, Adjudicator

November 8, 2023

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SYNOPSIS

The Respondent faced three allegations under section 7.1 of the RCMP Code of Conduct for engaging in discreditable conduct in a manner that is likely to discredit the Force. The Respondent declared CAN$600.00 in purchased goods at the Canadian airport upon her return from a trip abroad. A Canadian Border Services Agency Officer L.B. examined receipts found in the Respondent's possession that showed the value of purchased goods in the Respondent's possession to CAN$2,279.05. The Respondent made a number of inappropriate comments towards Officer L.B. throughout their interaction. The next morning, the Respondent reported the events to her RCMP supervisor; however, she did not convey the dollar value of the items she did not declare. The Respondent subsequently pleaded guilty to making a false declaration under the *Customs Act*, RSC, 1985, c 1 (2nd supp.), for which she was granted an absolute discharge.

The Respondent contested all three allegations. The Conduct Board found that the allegations were established and imposed a 45-day pay forfeiture, as well as additional conduct measures, including an ineligibility for promotion for a period of 3 years.

On appeal, the Appellant sought the Respondent's dismissal, arguing that the Conduct Board: mistakenly accepted the Respondent's apology and letters of support as mitigating factors; had underestimated the burden of maintaining the Respondent as a member of the Force that was created by her McNeil disclosure requirement; and had failed to consider two additional aggravating factors.

The appeal was referred to the RCMP External Review Committee for review, who found that the Conduct Board did not err in its consideration of mitigating and aggravating factors and did not render a clearly unreasonable decision.

The adjudicator found that the Conduct Board's decision was supported by the Record and is not clearly unreasonable. Thus, the appeal is dismissed.

INTRODUCTION

[1] The Appellant appeals the conduct measures imposed by an RCMP Conduct Board based on its finding that three allegations against the Respondent had been established, contrary to section 7.1 of the RCMP Code of Conduct, a schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281. While the Appellant was seeking the Respondent's dismissal, the Conduct Board instead imposed a 45-day pay forfeiture as well as other conduct measures. The Appellant contends that the imposed conduct measures are clearly unreasonable and requests that the Respondent be ordered to resign within 14 days or be dismissed.

[2] 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 July 26, 2023 (ERC C-2022-011 (C-082)) (the ERC Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

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

[4] In rendering my decision, I have considered the materials before the Conduct Board (Materials), the 242-page Appeal Record prepared by the Office for the Coordination of Grievances and Appeals (OCGA), and the ERC Report, collectively referred to as the Record. I refer to documents in the Record by way of the page number from the electronic file.

[5] Upon reviewing the Record, I am satisfied that the Appellant has standing and that the appeal was presented within the statutory time limitation period, pursuant to section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [*CSO (Grievances and Appeals)*]. Therefore, I have jurisdiction to adjudicate this appeal.

[6] For the reasons that follow, I agree with the ERC and find that the Appellant has failed to establish on a balance of probabilities that the Conduct Board's decision was reached in a manner that contravened the applicable principles of procedural fairness, was based on an error of law, or

was clearly unreasonable. I dismiss the appeal and confirm the conduct measures imposed by the Conduct Board.

BACKGROUND FACTS

[7] The ERC summarized the factual background leading to the conduct hearing as follows:[1]

> [4] The Respondent joined the RCMP in 2006.[2] On September 24, 2019, the Respondent was returning to Canada from a personal trip to Florida through an airport in "C" Division. The Respondent was the holder of a NEXUS card. This meant that she was a "trusted traveler" who could, upon returning to Canada, use a special kiosk to declare any goods purchased abroad.[3] However, on September 24, 2019, the Respondent could not use a NEXUS kiosk upon her arrival in Canada for technical reasons.[4] As a result, she attended a Canada Border Services Agency (CBSA) counter where she declared to CBSA Officer Y.B. a total amount of [CAN]$600.00 in goods purchased abroad. CBSA Officer Y.B. then sent the Respondent to a secondary examination, where CBSA Officer L.B. (Officer L.B.) sought further details concerning her declaration.
>
> [5] The Respondent gave four receipts to Officer L.B. However, Officer L.B. determined, applying the applicable exchange rate, that the value of the four receipts was [CAN]$1,031.79, thus exceeding the [CAN]$600.00 declared amount. A further examination of the Respondent's luggage revealed three additional receipts for purchases amounting to [CAN]$1,212.58. The Respondent told Officer L.B. that these additional receipts in fact represented gifts she had received, and that she did not believe she had to declare them.[5] In the end, the total value of receipts in the Respondent's possession was [CAN]$2,279.05, not [CAN]$600.00.
>
> [6] As a result of failing to declare the full amount of goods she had purchased abroad, the Respondent was the subject of a seizure, paid a fine of approximately [CAN]$700.00 and her NEXUS card was seized.[6]
>
> [7] According to Officer L.B., the Respondent made a number of unusual, and in some instances, inappropriate comments during their interaction, including:

[1] ERC Report, at paragraphs 4 to 10.
[2] Transcript, Volume 1, at page 96.
[3] Transcript, Volume 1, at pages 45 to 47.
[4] Transcript, Volume 1, at pages 139 to 140.
[5] Transcript, Volume 1, at pages 29 to 36.
[6] Conduct Board Decision, at paragraph 26.

- The Respondent identified herself as working "in national security for the government" and stated "that's why she was being sent in to the secondary inspection".[7]
- The Respondent made comments about feeling as though she was constantly harassed by the CBSA,[8] the subject of discrimination as a white woman, and that it was a known fact that the CBSA "don't like us". When Officer L.B. asked who was meant by "us", the Respondent answered "RCMP".[9]
- Officer L.B suggested that she thought the Respondent would be more understanding of Officer L.B.'s role, because they both work in security. The Respondent answered by suggesting that Officer L.B. should be "spending more time on people who are more likely to blow up planes" and that "some ethnic groups are more likely to commit crimes".[10]
- The Respondent referred to the process as a "fucking gong show", after everything she had "done for this country".[11]
- After having waited for Officer L.B. to complete paperwork relating to the seizure, the Respondent commented "let me get this right, it takes us 10 minutes to arrest a terrorist and it takes you guys two hours to do a seizure?"[12]

[8] The next day, the Respondent returned to work. At the beginning of her shift, she explained to her supervisor, Corporal (Cpl.) S.P., some of the previous day's events. She told Cpl. S.P. that she had been sent to secondary, that receipts had been found in her suitcase, that she had to pay a fine and that her NEXUS card had been seized. Cpl. S.P.'s understanding was that she forgot to declare "five or $600 of items that she purchased".[13]

[9] The Respondent was eventually charged in provincial court proceedings under paragraph 153(a) of the [*Customs Act*, RSC, 1985, c 1 (2nd supp.) (*Customs Act*)] for making a false declaration (*Customs Act* proceeding). The Respondent pleaded guilty to that charge and, based on a joint submission from the parties, was granted an absolute discharge on July 22, 2021.[14]

2. Conduct Proceedings

A. Investigation and Notice of Conduct board Hearing

[10] A *Code of Conduct* investigation took place regarding the events of September 24 and 25, 2019. Statements were obtained from the Respondent, as well as other witnesses including Officer L.B. and Cpl. S.P. Relevant

[7] Transcript, Volume 1, at pages 16 and 17.
[8] Transcript, Volume 1, at pages 20 and 21.
[9] Transcript, Volume 1, at pages 27 and 28.
[10] Transcript, Volume 1, at pages 39 to 41.
[11] Transcript, Volume 1, at page 58.
[12] Transcript, Volume 1, at pages 55 and 56.
[13] Transcript, Volume 1, at pages 82 to 84.
[14] Transcript, *Customs Act* proceeding, at pages 2 to 13.

documentation pertaining to the events was also obtained, and an investigation report was completed.[15]

Notice of Conduct Hearing

[8] On June 5, 2020, the Conduct Board was appointed to decide this matter. On June 10, 2020, based on the investigation, the Commanding Officer for "C" Division issued a Notice of Conduct Hearing containing three allegations that the Respondent had breached the Code of Conduct. The Notice was served on the Respondent on June 15, 2020, along with the investigating package. The allegations and their particulars are itemized as follows:

> **Allegation 1**
>
> On or about September 24, 2019, at or near Dorval, in the Province of Québec, Constable Judith Nolin engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.
>
> **Particulars**
>
> 1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted to "C" Division, Integrated National Security Enforcement Team, in Montréal, Québec.
>
> 2. You were a member of the NEXUS program, which is a voluntary program designed to speed up border crossings for low-risk, preapproved travellers into Canada and the United States.
>
> 3. In the 6 years preceding the alleged incident, you had travelled outside Canada on at least 46 occasions.
>
> 4. At the time of the alleged incident, you were returning to Canada via Pierre Elliott Trudeau International Airport after a three-week personal trip to Florida. You had in your possession goods of a value exceeding CAN $800, which you had purchased in the United States.
>
> 5. Upon your arrival at the airport, as you were unable to use the NEXUS kiosk, you presented yourself at the special services counter. You proceeded to this primary checkpoint where an officer of the Canada Border Services Agency (CBSA) asked you standard questions, including what was the value in Canadian dollars of any goods purchased outside the country. You declared $600.
>
> 6. Your declaration card was coded by the CBSA officer for a selective referral. You presented yourself for a secondary examination, where you provided CBSA officer, [L.B.], with [four] receipts for a total value of approximately CAN $1,031.79. While conducting the examination of your [checked] bag, officer [L.B.] found [three] additional receipts for a total value

[15] Part IV Investigation Report, at pages 1 to 29.

of approximately CAN $1212.58, which you had failed to disclose and provide at the primary checkpoint. You falsely declared that the goods were gifts you had received.

7. You failed to declare goods of a value exceeding CAN $800 and made false declarations to [two] CBSA officers, in contravention of section 12 of the Customs Act. As a result, you were the subject of a level two seizure for the non-reporting of imported goods, you paid a fine and your NEXUS card was seized.

8. Your actions were discreditable.

Allegation 2

On or about September 24, 2019, at or near Dorval, in the Province of Québec, you engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted to "C" Division, Integrated National Security Enforcement Team, in Montréal, Québec.

2. You were a member of the NEXUS program, which is a voluntary program designed to speed up border crossings for low-risk, pre-approved travellers into Canada and the United States.

3. In the 6 years preceding the alleged incident, you had travelled outside Canada on at least 46 occasions.

4. At the time of the alleged incident, you were returning to Canada via Pierre Elliott Trudeau International Airport after a three-week personal trip to Florida. You had in your possession goods of a value exceeding CAN $800, which you had purchased in the United States.

5. Upon your arrival at the airport, as you were unable to use the NEXUS kiosk, you presented yourself at the special services counter. You proceeded to this primary checkpoint where an officer of the Canada Border Services Agency (CBSA) asked you standard questions, including what was the value in Canadian dollars of any goods purchased outside the country. You declared $600.

6. Your declaration was coded by the CBSA officer for a selective referral.

7. You then presented yourself for a secondary examination and immediately told CBSA officer [L.B.] that you work for the government in national security and knew why you were there. Officer [L.B.] informed you that your occupation was not relevant as any person entering Canada is subject to examination. You continued to bring up your profession during the course of the examination.

8. You told Officer [L.B.] that "they" did not like the RCMP, which was the reason why you were constantly targeted and harassed; and that it was

discrimination against white females. Officer [L.B.] queried your "passage history" and confirmed that it was your first referral for secondary examination.

9. You also made several inappropriate comments to Officer [L.B.], such as:

don't they think they should be spending more time on people who are likely to blow up planes, some groups are just more likely to commit crimes; it's a known fact that CBSA don't like RCMP; I arrest people for a living so it's possible I have traces of drugs; why are you not using your discretion; why it took so long to do paperwork when it takes "them" 10 minutes to arrest a terrorist; this is how this country thanks me after all I've done; it's a fuckin' gong show.

10. Your overall comments and behaviour were inappropriate towards Officer [L.B.], an employee of a partner agency, and caused her to feel that you were trying to intimidate her.

11. Your actions were discreditable.

Allegation 3

On or about September 25, 2019, at or near Montreal, in the Province of Québec, you engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars

1. At all material times, you were a member of the Royal Canadian Mounted Police (RCMP) posted to "C" Division, Integrated National Security Enforcement Team, in Montréal, Québec.

2. On September 24, 2019, in contravention of section 12 of the *Customs Act*, you failed to declare goods of a value exceeding CAN $800 and made false declarations to Canada Border Services Agency officers. As a result, you were the subject of a level two seizure for the non-reporting of imported goods, you paid a fine and your NEXUS card was seized.

3. On September 25, 2019, you were returning to work after a vacation.

4. You spoke to your supervisor, [Cpl. S.P.], and disclosed that the previous days, upon your return to Canada from your trip, you were sent to a secondary examination by a CBSA officer. You explained to [Cpl. S.P.] that you had omitted to declare the items you had purchased and used during your trip, which were of a value of approximately $600; you also told him that your NEXUS card was seized.

5. You provided misleading information to your supervisor pertaining to your secondary examination and the details of your contravention to section 12 of the *Customs Act*.

6. Your actions were discreditable.

[*Sic throughout*]

Motions and disclosure requests

[9] The Respondent submitted a few motions and disclosure requests. These issues have been dealt with appropriately by the Conduct Board and they have not been raised in this appeal.

Respondent's written response to the Notice of Conduct Hearing

[10] On April 6, 2021, the Respondent submitted her written response pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], in which she denied all three allegations.[16]

CONDUCT HEARING PROCEEDINGS

Allegations phase

[11] The ERC summarized the allegations phase of the conduct hearing proceedings as follows:[17]

> **a) Allegations Phase**
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> [14] The [Conduct] Board heard the evidence of three witnesses during the allegations phase: Officer L.B., Cpl. S.P. and the Respondent.
>
> Officer L.B.
>
> [15] Officer L.B. described, as noted in the factual summary above, how the Respondent had failed to fully declare the amount of receipts in her possession during the secondary examination.[18] Officer L.B. recalled the Respondent's explanation that she had forgotten about some receipts because they were gifts; she told the Respondent she did not believe her because of her status as a NEXUS member and her frequent travel history.[19] Officer L.B. felt like at the outset, the Respondent was "on the defensive" and upset at the fact she was the subject of a secondary examination.[20] She also described comments made by the Respondent during their interaction. These comments included the Respondent stating that "I know why I'm here", followed by "it's because I work for the government",[21] and other references to the CBSA

[16] Subject member's subsection 15(3) response.
[17] ERC Report, at paragraphs 14 to 23.
[18] Transcript, Volume 1, at pages 29 to 36.
[19] Transcript, Volume 1, at pages 36 and 37.
[20] Transcript, Volume 1, at pages 19 and 20.
[21] Transcript, Volume 1, at pages 15 and 16.

discriminating against white women and not liking "us", meaning the RCMP.[22]

[16] Officer LB also described other comments made by the Respondent including the comments about spending more time on people "likely to blow up planes", and that "some ethnic groups are more likely to commit crimes". Officer L.B. was taken aback by these comments, and the fact the Respondent looked at her nametag as she made them; she described how they impacted her as a Muslim Arab woman living in the "post 9/11 era".[23] Officer L.B. further identified the Respondent's comment about how "it takes us 10 minutes to arrest a terrorist and it takes you guys two hours to do a seizure", after having waited for Officer L.B. to complete required paperwork, as well as her comment that "it's a fucking gong show" after being told her NEXUS card would be seized.[24] Overall, Officer L.B. described the Respondent as "very rude" and abrasive.[25] On cross-examination, Officer L.B. acknowledged that during their interaction, there were times when the Respondent "was more unpleasant than others", particularly after she had been told that she would be the subject of a seizure.[26]

[17] Officer L.B. reported the incident to her Superintendent, noting what had transpired and comments that had been made. They discussed what level of seizure should take place in the circumstances, as well as whether the matter should be reported to the RCMP.[27]

Respondent

[18] The Respondent explained the discrepancy between the [CAN]$600.00 amount declared and the [US]$777.00 in receipts that she had on her person and presented to Officer L.B. Some items had remained in Florida or had been refunded. She further described how she had forgotten about the items relating to the three receipts found in her suitcase. The Respondent stated that earlier that day, she had to "reshuffle" her belongings at the airport in Florida given that her luggage was overweight. As a result she did not keep all her receipts with her. She also detailed having mistakenly believed, at the time, that one of the items was a gift. The Respondent testified that she was "not hiding anything to avoid any taxes or duties or customs".[28]

[19] The Respondent also described having been "extremely upset" the day of her interaction with Officer L.B[.], for reasons that included having already been searched prior to boarding her flight in Florida. She felt it suspicious that she would be the subject of a "random check" again the same day. While she agreed that there were certain comments that she should not have made to

[22] Transcript, Volume 1, at pages 27 and 28.
[23] Transcript, Volume 1, at pages 39 to 41.
[24] Transcript, Volume 1, at pages 56 and 58.
[25] Transcript, Volume 1, at page 60.
[26] Transcript, Volume 1, at pages 73 and 74.
[27] Transcript, Volume 1, at pages 52 and 53.
[28] Transcript, Volume 1, at pages 100 to 106, 110, 111 and 116.

Officer L.B., and stated that she had been attempting to bring humour to the circumstances, she denied mentioning that she worked for the government to intimidate Officer L.B. Rather it was an attempt to de-escalate the situation, which the Respondent felt was tense, and to make Officer L.B. understand that there was no reason to be "alert".[29]

[20] The Respondent testified that on September 25, 2019, she returned to work at approximately [7 a.m.] At that time, she informed Cpl. S.P. that the previous day, she "didn't declare", she paid a fine and she lost her NEXUS card. She told Cpl. S.P. that she had forgotten to declare items.[30]

[21] On cross-examination, the [Conduct Authority Representative (CAR)] underscored that the Respondent had not, in her statement to the investigator or in her written response to the Notice, mentioned that certain items had remained in Florida or that she had received a refund for items identified in her receipts. The CAR also probed the Respondent on her explanation that she declared the $600.00 amount in US dollars rather than Canadian currency. The CAR further questioned the Respondent's assertion that she had forgotten about the three receipts in her suitcase, pointing to her statement to the investigator, where she had described realizing during her flight that there may be an issue with her receipts.[31]

[22] When pressed by the CAR as to whether Officer L.B. could have felt intimidated by her actions, the Respondent indicated that "it's impossible for me to know how she feels".[32] When the CAR suggested that the Respondent had been "dropping some pretty big hints" about where she worked, she asserted that Officer L.B. had in some instances been the one asking about where the Respondent worked.[33] The Respondent also admitted to the CAR that she could not recall if she had, when reporting the incident to Cpl. S.P. the next morning, mentioned the exact amount of purchased goods that she had not declared.[34]

[Cpl.] S.P.

[23] Cpl. S.P. recalled the conversation he had with the Respondent in the early morning of September 25, 2019. The Respondent reported that she had been the subject of a secondary search by the CBSA, that receipts had been found in her luggage, that she had paid a fine, and that her NEXUS card had been taken away. Cpl. S.P. recalled that the Respondent indicated she had forgotten about items she had purchased and used on the trip. His understanding was that she had "forgotten to declare five or $600 of items that she purchased".[35] He also recalled the Respondent indicating that she had

[29] Transcript, Volume 1, at pages 107 to 109.
[30] Transcript, Volume 1, at pages 112 and 113.
[31] Transcript, Volume 1, at pages 127 to 143, 145 and 146.
[32] Transcript, Volume 1, at page 147.
[33] Transcript, Volume 1, at page 150.
[34] Transcript, Volume 1, at pages 147 and 148.
[35] Transcript, Volume 1, at pages 82 to 84.

> mentioned to a CBSA officer that she had probably been searched because she was a white female.[36]

[12] On December 1, 2021, the Conduct Board delivered its oral decision on the allegations. The three allegations were established and the oral decision on conduct measures was delivered on December 3, 2021. The Conduct Board's written decision was issued on January 19, 2022.

[13] The ERC next summarized the Conduct Board's written decision:[37]

> [25] In its written Decision, the [Conduct] Board found Officer L.B. to be a credible witness. However, the [Conduct] Board expressed concerns about the Respondent's credibility, as her explanations for failing to fully declare her purchases contained inconsistencies. This cast a doubt on her credibility and the reliability of her evidence as a whole. The [Conduct] Board also observed that the Respondent's answers were sometimes evasive.[38]
>
> [26] With respect to Allegation 1, the [Conduct] Board found that the Respondent had falsely declared that items identified on three receipts found in her luggage were gifts. The [Conduct] Board also found that the Respondent had failed to declare the full amount of goods purchased abroad in her possession. The [Conduct] Board then applied the discreditable conduct test, noting at the outset that the CAR was not required to prove that the Respondent had an intention to deceive or to make a false declaration. In the [Conduct] Board's view, a reasonable person would be appalled by the fact that the Respondent, a police officer, had failed to declare goods in the amount of [CAN]$1,600.00, and had made false declarations to two CBSA officers.[39]
>
> [27] The [Conduct] Board explained that Allegation 2 had also been established. It found it likely that the Respondent had in multiple instances, while interacting with Officer L.B., brought up the fact that she worked in national security. The [Conduct] Board also accepted that the Respondent had referred to the CBSA not liking the RCMP, and related perceptions of harassment and discrimination against white females. The [Conduct] Board further found that the Respondent had made the other comments particularized in Allegation 2, including references to people likely to "blow up planes" and groups more likely to commit crimes, and noted the direct impact of those two specific comments on Officer L.B. The [Conduct] Board concluded that a reasonable person would view the Respondent's overall comments and behaviour as likely to discredit the Force.[40]

[36] Transcript, Volume 1, at pages 82 to 86.
[37] ERC Report, at paragraphs 25 to 28.
[38] Conduct Board Decision, at paragraphs 34, 36 to 38.
[39] Conduct Board Decision, at paragraphs 46 to 75.
[40] Conduct Board Decision, at paragraphs 76 to 89.

> [28] The [Conduct] Board found that Allegation 3 had been established. It noted that there was no requirement to prove that the Respondent intended to make a false statement to Cpl. S.P. The [Conduct] Board also noted the Respondent's admission, in testimony, that "she did not provide [Cpl. S.P.] with a full explanation of the overall severity of the incident". It further noted that Cpl. S.P. might have perceived the incident differently if he had been aware of "all the details". In the [Conduct] Board's view, a reasonable person would conclude that the lack of transparency displayed by the Respondent when reporting the incident to her supervisor would likely discredit the Force.[41]

Conduct measures phase

[14] Upon finding the allegations established, the Conduct Board then heard evidence and submissions respecting conduct measures. Ultimately, it decided not the dismiss the Respondent:[42]

> **c) Conduct Measures Phase**
>
> Evidence
>
> [29] The Respondent's counsel filed a number of exhibits for the [Conduct] Board's consideration in assessing an appropriate conduct measure: (i) medical reports; (ii) letters of support from colleagues; (iii) commendations regarding the Respondent's work on a special project in "E" Division; (iv) the Respondent's performance evaluations, and; (v) a letter that the Respondent had written to the Crown in the context of the *Customs Act* proceeding.
>
> [30] The Respondent gave a statement to the [Conduct] Board in which she "took responsibility" for her actions and apologized for her behaviour on September 24, 2019. The Respondent referred to a lingering chronic illness that had been the result of a motor vehicle accident in 2013, difficulties obtaining treatment for it in "C" Division, and the resulting anxiety; she qualified this by stating that these circumstances don't "excuse anything for that day at the border". The Respondent described her pride in her work for the RCMP, noting that she was "really emotional because I really [*sic*] work hard to get where I am". She explained that she now diligently keeps receipts, even for small items. She expressed anger at herself for having a bad day that was out of character, an "error that will never happen again".[43]
>
> [31] The Respondent was cross-examined. The CAR underscored that the Respondent could have apologized and recognized the seriousness of her actions earlier in the proceedings. The Respondent acknowledged this, but noted that she had been following "what the union and the legal were telling

[41] Conduct Board Decision, at paragraphs 90 to 99.
[42] ERC Report, at paragraphs 29 to 40.
[43] Transcript, Volume 3, at pages 26 to 30.

me". The Respondent also recognized that her actions could have affected Officer L.B. in the exercise of her duties.[44]

Submissions

[32] In submissions as to appropriate conduct measures, the CAR sought the Respondent's forced resignation as in his view the [Conduct] Board's findings went to the Respondent's integrity and amounted to a fundamental breach of her obligations as a police officer. The CAR acknowledged that the Respondent's solid performance record and the absence of prior discipline, and to a lesser extent the letters of support for the Respondent, were mitigating factors. But in the CAR's view they were insufficient to overcome the severity of the misconduct.[45] The CAR suggested that the Respondent knew there were additional receipts in her suitcase, and that she was at a minimum careless in providing her declaration.[46] The CAR pointed to aggravating factors that included the serious nature of the allegations, the deceptive testimony given by the Respondent, the fact that a partner agency was involved, and the impact on Officer L.B. The CAR also noted that the Respondent had, in her statement to the investigator, framed the whole matter as an inconvenience to her, rather than acknowledge responsibility for what had occurred.[47]

[33] The CAR further underscored that the Respondent had fully contested the allegations without taking responsibility for her actions, and that it was in this context that her late apology had to be considered as a limited recognition of misconduct that "comes too late".[48] The CAR also suggested that as a result of obligations to henceforth disclose her misconduct pursuant to requirements flowing from the Supreme Court of Canada (SCC)'s judgment in *McNeil*,[49] the Respondent would be a significant burden on the Force.[50]

[34] The Respondent's counsel argued that the circumstances did not warrant dismissal. He addressed the CAR's submissions on late recognition of the misconduct by explaining that the allegations had been contested based on counsel's understanding that intent was a requirement under section 7.1 of the *Code of Conduct.*[51] He highlighted the letter written by the Respondent in the *Customs Act* proceeding in which she was proactive with an apology "where she believed that intent was not something that the prosecution had to prove".[52]

[35] The Respondent's counsel highlighted what he viewed as applicable mitigating factors, including the letters of support written for the Respondent,

[44] Transcript, Volume 3, at pages 32 to 39.
[45] Transcript, Volume 3, at pages 41 to 43.
[46] Transcript, Volume 3, at pages 48 and 49.
[47] Transcript, Volume 3, at pages 43 to 45.
[48] Transcript, Volume 3, at pages 45 to 47, 52 to 55, 58.
[49] *R. v McNeil*, 2009 SCC 3 [*McNeil*].
[50] Transcript, Volume 3, at pages 47 and 48.
[51] Transcript, Volume 3, at pages 59 and 60.
[52] Transcript, Volume 3, at page 62.

her "very good record of performance", the absence of prior discipline and what he described as an isolated incident. This all pointed to a "potent prospect of rehabilitation".[53] The Respondent also pointed to medical information provided to the [Conduct] Board that described pain treatments flowing from the consequences of an on-duty car accident in 2013. The Respondent's counsel suggested that the cognitive side effects of these treatments could at least partially explain the Respondent's behaviour on September 24, 2019.[54] He asked for a 60 day pay forfeiture, a reprimand, and a direction that the Respondent write letters of apology to the CBSA, Officer L.B., and her RCMP superiors.[55]

d) Conduct Measure Imposed by the [Conduct] Board

[36] In an oral decision, the [Conduct] Board imposed conduct measures consisting of a 45 day pay forfeiture, an ineligibility for promotion for a period of three years, a direction to work under close supervision for one year and a direction that the Respondent write letters of apology to Officer L.B. and Cpl. S.P.

[37] In its written reasons explaining that decision, the [Conduct] Board identified several aggravating factors. First, the incident had involved officers of a partner agency, the CBSA. Second, Officer L.B. had been negatively impacted by her interaction with the Respondent, and it was significant enough that Officer L.B. had felt the need to report the Respondent's behaviour and comments to her supervisor. Third, the misconduct amounted to a violation of a federal statute, the *Customs Act*, and fourth, it involved a lack of honesty, integrity and professionalism which were fundamental breaches of her obligations as an RCMP member. Fifth, the Respondent would now be the subject of *McNeil* requirements, thus creating a significant, but not unsustainable burden, on the Force.[56] The [Conduct] Board explained that it had not considered the Respondent's late apology to be an aggravating factor, based on the Respondent's counsel providing a plausible explanation as to why she had fully contested the allegations before the [Conduct] Board.[57]

[38] The [Conduct] Board then identified mitigating factors. First, the Respondent had apologized and showed appreciation for the seriousness of her actions at the hearing. Second, the Respondent had 15 years of productive RCMP service, with "very positive evaluations" that described her as a dedicated member who was always willing to assist, had a positive working attitude, was enthusiastic and self-motivated. Third, the Respondent had no prior discipline and no criminal record. Fourth, letters of support prepared for the Respondent spoke to her positive attitude and diligent work, despite the injuries sustained in a car accident. The [Conduct] Board did not consider the

[53] Transcript, Volume 3, at pages 60 to 64.
[54] Transcript, Volume 3, at pages 64 to 67.
[55] Transcript, Volume 3, at pages 74 and 75.
[56] Conduct Board Decision, at paragraph 115.
[57] Conduct Board Decision, at paragraphs 116 to 121.

> medical documents submitted by the Respondent in support of mitigation, given that there was no evidence of a causal link between the treatment she received and the allegations.[58]
>
> [39] The [Conduct] Board turned its mind to the Respondent's potential for rehabilitation. While recognizing that the efforts of the CBSA were undermined, the Respondent had not discarded any of the receipts corresponding to the undeclared goods, they were placed "on top" of the contents inside her baggage rather than hidden, and Officer L.B. had admitted that the interaction was not "entirely unpleasant". The [Conduct] Board further noted that the Respondent had informed Cpl. S.P. of the incident relatively quickly, and her performance assessments and support letters allowed the [Conduct] Board to conclude that it had no reason to believe a recurrence was likely.[59]
>
> [40] The [Conduct] Board noted indications that the Respondent had taken measures to prevent a recurrence. While the Respondent had initially had a cavalier attitude towards her failure to properly declare goods, the [Conduct] Board was satisfied that "she now fully understands the severity of her actions as a police officer". Mindful of the Respondent's 15 years of "good solid performance", the [Conduct] Board viewed the misconduct as a one-time serious error in judgment and was satisfied that she had learned a positive lesson from the situation. There was a minimal likelihood of recidivism and a potential for rehabilitation supporting conduct measures short of dismissal.[60]

APPEAL

[15] The Appellant filed his *Statement of Appeal* on February 3, 2022, indicating that the Conduct Board's decision was based on an error of law and that it was clearly unreasonable. More specifically, the Appellant indicated that the Conduct Board wrongly interpreted or applied the impact of the *McNeil* decision and reserved the right to add more grounds of appeal following proper disclosure. As redress, the Appellant seeks the Respondent's dismissal.

[16] On April 27, 2022, in his submissions, the Appellant raised the following six grounds of appeal, as summarized by the ERC:[61]

[58] Conduct Board Decision, at paragraphs 122 and 123.
[59] Conduct Board Decision, at paragraphs 126 and 127.
[60] Conduct Board Decision, at paragraphs 128 to 130.
[61] ERC Report, at paragraph 42.

A. whether the [Conduct] Board's acceptance of the Respondent's testimony at the conduct measures phase was clearly unreasonable given its earlier credibility findings;

B. whether the [Conduct] Board's consideration of the Respondent's apology during the conduct measures phase was clearly unreasonable;

C. whether the [Conduct] Board's reliance on letters of support for the Respondent as a mitigating factor was clearly unreasonable;

D. whether the [Conduct] Board's assessment of *McNeil* implications was clearly unreasonable;

E. whether the [Conduct] Board erred by failing to consider comments displaying racism as an aggravating factor; and

F. whether the [Conduct] Board erred by failing to consider the Respondent's pursuit of personal gain as an aggravating factor.

Scope of appeal

[17] The Respondent submits that several of the enumerated grounds of appeal should not be considered by virtue of the manner in which they were raised. She submits that the additional arguments should not be considered as, of the six grounds of appeal presented in the appeal submission, only one was raised in the *Statement of Appeal*.[62]

[18] I agree with the ERC that the purpose of the *Statement of Appeal* form is to register the appeal[63] and to concisely identify the "grounds of appeal".[64] As such, a *Statement of Appeal* defines the scope of the appeal, sets the parameters of the debate, and triggers the Commissioner's (or delegate's) jurisdiction to act.

[19] In his *Statement of Appeal* (and in his subsequent clarification), the Appellant defined the scope of his appeal as related to the conduct measures imposed by the Conduct Board and set the parameters of the debate as whether that decision is based on an error of law and whether it is clearly unreasonable. As "clearly unreasonable" is a standard of review (and not a ground of review),[65] it is clear that the Appellant was identifying as within the scope of his appeal any other

[62] Appeal Record, at pages 123 and 124.
[63] *National Guidebook – Appeals Procedures*, at section 4.1.
[64] *National Guidebook – Appeals Procedures*, at section 32; *CSO (Grievances and Appeals)*, at section 22; *Administration Manual*, Chapter II.3 "Grievances and Appeals" (July 9, 2015, version), at section 5.2.3.3.
[65] *Smith v Canada (Attorney General)*, 2021 FCA 73, at paragraph 44.

error in the Conduct Board's decision being reviewed under that standard (errors of fact or mixed fact and law).

[20] Although the Appellant provided only one argument in his *Statement of Appeal*, in regard to the *McNeil* impact, I find that his additional arguments submitted at the submission phase fall within the scope of his appeal and that they all relate to alleged errors made by the Conduct Board in imposing global conduct measures short of dismissal.

[21] In addition, it would be procedurally unfair to an appellant to require that they identify all of their arguments at the presentation stage of the appeals process without them having even received the collection of relevant materials. For all these reasons, I will consider all of the Appellant's arguments.

Considerations on appeal

[22] In considering the appeal of a conduct board's decision, the adjudicator's role is governed by subsection 33(1) of the *CSO (Grievances and Appeals)*:

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

[23] Policy in the *Administration Manual*, Chapter II.3 "Grievances and Appeals" (July 9, 2015, version), section 5.6.2, states that the adjudicator must consider the following documents in their decision-making process:

> 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.

Analysis

Procedural fairness

[24] The conduct process involving a conduct hearing set out in the *RCMP Act*, the *CSO (Conduct)* and the *Administration Manual*, Chapter XII.1 "Conduct" (November 28, 2019, version), provides a higher degree of procedural fairness. Of note, subsection 45(3) of the *RCMP Act* states that the conduct board's decision must be recorded in writing and include a statement of the conduct board's findings on questions of fact material to the decision, reasons for the decision and a statement of the conduct measure or measures, if any, imposed under subsection 45(4).

[25] Similarly, the conduct appeal regime set out in the *RCMP Act* and the *CSO (Grievances and Appeals)* provides for a high degree of procedural fairness.[66] It is explained in section 1.4 of the *National Guidebook – Appeals Procedures* and is comprised of:

> The right to be heard;
> The right to a decision from an unbiased adjudicator;
> The right to a decision from the person who hears the appeal; and
> The right to reasons for the decision.

[26] Any issue of procedural fairness is reviewed without deference as ultimately, I must ensure that the procedure was fair having regard to all of the circumstances.[67] If not, the decision is set aside, except in rare cases where the result found therein is inevitable even if the violation was to be rectified.[68]

Application to this case

[27] The Appellant raises no issue with respect to procedural fairness during the conduct or the conduct appeal processes. Any outstanding procedural fairness issues raised by the Respondent in regard to the Appellant's arguments on appeal are addressed later in my decision. As a result, there

[66] *Smith v Canada (Attorney General)*, 2019 FC 770, at paragraph 40.
[67] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paragraph 43. Also, *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at paragraphs 54 and 55; *Gulia v Canada (Attorney General)*, 2021 FCA 106, at paragraph 9; and *Davidson v Canada (Attorney General)*, 2021 FCA 226, at paragraph 14.
[68] *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at page 228.

is no outstanding procedural fairness issue and I conclude that the Conduct Board's decision did not contravene the principles of procedural fairness.

Error of law

[28] An error of law is generally described as the application of an incorrect legal requirement or a failure to consider a requisite element of a legal test.[69] It requires proof that the decision maker relied on an incorrect law or legal standard in rendering a decision.

Application to this case

[29] Although the Appellant indicated in his *Statement of Appeal* that he would argue that the decision is based on an error of law, he did not specifically address this ground of appeal in his submissions. The issues raised by the Appellant involve questions of fact and mixed fact and law. Consequently, I find that the Conduct Board's decision was not based on an error of law. Thus, I will address all six of the Appellant's arguments within the clearly unreasonable standard.

Clearly unreasonable

[30] Subsection 33(1) of *CSO (Grievances and Appeals)* requires the adjudicator on appeal to respond to allegations of errors of fact or mixed fact and law by considering whether the decision under appeal was "clearly unreasonable". The term "clearly unreasonable" is equivalent to the common law standard of patent unreasonableness.[70] Therefore, significant deference must be provided to the Conduct Board in the application of the clearly unreasonable standard.[71]

[31] Essentially, a decision is clearly or patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", in other words, if it is "openly, evidently, clearly" wrong.[72] The decision must be "clearly irrational", "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand".[73] Under the clearly unreasonableness

[69] *Housen v Nikolaisen*, 2002 SCC 33, at paragraph 36.
[70] *Smith v Canada (Attorney General)*, 2021 FCA 73, at paragraph 56; *Kalkat v Canada (Attorney General)*, 2017 FC 794 at paragraph 62.
[71] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraphs 34 and 35.
[72] *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at paragraph 57.
[73] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paragraph 52.

standard, it is not enough to merely demonstrate that the reasons provided are insufficient.[74] The Appellant must not only identify that the Conduct Board erred, but that it was determinative in reaching an outcome that would not have been possible without the mistake.

[32] Furthermore, when considering the clearly unreasonable standard in the context of conduct measures, paragraph 36.2(e) of the *RCMP Act* states that one of the purposes of the conduct regime is to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive. Accordingly, subsection 24(2) of the *CSO (Conduct)* states that the Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct.

[33] Additionally, the SCC expands on the deference owed with regard to a review of sanction measures:[75]

> [43] […] 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. […]
>
> [44] 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.

[34] As a result, questions of fact or mixed fact and law in this appeal are entitled to significant deference and only the presence of a manifest or determinative error would lead to a conclusion that the decision made by the Conduct Board is clearly unreasonable.

[35] In addition, although I understand that I must apply the clearly unreasonableness standard, I find that *Vavilov*'s instructions provide useful guidance on how to consider the reasonableness

[74] *Speckling v British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 [*Speckling*], at paragraph 37.
[75] *R. v Lacasse*, 2015 SCC 64, at paragraphs 43 and 44.

of a decision. Thus, I must focus both on the decision maker's reasoning process and the outcome.[76] In doing so, I must give respectful attention to the reasons provided by the Conduct Board and seek to understand how it arrived at its conclusion.[77] Furthermore, in examining the reasonableness of the outcome reached by the Conduct Board, I must review "holistically and contextually" any written reasons in light of the entire context, including the evidentiary record and the submissions made, with "due sensitivity to the administrative regime".[78] These written reasons must not be assessed against a standard of perfection.[79] Moreover, I must keep in mind that the reasonableness standard must be applied in a rigorous way when the impact of the administrative decision on an individual is high.[80] Also, "according to the principle of responsive justification, where the impact of a decision on an individual's rights and interests is severe, the reasons provided to the individual must reflect the stakes".[81]

Application to this case

A. Was the Conduct Board's acceptance of the Respondent's testimony at the conduct measures phase clearly unreasonable given its earlier credibility findings?

[36] The Appellant submits that the Conduct Board's findings respecting the Respondent's credibility are inconsistent. The Appellant relies on these findings as evidence that the Respondent's eventual claims of contrition were self-serving. The ERC summarized the Parties' respective arguments as follows:[82]

> [61] The Appellant first points to the [Conduct] Board's findings, when deciding that the allegations were established, that the Respondent's explanations for her behaviour were implausible, that she was evasive, and that her testimony contained many inconsistencies. The Appellant then pivots to the conduct measures phase, where the [Conduct] Board accepted the Respondent's testimony when assessing her potential for rehabilitation. In the Appellant's view, the [Conduct] Board's acceptance of the Respondent's

[76] *Vavilov*, at paragraph 83.
[77] *Vavilov*, at paragraphs 91, 127 and 128.
[78] *Vavilov*, at paragraphs 94, 97, 103 and 123.
[79] *Vavilov*, at paragraphs 91 and 92.
[80] *Vavilov*, at paragraph 133.
[81] *Vavilov*, at paragraph 133; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at paragraph 76.
[82] ERC Report, at paragraphs 61 to 63.

> testimony at the conduct measures phase is inconsistent with its findings at the allegations stage.
>
> [62] The Appellant raises a further alleged inconsistency. The [Conduct] Board, when explaining why the third allegation (providing misleading information to Cpl. S.P.) was established, concluded that the Respondent had not provided Cpl. S.P. "a full explanation of the overall severity of the incident". Yet, when later addressing the Respondent's potential for rehabilitation, the Appellant underscores that the [Conduct] Board "notes favorably" the Respondent's reporting of the incident to Cpl. S.P. in a timely fashion. The Appellant believes that this conclusion is clearly unreasonable, as it ignores the [Conduct] Board's earlier concerns about the completeness and transparency of that reporting.[83]
>
> [63] The Respondent counters that the [Conduct] Board's credibility assessment, a question of fact, is owed significant deference. The [Conduct] Board was entitled to accept or reject evidence as it saw fit, and did not have to accept or reject the evidence of a witness in its totality.[84]

[37] In its written decision, the Conduct Board made the following comments on the Respondent's credibility and reliability:

- In regard to Allegation 1:

> [36] As for [the Respondent], many significant inconsistencies were raised during her testimony regarding the reasons why she failed to declare the items she had purchased during her trip to Florida, which cast doubt on her credibility and the reliability of her evidence as a whole. She constantly tried to justify why she declared having $600.00 worth of goods instead of $2,200.00. The explanations provided throughout the conduct process became implausible and, as a whole, lacked an air of reality.
>
> [37] For example, at the border, she declared that the items were a gift. In her statement to the statutory investigator, she explained that, given the considerable amount of money spent on the purchase of items during the trip, she simply forgot about those listed on the additional three receipts found in her checked luggage. She also mentioned that the value to declare should not have included the taxes. In her response to the allegations, she explained that she had declared the goods in US currency instead of Canadian currency. At the hearing, she mentioned that she did not declare some items because she had left them in Florida or had received a refund (i.e., the Under Armour purchase). However, as established by the [CAR], this last explanation was not supported by the evidence. […]

[83] Appeal Record, at pages 79 and 80.
[84] Appeal Record, at page 123.

- In regard to Allegation 2:

> [38] Finally, I find that [the Respondent]'s answers were sometimes evasive. For example, when she had trouble recognizing that the comments she made to Officer L.B. may have caused her to be intimidated. It is clear from the evidence that Officer L.B. was doing her job properly and that [the Respondent]'s inappropriate comments caused the interaction to deteriorate. […]

- In regard to Allegation 3:

> [95] While I acknowledge that [the Respondent] informed [Cpl. S.P.] of the incident immediately upon her return to work, she did admit on cross-examination that she did not provide him with a full explanation of the overall severity of the incident. In fact, my review of the evidence confirms that [Cpl. S.P.]'s statement had similarities to the one provided by Ms. A.B., a colleague of [the Respondent]. Both knew that her NEXUS card had been seized and that she was upset about it. Although they could not confirm the undeclared value of the goods imported by [the Respondent], they knew it involved shoes, air pods and a bracelet, which were worn during the trip. They both thought that she simply forgot to declare the goods.
>
> [96] This would explain why [Cpl. S.P.] could not confirm to the Code of Conduct investigator the amount of the goods [the Respondent] declared nor understand why she had to pay a fine. Also, as stated by [the Respondent], [Cpl. S.P.] was not overly concerned about the situation and told her: "It's not a big deal. Don't worry about it." 19 Transcripts, Word version, dated November 29, 2021, page 114.
>
> [97] It is clear from the record that [Cpl. S.P.] may have perceived the incident differently if he had been aware of all the details. […]

[38] In the Conduct Measures section, the Conduct Board added the following:

> [122] I consider the following to be mitigating factors:
>
> a) At the hearing, [the Respondent] apologized and showed appreciation for the seriousness of her actions. She also apologized to Officer L.B. and supervisor for her inappropriate behaviour, which was not her "finest moment", and for the unnecessary burden inflicted on the Force.
>
> […]
>
> d) The letters of character reference provided from co-workers and supervisors confirm that [the Respondent] has their ongoing support. She is a dedicated worker who did not let the injuries sustained during the on-duty motor vehicle incident stop her from maintaining a positive attitude and

> working diligently. They also stated that they had no concerns to working with her again and would welcome such an opportunity.
>
> > i. As indicated by the [CAR], the letters do not indicate whether the writer was aware of the exact allegations against [the Respondent]. At the hearing, [the Respondent] and the Subject Member Representative both confirmed that everyone who wrote a letter was informed of the conduct process pending against her. Consequently, I have considered them as a mitigating factor.
>
> […]
>
> [126] When reviewing the ability of [the Respondent] to reform and rehabilitate, I recognize that her false declarations undermined the efforts of another law enforcement agency to conduct its mandate. However, Officer L.B. confirmed that [the Respondent] did not discard any of the receipts corresponding to the undeclared goods. The receipts were also not hidden in her luggage, but placed on top of its contents. Officer L.B. also admitted that her interaction with [the Respondent] was not entirely unpleasant.
>
> [127] As for her lack of transparency when informing her supervisor about the incident, there is nothing in the record to show similar contraventions at any point in her career. The issue involves a non-operational, personal matter. As indicated in my decision on the allegations, [the Respondent] did inform her supervisor of the incident immediately upon her return to work the next day at 7 a.m., which is about 12 hours after the incident. Her performance assessments as well [as] her letters of reference provide some insight into her character, which allow me to conclude that I have no reason to suspect that she will again act in a similar fashion.
>
> [128] In her letter of apology of May 2021 provided in the criminal court proceedings, [the Respondent] "endeavoured to take every measure to ensure that something like this will never happen again." At the conduct hearing, she testified that, since the incident, she still travels to Florida to visit her partner, but she is now extremely diligent in keeping every receipt of every item purchased, even small toiletry items.
>
> [129] Although [the Respondent] initially had a cavalier attitude towards her failure to properly declare the value of the goods purchased during her trip when returning to Canada, I am convinced that she now fully understands the severity of her actions. […]

[39] I will separately address the Appellant's two credibility arguments: 1) the Conduct Board's decision to accept the Respondent's conduct measures phase testimony was clearly unreasonable based on its earlier finding that she lacked credibility; 2) it was clearly unreasonable to rely on the Respondent's "timely" reporting of the incident to Cpl. S.P. as proof of potential rehabilitation when that reporting was inaccurate and truncated.

i. Was the Conduct Board's acceptance of the Respondent's conduct measures testimony clearly unreasonable in light of previous credibility findings?

[40] Since the Conduct Board had found the Respondent not credible earlier, the Appellant submits that it should not have reinstated her credibility in the absence of independent supporting evidence.

[41] I agree with the ERC; the Conduct Board's findings at the conduct measures phase were not inconsistent with its findings at the allegations phase.[85]

[42] The Conduct Board was required to consider the evidence in its entirety when making an assessment of the parties' respective credibility.[86] The SCC indicates that a trial judge "should not consider a plaintiff's evidence in isolation", but rather must "look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case."

[43] Much like the ERC, I find that the Conduct Board was not required to undertake a separate analysis of the Respondent's subsequent testimony at the conduct measures phase. The Conduct Board's decision clearly demonstrates that it was aware of the inconsistent evidence concerning the Respondent's credibility. It specifically referred to *McDougall* when it explained that it had considered "the totality of the evidence to assess the impact of the inconsistencies in the evidence and the core issue in the case".[87] Moreover, the SCC in *McDougall* states the following:[88]

> [70] […] Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

[44] In other words, the Conduct Board was not precluded from finding the Respondent's testimony to be credible at the conduct measures phase after finding otherwise during the

[85] ERC Report, at paragraph 65.
[86] *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], at paragraph 58.
[87] Conduct Board Decision, at paragraph 33.
[88] *McDougall*, at paragraph 70.

allegations phase. Given the high level of deference owed, the Conduct Board was justified in demonstrating that it was alive to the inconsistencies in the Respondent's testimony and, nevertheless, find that the Respondent appreciated the seriousness of her actions.

[45] As noted by the ERC, it was open to the Conduct Board to accept some of the Respondent's evidence, while rejecting some of her other evidence.[89] Different weight may be attached to different parts of a witness's evidence.[90]

[46] The ERC then listed the Conduct Board's reasoning for finding that the Respondent now fully understood the severity of her actions. I agree that the indicia are strong enough to support the Conduct Board's finding that the Respondent had learned from the situation, even after finding that portions of her evidence revealed a lack of credibility:[91]

> - The [Conduct] Board found that the Respondent had "apologized and showed appreciation for the seriousness of her actions", and acknowledged that her inappropriate behaviour was not her "finest moment". Those findings reflect the Respondent's sworn testimony during the conduct measures phase;[92]
> - The [Conduct] Board determined that the Respondent had taken measures to avoid another incident involving a failure to fully declare goods. This is supported by the Respondent's sworn testimony as well as the May 2021 letter provided in the *Customs Act* proceeding (May 2021 Letter). In that letter, the Respondent had indicated that she would "ensure that I take every measure I can to ensure that something like this will never happen again".[93]

[47] In particular, the Appellant disputed the Conduct Board's acceptance of the Respondent's claim during the conduct measures phase that she now diligently tracks receipts, without any evidence to support the claim.[94] I note that the Respondent made this claim under oath, and she was not challenged on her lack of evidence during cross-examination:[95]

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[89] *R. v R.E.M.*, 2008 SCC 51, at paragraph 65.
[90] *R. v Howe, 2005 CanLII 253* (ON CA), at paragraph 44; *Novak Estate (Re)*, 2008 NSSC 283 at paragraph 37.
[91] ERC Report, at paragraph 73.
[92] Transcript, Volume 3, at pages 26 to 30.
[93] Transcript, Volume 3, at page 26; Conduct Hearing Exhibits – Letter from Respondent, dated May 2021.
[94] Appeal Record, at page 80.
[95] Transcript, Volume 3, at page 26; 33 to 39.

> I have to agree that it was not my finest moment at the border. I take ALL responsibility for my action. And, obviously, I'm really sorry about my behaviour on that day.
>
> I also understand that my mental and emotional state was not impeccable on that day, but that doesn't an excuse my behaviour neither.
>
> I never want this to happen ever again. I am now extremely careful. I came back a few times after and I kept every receipt, even for small toiletry, toothpick or items and I kept them with me.
>
> I am also sorry that I made the police at the border uncomfortable that day. And, also, that my behaviour put a burden on the RCMP.

[48] The Conduct Board was entitled to make its own finding as to whether this claim was truthful, particularly after demonstrating it was alive to the general inconsistencies from the Respondent and her previous "cavalier attitude towards her failure to properly declare the value of the goods".[96] In the absence of a clear and determinative error indicating otherwise, I am not prepared to intervene and make my own credibility finding as to whether the Respondent now keeps receipts of all travel spending.

[49] Ultimately, I find that it was not clearly unreasonable for the Conduct Board to conclude that the Respondent "now fully understands the severity of her actions" even though she lacked credibility in other respects.

ii. Was the Conduct Board's characterization of the Respondent's disclosure to Cpl. S.P. as timely clearly unreasonable?

[50] The Appellant believes that the Conduct Board's comment that the Respondent "did inform [Cpl. S.P.] of the incident immediately upon her return to work the next day" unreasonably ignores the [Conduct] Board's earlier findings that the Respondent had not provided to Cpl. S.P. a full explanation of the incident's severity when she initially reported it. The comment that is of concern to the Appellant is found at paragraph 127 of the Conduct Board's Decision.[97]

[51] I agree with the ERC that it was not clearly unreasonable for the Conduct Board to refer to the Respondent's timely reporting of the incident to her supervisor as support for her potential for

[96] Conduct Board Decision, at paragraphs 128 and 129.
[97] Already cited at page 38 of this decision.

rehabilitation.[98] Indeed, the Conduct Board did acknowledge in that same paragraph the "lack of transparency" on the part of the Respondent when informing Cpl. S.P. of her transgression. Evidently, the Conduct Board was alive to the concern raised by the Appellant. Nor do I find it inconsistent when, with respect to Allegation 3, the Conduct Board observed that the Respondent had been prompt in reporting the incident, despite failing to demonstrate full transparency in doing so.

[52] On this issue, I adopt the ERC reasoning as to why the Conduct Board was open to consider the Respondent's prompt, yet truncated, disclosure as a positive sign of potential rehabilitation:[99]

> [80] Further, the comment was made in the context of assessing potential for rehabilitation. It is in this context that the [Conduct] Board noted that Cpl. S.P. had been informed "of the incident" in relatively short order, and that the Respondent's performance assessments and letters of reference provided "some insight" into the Respondent's character. This allowed the [Conduct] Board to conclude that it had "no reason to suspect that she will again act in a similar fashion". In assessing the potential for rehabilitation, it is appropriate when sufficient mitigating factors are present to allow a police officer "an opportunity to redeem [themselves] and demonstrate that [their] misconduct was a momentary departure from an otherwise good career."[100] Again, the [Conduct] Board's reasons show it was cognizant of the totality of the evidence. It was open to the [Conduct] Board, when considering the factors pointing to rehabilitative potential, to note the relatively prompt, if lacking, disclosure to Cpl. S.P.

[53] In short, the Conduct Board's consideration of the Respondent's behaviour in this respect was not clearly unreasonable.

B. Was the Conduct Board's consideration of the Respondent's apology clearly unreasonable?

[54] The ERC summarized the Parties' respective arguments as follows:[101]

> [86] The Appellant contests the [Conduct] Board's finding that the Respondent sincerely apologized for her behaviour, believing this is clearly

[98] ERC Report, at paragraph 77.
[99] ERC Report, at paragraph 80.
[100] *Ontario (Provincial Police) v Favretto*, 2004 CanLII 34173 (ON CA) (leave to appeal to SCC dismissed on April 28, 2005) at paragraphs 38 and 56.
[101] ERC Report, at paragraphs 86 to 90.

> unreasonable because the Respondent only apologized after the allegations had been established, to avoid dismissal.
>
> [87] The Appellant further questions the [Conduct] Board's explanation of why it did not see the Respondent's late apology as an aggravating factor. The Respondent admitted numerous times that she could have apologized earlier and, according to the Appellant, the CAR saw the late apology as an aggravating factor at the hearing. In the Appellant's view, the [Conduct] Board should have seen this as an aggravating factor as well.
>
> [88] Finally, the Appellant submits that the [Conduct] Board erred in finding that the Respondent had apologized to Officer L.B[.] "and supervisor", as the evidence does not support that conclusion.[102]
>
> [89] The Respondent disagrees that the Respondent's late apology should be seen as an aggravating factor. The Respondent argues that the [Conduct Board] did not, as the Appellant suggests, see the late apology as an aggravating factor. Rather, the issue before the [Conduct] Board was the weight it should be given as a mitigating factor. This is a highly discretionary assessment that should not be interfered with on appeal.[103]

[55] In its written decision, at paragraphs 116 to 122, the Conduct Board indicates the following in regard to the Respondent's apology:

> [116] Although [the Respondent] waited after the establishment of the allegations to acknowledge her misconduct and fully apologize, I did not consider this to be an aggravating factor for the following reasons. In May 2021, [the Respondent] submitted in the criminal court proceedings a letter of apology where she admitted that she forgot to declare several items purchased during her trip to Florida. She states that doing so was completely unintentional. In the end, the incident has been very distressing to her both mentally and physically and she endeavours to take every measure to ensure that something like this will never happen again. This letter led to a joint submission where [the Respondent] pleaded guilty to making false declarations to CBSA officers in contravention of section 12 of the *Customs Act*. As a result, [the Respondent] received an absolute discharge.
>
> [117] As indicated by the [CAR], it is unfortunate that this letter was only admitted into evidence by [the Respondent] following the establishment of the three allegations. Admitting the misconduct at the earliest opportunity could have at a minimum shortened the length of this conduct proceeding.
>
> [118] In response, the Subject Member Representative explained that it was their understanding that, in order for the Conduct Board to establish the allegations of misconduct in contravention of section 7.1 of the [Code of

[102] Appeal Record, at pages 80 to 82, 223 and 224.
[103] Appeal Record, at pages 125 and 126.

> Conduct], the Conduct Authority had to prove that [the Respondent] had the intent to deceive and to provide a false declaration. Due to the lack of intent on her part, [the Respondent] "took an approach, based on various consultation[s] with her prior attorneys, that led to this decision to contest the allegations."
>
> […]
>
> [121] I agree with the [CAR] that obtaining a copy of [the Respondent]'s apology letter earlier in the process would have been in the interest of both parties. Nonetheless, I find that the Subject Member Representative provided a plausible explanation as to why [the Respondent] fully contested the allegations at the hearing. In these specific circumstances, I do not consider this to be an aggravating factor.
>
> Mitigating Factors
>
> [122] I consider the following to be mitigating factors:
>
> a) At the hearing, [the Respondent] apologized and showed appreciation for the seriousness of her actions. She also apologized to Officer L.B. and supervisor for her inappropriate behaviour, which was not her "finest moment", and for the unnecessary burden inflicted on the Force.
>
> […]

[56] I will separately address the Appellant's arguments respecting the apology, which that the Conduct Board erred by: i) finding that the Respondent apologized to Officer L.B. and her supervisor; ii) not characterizing the late apology as an aggravating factor; and iii) characterizing the apology as a mitigating factor.

i. Did the Respondent apologize to Officer L.B. and her supervisor?

[57] I agree with the ERC that the Conduct Board's finding that the Respondent "apologized to Officer L.B. and supervisor for her inappropriate behaviour" was not clearly unreasonable.[104]

[58] As previously mentioned, findings of credibility and of fact by the Conduct Board are entitled to great deference under the clearly unreasonable standard. Where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard-pressed to find a palpable and overriding error.[105]

[104] ERC Report, at paragraph 90.
[105] *McDougall*, at paragraph 55.

[59] At the conduct measures phase, the Respondent addressed the Conduct Board and stated the following:

> […] I am also sorry that I made the police at the border uncomfortable that day. […][106]

[60] The Conduct Board inferred that the words "police at the border" meant Officer L.B. and her supervisor. There is some evidence supporting this inference drawn by the Conduct Board as Officer L.B. was the principal CBSA border officer involved that day and she testified having reported the incident to her CBSA Superintendent.[107] Accordingly, the Conduct Board's finding of fact was supported by the evidence and I will not interfere.

ii. Should the late apology be characterized as an aggravating factor?

[61] Much like the ERC, I find that the Respondent's late apology should not be characterized as an aggravating factor.[108] The Respondent explained why she did not immediately apologize and instead defended her behaviour on the basis that she lacked the necessary intent to breach section 7.1 of the Code of Conduct:[109] On cross-examination, the Respondent appeared to explain that the legal advice she had received was not to admit responsibility for her actions.[110] The Respondent's counsel later explained, in the conduct measures submissions, why the Appellant contested the allegations. Counsel's understanding was that they could dispute the allegations based on an absence of intent.[111] The Conduct Board accepted this explanation and indicated that it would not consider the late apology to be an aggravating factor.

[62] The CAR's submissions at the conduct measures phase of the hearing rightly acknowledged that a member availing themselves of their procedural rights was not an aggravating factor. However, the CAR also pointed out that there was a distinction with a member immediately taking full responsibility. The CAR indicated that "had this occurred in this case and the Appellant apologized immediately either at the airport, and the fine had been paid and through this process,

[106] Transcript, Volume 3, at page 26.
[107] Transcript, Volume 1, at pages 52 and 53.
[108] ERC Report, at paragraph 92.
[109] ERC Report, at paragraph 93.
[110] Transcript, Volume 3, at page 36.
[111] Transcript, Volume 3, at pages 59 and 60.

we wouldn't be here today".[112] I take from the CAR's submission that he was asking the Conduct Board to assign little weight to the Respondent's late apology.

[63] However, in his appeal submissions[113], the Appellant is now arguing that the Conduct Board should have considered the Respondent's late apology as an aggravating factor:

> […] The [Conduct] Board found this explanation acceptable and refused to see the late apology as an aggravating factor. We submit that the [Conduct] Board made an error in principle by trying to remedy the consequences of the advice the Respondent said she received. Whatever the advice, the Respondent was the only master of her actions and behaviour. She was in charge of her case and was always at liberty to apologize for her behaviour at any time and she chose not to do so. In fact, like she did in the course of the criminal proceedings, she chose to apologize at the time she felt she would gain from it, that is, in the conduct process, after the allegations were established in the hopes of avoiding dismissal. The [Conduct] Board should have seen the late apology as an aggravating factor. […]

[64] This sounds closely similar to the situation in which the Court of Appeal of Ontario states:[114]

> […] Any doctor is entitled to deny allegations made against him or her and to require the College to establish such allegations. If he or she chooses to admit the allegations, that may be taken into account in appropriate circumstances in setting a penalty, but in no circumstances should denial serve to increase what would otherwise be an appropriate penalty. […]

[65] Contrary to the Appellant's assertion, the Respondent was entitled to defend herself without being penalized for doing it. Consequently, I see no reviewable error in the Conduct Board's decision not to treat the late apology as an aggravating factor.

[66] I also find that the Conduct Board's handling of the May 2021 Letter was appropriate as well. In that letter, the Respondent admitted her failure to declare the full value of her items, noting

[112] Transcript, Volume 3, at page 46.
[113] Appeal Record, page 82.
[114] *College of Physicians and Surgeons of Ontario v Gillen*, 1993 CanLII 8641 (ON CA), also cited by the Federal Court of Appeal in *Green v Canada (Treasury Board)*, 2000 CanLII 15129 (FCA), at paragraph 23.

that the oversight was "completely unintentional".[115] This is consistent with her explanation as to why she contested the Code of Conduct allegations, but not the *Customs Act* proceeding.[116]

[67] All in all, the Conduct Board's handling of the contents of the May 2021 Letter was not clearly unreasonable. The Conduct Board demonstrated that it was alive to the flaws in the evidence, as presented by the Respondent, including her cavalier attitude and lack of transparency. Given that the Conduct Board was aware of these issues during the allegations phase, it clearly considered these when subsequently determining the appropriate conduct measures.

iii. Should the late apology be characterized as a mitigating factor?

[68] I agree that it was open to the Conduct Board to consider the late apology a mitigating factor, regardless of when contrition was expressed. After all, the Conduct Board is afforded great deference in rendering conduct measures and an apology is one of many factors to be assessed. The ERC correctly noted that there was ample evidence justifying the Conduct Board's finding that the Respondent's apology was genuine:[117]

> [100] In light of this testimony, it was open to the [Conduct] Board to find that the Respondent had apologized and showed an appreciation for the seriousness of her actions, that she had taken measures to ensure such an event would not occur again, and that she now fully understood the severity of her actions. The [Conduct] Board was in the best position to assess the Respondent's self-awareness of the seriousness of her misconduct and the extent to which she understood how to prevent a recurrence. The [Conduct] Board's determination that the Respondent had "initially had a cavalier attitude", but "now fully understands the severity of her actions", shows that it was alive to the totality of the evidence when assessing her sincerity at the conduct measures phase. I cannot reweigh this evidence on appeal, nor can I substitute the [Conduct] Board's inferences with my own preferred ones were I to take a different view.

[115] Materials, Conduct Hearing Exhibits – Letter from the Respondent dated May 2021.
[116] Transcript, Volume 3, at page 62.
[117] ERC Report, at paragraph 100.

C. Was the Conduct Board's handling of the Respondent's letters of support clearly unreasonable?

[69] The Appellant objects to the Conduct Board's finding that the Respondent's letters of support were a mitigating factor. The Appellant emphasizes that it is unclear the extent to which the authors were aware of the Respondent's impugned behaviour at the time of drafting those letters. According to the Appellant:[118]

> The Respondent indicated in her testimony at the sanctions stage that all the members who had provided letters of reference were aware that she was being investigated "for a Code of Conduct", without adding further detail. Her lawyer repeated those words in his closing arguments at the sanctions stage. He added that she had testified that if contacted, "every people could provide information as to the extent of the conduct proceedings". In fact, the Respondent never said any such thing in her testimony. [References omitted]

[70] Meanwhile, the Respondent argues that I should not interfere with the Conduct Board's decision to accept the letters as a mitigating factor.

[71] In its written decision at paragraph 122, the Conduct Board indicated the following in regard to the letters of character reference:

> **Mitigating factors**
>
> [122] I consider the following to be mitigating factors:
>
> […]
>
> d) The letters of character reference provided from co-workers and supervisors confirm that [the Respondent] has their ongoing support. She is a dedicated worker who did not let the injuries sustained during the on-duty motor vehicle incident stop her from maintaining a positive attitude and working diligently. They also stated that they had no concerns to working with her again and would welcome such an opportunity.
>
> i. As indicated by the [CAR], the letters do not indicate whether the writer was aware of the exact allegations against [the Respondent]. At the hearing, [the Respondent] and the Subject Member Representative both confirmed that **everyone who wrote a letter was informed of the conduct process pending against her**. Consequently, I have considered them as a mitigating factor. [Bold added]

[118] ERC Report, at paragraph 105.

[72] Much like the ERC, I find that the Conduct Board did not commit a reviewable error by accepting the letters as a mitigating factor.

[73] Subsection 24(1) of the *CSO (Conduct)* states that, in determining the appropriate conduct measures to impose, the conduct board may examine any material submitted by the parties and hear their oral submissions and any witness, including those referred to in subsection 18(1) of the *CSO (Conduct)*.

[74] The Conduct Board accepted the Respondent's testimony (not subject to cross-examination by the CAR on this point) that "all those members in those letters are aware that I'm being investigated for a *Code of Conduct*".

[75] As it relates to the Subject Member Representative's submission that "if those people were to be contacted they could provide information as to **the extent of those disciplinary proceedings** taken against [the Respondent]", there is no indication that it was accepted as evidence by the Conduct Board. The Conduct Board's reasons, as highlighted in bold, demonstrate that it only accepted as evidence the fact that those supporters were aware of the conduct process against the Respondent, not that they were aware of the extent of it.

[76] Consequently, although the Conduct Board was alive to the CAR's concerns, it found the letters to be mitigating despite the uncertainty about the members' knowledge about the extent of the Respondent's conduct proceedings.

[77] On appeal, it is not my role to re-weigh the Respondent's evidence on this point,[119] nor to interfere on the basis that the evidence is "merely insufficient",[120] particularly since the Conduct Board's reasons show it remained alive to the totality of the evidence when it imposed conduct measures. The Conduct Board's finding that the letters along with the performance assessments "provide some insight into her character", in the context of assessing the Respondent's potential for rehabilitation, is supported by the evidence and is not clearly unreasonable.

[119] *British Columbia (W.C.A.T.) v. Fraser Health Authority*,2016 SCC 25 (*Fraser Health*) at paragraph 30.
[120] *Speckling*, at paragraph 37.

D. Is the Conduct Board's assessment of the impact of the **McNeil** *decision clearly unreasonable?*

[78] The ERC summarized the Parties' positions on the impact of the *McNeil* decision, including the submission of new evidence, as follows:[121]

> [114] The Appellant underscores the [Conduct] Board's findings regarding the Respondent's lack of honesty and integrity, specifically in relation to Allegation 1 and Allegation 3. While the [Conduct] Board properly took note of *McNeil* implications, the Appellant believes it erred in concluding that the Respondent's retention as a member would not create an unsustainable burden on the Force. If I understand the Appellant's position, it is that the [Conduct] Board's finding in that regard is clearly unreasonable.
>
> [115] The Appellant invokes jurisprudence which asserts that honesty and integrity are at the heart of the police profession, and that in light of *McNeil* disclosure requirements, it is difficult to imagine what duties a police officer could perform effectively once those values are lost.[122]
>
> [116] The Respondent observes that the CAR's arguments before the [Conduct] Board regarding *McNeil* referred to the Respondent being a "significant" rather than an unsustainable burden. The Respondent adds that the Appellant has cited no legal authority for how *McNeil* should be applied, nor have they explained how the [Conduct] Board's assessment of a significant, but not unsustainable burden on the Force was clearly unreasonable. The Respondent surmises that hundreds of RCMP members are still serving with *McNeil* considerations in play.[123]
>
> [117] The Respondent further attaches to her appeal submission a chapter of the Public Prosecution Service of Canada Deskbook (new evidence), noting that the Department of Justice and the RCMP have created a disclosure process to deal with *McNeil* implications.[124] The Appellant contests the admissibility of the new evidence on appeal.[125]

[79] The ERC declined to consider the **Respondent's** new evidence on appeal (as the Respondent had not demonstrated due diligence to introduce the new evidence), and ultimately addressed the Appellant's argument and found that the Conduct Board's assessment of *McNeil* implications was not clearly unreasonable.

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[121] ERC Report, at paragraphs 114 to 117.
[122] Appeal Record, at pages 83 and 84.
[123] Appeal Record, at pages 127 and 128.
[124] Appeal Record, at pages 128, 206 to 213.
[125] Appeal Record, at page 223.

[80] Although I agree in the end with the ERC on its Conduct Board's assessment of the *McNeil* implications, in my view, one additional issue needs to be addressed: whether **the Appellant** is introducing new information on appeal. Consequently, my review will address the following three questions:

i. Is the Appellant introducing new information in his appeal submission that was known or could reasonably have been known by him when the decision was rendered?
ii. Is the Respondent's new evidence addressing the procedures governing *McNeil* disclosures admissible on appeal?
iii. Is the Conduct Board's assessment of the impact of the *McNeil* decision clearly unreasonable?

[81] In examining these three questions, I find that the relevant legislation and policy are as follows:

> ***RCMP Act***
>
> […]
>
> **45.11** (1) A member who is the subject of a conduct board's decision or the conduct authority who initiated the hearing by the conduct board that made the decision may, within the time provided for in the rules, appeal the decision to the Commissioner in respect of
>
> a) any finding that an allegation of a contravention of a provision of the Code of Conduct by the member is established or not established; or
>
> (b) any conduct measure imposed in consequence of a finding referred to in paragraph (a).
>
> […]
>
> Grounds of appeal
>
> **(4) An appeal lies to the Commissioner on any ground of appeal.**
>
> […]
>
> ***CSO (Grievances and Appeals)***
>
> **25** (1) The OCGA must provide the appellant with an opportunity to file written submissions and other documents in support of their appeal.
>
> Restriction
>
> (2) **The appellant is not entitled to**

> (a) file any document that was not provided to the person who rendered the decision that is the subject of the appeal if it was available to the appellant when the decision was rendered; or
>
> **(b) include in their written submissions any new information that was known or could reasonably have been known by the appellant when the decision was rendered.**
>
> […]
>
> Response to submissions – appeal of conduct board decision
>
> **28** In the case of an appeal of a decision rendered by a conduct board, the respondent may file with the OCGA a written response to the appellant's submissions and the appellant may file with the OCGA a written rebuttal to that response.
>
> […]
>
> Evidence
>
> **32 The Commissioner, when considering an appeal or any matter arising in the context of an appeal, may accept any evidence submitted by a party.**
>
> […] [Bold added]

> **i. Is the <u>Appellant</u> introducing new information in his appeal submission that was known or could reasonably have been known by him when the decision was rendered?**

[82] A review of the submissions made during the conduct hearing is necessary to answer this question.

[83] In his submission during the conduct measures phase, the CAR asked the Conduct Board to take note of what the Respondent's misconduct would mean in practice, given her specialization in police discipline. More specifically, the CAR made the following submission[126] on the impact of the *McNeil* decision:

> What it means is she's going to be kept away and risk managed from any significant police work. And what does that mean for the [F]orce? We've invested in [an] employee who had tremendous potential, and it is -- it becomes a great disappointment when you can't utilise that asset because of the risk that it'll represent in significant investigations.

[126] Transcript, Volume 3, at page 51.

> And, of course, the [F]orce is going to have to take those measures. We invest resources, time, effort, human, if I can call it, labour into executing the mandate of the RCMP. And now we have to -- we'll have to manage -- and she's responsible for that outcome, by the way. **So it's a significant burden. And I know in past decisions it's been recognised that it's not so insignificant that it can't be placed, but in my respectful submission, this is not one of those cases.** [Bold added]

[84] The Respondent made no specific submission on the impact of the *McNeil* decision during the conduct measures phase.

[85] Most of the CAR's arguments on this point referred to this being a "significant burden" on the Force. Even his last sentence on the issue (highlighted) suggests that, when read without the double negative, the Respondent's case is not an unsustainable burden for the Force. This interpretation appears to be contrary to the argument raised by the Appellant in his *Statement of Appeal*, but the Appellant confirmed the Record and raised no issue with the transcript.

[86] The fact that it would be an unsustainable burden on the Force to retain the Respondent was known or could reasonably have been known by the Appellant since at least the day the allegations involving a lack of honesty and integrity were established by the Conduct Board on December 1, 2021. As a result, the "unsustainability" issue could have been introduced (or at least explained unequivocally) at the conduct measures phase. So, this issue was known before the Conduct Board's decision on conduct measures.

[87] Now on appeal, the Appellant is arguing that the Conduct Board erred in concluding that the Respondent's retention as a member would not create an unsustainable burden on the Force. Although the *McNeil* issue had been discussed in terms of being a significant burden at the hearing, the unsustainability burden issue had not been introduced. This is new information on appeal. As previously indicated, this is specifically precluded by paragraph 25(2)(b) of the *CSO (Grievances and Appeals)*.

[88] The Appellant submits that he should be allowed to do so because said arguments are based on the evidence before the Conduct Board. However, the SCC indicates:[127]

[127] *Athey v Leonati*, [1996] 3 SCR 458 [*Athey*], at paragraph 51.

> […] In any event, the Court of Appeal erred in refusing to consider the appellant's arguments on the grounds they were not raised at trial. The general rule is that an appellant may not raise a point that was not pleaded, or argued in the trial court, unless the relevant evidence is in the record: John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (1993), at p. 51. […]

[89] I disagree with the Appellant as all the relevant evidence is not in the Record. Whether the Respondent's misconduct created an unsustainable burden on the Force is fact specific. There was no evidence introduced at the hearing regarding the lack of opportunities in the Force available to the Respondent specifically or on whether the Respondent's case created an unsustainable burden on the RCMP. In addition, the Respondent had not had a chance to present evidence on the unsustainability issue.

[90] Based on this, I find that the Appellant was introducing new information in his appeal submission that was known or could reasonably have been known by the Appellant when the decision was rendered. Thus, the legislation and the common law preclude me from reviewing this information.

ii. Is the Respondent's new evidence addressing the procedures governing *McNeil* disclosures admissible on appeal?

[91] The Respondent observes that the CAR's arguments before the Conduct Board regarding *McNeil* referred to the Respondent being a "significant" rather than an unsustainable burden. The Respondent attached "Chapter 2.12 The Disclosure of Police Misconduct Information- R v McNeil" (the Public Prosecution document) in her response submission on appeal. This Public Prosecution document was not provided to the Conduct Board, but it is dated April 4, 2018, and appears to be from the Public Prosecution Service of Canada website. In his rebuttal, the Appellant contests the admissibility of the Public Prosecution document.

[92] The ERC concluded that the Public Prosecution document was not admissible after referring to the SCC test for admitting new evidence,[128] emphasizing that new evidence can be admitted on appeal when:[129] i) the evidence could not reasonably have been submitted at the hearing (due diligence); ii) it is relevant to a decisive or potentially decisive issue; iii) it is credible;

[128] *Palmer v The Queen*, [1980] 1 SCR 759, at page 775
[129] ERC Report, at paragraph 35.

and iv) if believed, it could reasonably be expected to have affected the impugned decision. It added that the test is driven by an overarching concern for the interests of justice.[130] The ERC found that the first criterion precludes consideration of the new evidence in this appeal as the Respondent had not demonstrated due diligence to introduce the new evidence.

[93] I acknowledge that, generally, only the material that was before the decision maker (here, the Conduct Board) is admissible on appeal. However, the Respondent's new evidence was being adduced to address the Appellant's new information (that it was an unsustainable burden for the Force) that was improperly introduced on appeal. Although the Public Prosecution document predates the conduct hearing, the Respondent could not reasonably have submitted the evidence at the hearing (due diligence) as the unsustainable burden issue was never raised by the Appellant during the hearing.

[94] All that being said, section 32 of the *CSO (Grievances and Appeals)* provides me with the discretion to accept any evidence submitted by a party in considering an appeal or any matter arising in the context of an appeal.

[95] In reviewing the Public Prosecution document, I am also not convinced that it constitutes "evidence". The Public Prosecution document does not provide any information directly related to the Respondent's case, but rather provides insights of the guiding principles that all federal prosecutors must follow when dealing with the *McNeil* requirement. Contrary to the Respondent's assertion that "*McNeil* had nothing to do with conduct measures being imposed against police officers", police misconduct impacts prosecutions. I find the Public Prosecution document, in conjunction with the actual *McNeil* decision, to be relevant contextual and legal constraints that bear on the Conduct Board's exercise of its delegated powers when assessing the impact of the *McNeil* decision[131] during the determination of a conduct measure for this matter. Consequently, I find that the Public Prosecution document can assist my reasonableness review of the Conduct Board's decision and is admissible.

[96] Considering the uncertainty surrounding the Parties' *McNeil* submissions, I find that no resulting unfairness would ensue to either Party by accepting to consider both the Appellant's new

[130] *Barendregt v Grebliunas*, 2022 SCC 22, at paragraph 29.
[131] *Vavilov*, at paragraph 90.

information and the Respondent's new evidence in order to provide some finality on this issue and in the interest of reaching a just result. Pursuant to section 32 of the *CSO (Grievances and Appeals)*, I will consider both in my review of the Conduct Board's assessment of the *McNeil* impact in the next section.

iii. Is the Conduct Board's assessment of the impact of the *McNeil* decision clearly unreasonable?

[97] The Public Prosecution document identifies the situations where the *McNeil* decision could have an impact for police officers:[132]

> The disclosure obligations apply to police members and civilian members of a police force or law enforcement agency, such as translators, forensic analysts and wiretap monitors, in addition to any other civilian employees who played more than a peripheral role in the investigation. **Information concerning acts of serious misconduct by police officers who may be called as witnesses or who were otherwise involved in the investigation of the accused that is either "related to the investigation against the accused" or could "reasonably impact" on the case against the accused** has been carved out of O'Connor and placed squarely in the first party disclosure package under Stinchcombe. Thus, misconduct information that falls into either of these two categories must be provided to the Crown by the police without prompting.
>
> The [SCC] recognized that some police officers may have played only a minor or peripheral role in the investigation. Some latitude is given to Crown counsel in determining whether the conduct in question has a realistic bearing on the credibility or reliability of the officer's evidence. The [SCC] also stated that not every act or allegation of misconduct needs to be disclosed to defence as first party disclosure, e.g. (exempli gratia), discipline imposed for being late for work. Similar disciplinary findings related to neglect of health, improper dress, and untidiness in person, clothing or equipment while on duty need not be disclosed to the Crown.
>
> It is the responsibility of the Crown to review the misconduct material to determine what, if anything, should be disclosed to the accused[7].
>
> Footnotes
>
> […]
>
> 7 It is extremely difficult to determine at the outset of a case what issues will arise in a prosecution – especially in relation to whether a member's involvement is peripheral and whether credibility or reliability will be in

[132] Appeal Record, at pages 207 and 208.

> question. For these reasons, it is our opinion that the police should not review material for relevance, but leave that determination to be made by the Crown as part of its continuing obligation to provide full disclosure to the accused.
>
> [Bold added]

[98] The Conduct Board properly acknowledged these situations in its relevant findings on the impact of the *McNeil* decision[133]:

> Aggravating factors
>
> […]
>
> **d) The misconduct involves a lack of honesty, integrity and professionalism on the part of [the Respondent], which are fundamental breaches of her obligations as a police officer and of the RCMP core values.**
>
> **e) Under the implication of the McNeil decision, [the Respondent] will now have a legal requirement to disclose her misconduct with Crown counsel in all matters where she will be called to give evidence as a witness. This could affect her ability to testify in criminal proceedings** or to be assigned to another position in the context of transfers, deployments and promotions, creating a significant, but not unsustainable, administrative burden to the RCMP. [Bolt added]

[99] The Conduct Board's reasons demonstrate that, as suggested by the CAR, it implicitly took judicial notice of these issues and properly considered the *McNeil* impact on prosecutions by indicating that "[the Respondent] will now have a legal requirement to disclose her misconduct with Crown counsel **in all matters where she will be called to give evidence as a witness. This could affect her ability to testify in criminal proceedings** […] [Bolt added] In addition, in its reasons, the Conduct Board also took notice that the impact of the *McNeil* decision could also "affect [the Respondent's] ability to be assigned to another position in the context of transfers, deployments and promotions, creating a significant, but not unsustainable, administrative burden to the RCMP."

[100] That being said, the Conduct Board's reasons demonstrate that it was not prepared to take judicial notice that the Respondent's misconduct created an unsustainable burden on the Force.

[133] Conduct Board Decision, at paragraph 115.

[101] The SCC explained the concept of judicial notice and said[134]:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. **Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy** […]. [Bold added]

[102] Whether the Respondent's misconduct created an unsustainable burden on the Force is fact specific; from the previous similar cases, dismissal is not so notorious or generally accepted as to not be the subject of debate for all cases involving a lack of honesty and integrity.[135] As such, the Appellant bore the burden of demonstrating it. There was no evidence introduced at the hearing regarding the lack of opportunities in the Force available to the Respondent specifically. The Appellant's appeal submission on the Respondent's case creating an unsustainable burden for the RCMP is largely speculative.

[103] Here, the Conduct Board found that the Respondent's actions demonstrated a one-time serious error in judgment rather than a behaviour indicative of an irredeemable character flaw[136]. Consequently, it had broad discretion to determine the impact the *McNeil* disclosure would have upon the Respondent and the RCMP. In the absence of any evidence submitted to the contrary, the Conduct Board did not err when it determined that the Respondent's new disclosure obligations, stemming from her lack of honesty and integrity, would not prove to be an unsustainable burden for the RCMP.

E. Did the Conduct Board err by failing to consider racism as an aggravating factor?

[104] The Appellant submits that the Conduct Board erred in not considering the racist comments made by the Respondent to the CBSA officer as an independent aggravating factor. The Appellant

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[134] *R. v. Find*, 2001 SCC 32 (CanLII), [2001] 1 SCR 863, at paragraph 48.
[135]Clarke Conduct Appeal Decision RCMP 2016-335279 (C-027), at paragraph 91; Cormier Conduct Appeal Decision RCMP 2016-33572 (C-017), at paragraphs 38, 82, 83, 84. Also see *Costa v Toronto Police Service*, 2017 ONCPC 14, at paragraph 72.
[136] Conduct Board Decision, paragraph 130.

specifically referred to the following behaviour and comments made by the Respondent and Officer L.B.:

> a) The Respondent, angry that her luggage was being inspected, asked her: "Well, don't you think you should be spending more time on people who are more likely to blow up planes?"[137] and staring at the CBSA Officer's nametag, she added that "some ethnic groups are more likely to commit crimes".[138]
>
> b) CBSA Officer L.B. described herself as "a Muslim Arab woman, living in post 9/11 era". From her experience, these comments were not made randomly and were targeted at her.[139]

[105] The Respondent submits that the CAR never raised the racist comments as aggravating factors at the hearing. Consequently, she argues that it is not open to the Appellant to now claim on appeal that the Conduct Board erred in that regard when the CAR at the hearing didn't even ask for those findings. The Respondent adds that the Conduct Board made a global finding concerning all negatives of the interactions between the Respondent and the CBSA officer. She submits that there is no evidence that the Conduct Board ignored or improperly discounted any of that CBSA officer's evidence and that there was no requirement for the Conduct Board to create multiple subcategories of aggravating factors, especially when they weren't requested by the CAR at the hearing.

[106] The relevant passages in Allegation 2 are found in particulars 9 to 11:

> 9. You also made several inappropriate comments to Officer [L.B.], such as: don't they think they should be spending more time on people who are likely to blow up planes, some groups are just more likely to commit crimes; it's a known fact that CBSA don't like RCMP; I arrest people for a living so it's possible I have traces of drugs; why are you not using your discretion; why it took so long to do paperwork when it takes "them" 10 minutes to arrest a terrorist; this is how this country thanks me after all I've done; it's a fuckin' gong show.
>
> 10. Your overall comments and behaviour were inappropriate towards Officer [L.B.], an employee of a partner agency, and caused her to feel that you were trying to intimidate her.

[137] Transcript, Volume 1, at page 42.
[138] Transcript, Volume 1, at page 43.
[139] Transcript, Volume 1, at page 43.

11. Your actions were discreditable.

[107] The relevant passages from the Conduct Board's decision for Allegation 2 are as follows:

> […] Particular 9 alleges that [the Respondent] made several inappropriate comments to Officer L.B., some of which were admitted and others were denied. [The Respondent] admitted making the following comments:
>
> Investigation material, page 161.
>
> a) "Some groups are just more likely to commit crimes"
>
> b) "It's a known fact that CBSA don't like RCMP"
>
> c) "I arrest people for a living so [it's] possible I have traces of drugs"
>
> d) "Why are you not using your discretion?"
>
> [84] In her response to the allegation, [the Respondent] denied making the following statements:
>
> a) "Don't they think they should be spending more time on people who are more likely to blow up planes"
>
> b) "Why it took so long to do paperwork when it takes 'them' 10 minutes to arrest a terrorist"
>
> c) "This is how this country thanks me after all I've done"
>
> d) "It's a fucking gong show"
>
> [85] During her testimony at the hearing, [the Respondent] admitted that her language was not polished when speaking with Officer L.B. and was inappropriate in the circumstances. Furthermore, in cross-examination, [the Respondent] admitted to saying that the incident was a "fucking gong show" when leaving the customs area.
>
> [86] As mentioned in Allegation 1, I cannot accept the Subject Member Representative's argument that [the Respondent] acted this way with Officer L.B. because of her mental state at the time of the incident. Again, there is no evidence in the [R]ecord to show a causal link between the incident and her behaviour. In fact, the record shows that [the Respondent] expressed herself this way more often than not. A co-worker described her as someone who: "[TRANSLATION] says out loud what she thinks; well sometimes it is not correct; she's quick-tempered".
>
> [87] When reviewing her cautioned statement made to the statutory investigator, who is an RCMP member, I noted that [the Respondent] said the word "fuck" at least 47 times. She also mentioned that women in uniform have an attitude. I can appreciate that [the Respondent] may have tried to downplay the situation when speaking with one of her peers, but ultimately

> her comments and language were totally unacceptable, unprofessional and reflected badly on her credibility. Moreover, I find that she was utterly disrespectful to women in law enforcement who, just like her, wear a uniform. Particular 9 is established.
>
> [88] Particular 10 alleges that [the Respondent]'s overall comments and behaviour were inappropriate and caused Officer L.B. to feel like she was trying to intimidate her. For example, when [the Respondent] told Officer L.B. that CBSA should spend more time on people who are likely to blow up planes and that some groups are just more likely to commit crimes, the latter was offended by the comment. In her testimony at the hearing, Officer L.B. explained that "she is a Muslim Arab woman living in post 9/11 era. […] I knew at this point maybe it became a bit personal and that [the] attack was definitely not random." Consequently, particular 10 is also established.
>
> [89] Pursuant to section 37 of the *RCMP Act*, [the Respondent] has a duty to act at all times in a courteous, respectful and honourable manner. This applies whether she is on- or off-duty. I find that a reasonable person aware of all the relevant circumstances would view the overall comments and behaviour of [the Respondent] as likely to discredit the Force. The link to employment has been made and Allegation 2 is established.
>
> […]
>
> **Aggravating factors**
>
> [115] I consider the following to be aggravating factors:
>
> […]
>
> b) Officer L.B. was negatively impacted by her interaction with [the Respondent]. She described the incident as remarkable in her eight-year career. It was significant enough that, following the incident, she sought the advice from her supervisor to determine whether [the Respondent]'s behaviour and comments should be reported to her employer.
>
> […]

[108] I agree with the ERC that I can consider the Appellant's argument. As mentioned earlier, the RCMP governing statutory scheme for conduct appeals provides the necessary legal framework to deal with the admissibility of a new argument on appeal without having to resort to the criteria established in common law.

[109] Again, the only restrictions to what an appellant can file on appeal are the ones pursuant to section 25 of the *CSO (Grievances and Appeals)*. Here, the Appellant is alleging that the Conduct

Board erred in not considering the racist comments made by the Respondent to the CBSA officer as an independent aggravating factor.

[110] I find that the issue of "racist comments" is not "new information" on appeal. These comments and behaviour highlighted by the Appellant in his appeal submission are the same as those presented during the hearing. Furthermore, the words "racist" was specifically mentioned twice during the allegations phase of the conduct hearing: Officer L.B. testified to the "clear racist undertone" of the Respondent's comment[140] and the Respondent, in response, testified that these comments were "irrelevant" as she was not racist.[141] As the Appellant is not including in his submission any new information that was not before the Conduct Board, there is nothing precluding me from considering this argument on appeal.

[111] I do not accept the Appellant's premise that the critical element of racism was overlooked by the Conduct Board. Although the Conduct Board does not specifically mention the word "racist" in its decision, the example it cited for Particular 10 ("when [the Respondent] told Officer L.B. that CBSA should spend more time on people who are likely to blow up planes and that some groups are just more likely to commit crimes") as well as pointed out to the fact that Officer L.B. had explained that "she is a Muslim Arab woman living in post 9/11 era" demonstrate that the Conduct Board was alive and sensitive to the racism issue before it and meaningfully grappled with the Respondent's racist comments in its decision.

[112] Also, I do not find that the Conduct Board erred in not considering the racist comments made by the Respondent to the CBSA officer as an independent aggravating factor. The reasonableness of the Conduct Board's decision must be reviewed and assessed in light of the history and context of the proceedings in which they were rendered, including the submissions of the parties.[142]

[113] In the present case, Allegation 2 was particularized in the Notice to describe several different types of inappropriate comments and behaviour. It describes the fact that the Respondent told Officer L.B. that she works for the government in national security, that "they" did not like

[140] Transcript, Volume 1, at pages 44 and 60.
[141] Transcript, Volume 1, at page 126.
[142] *Vavilov*, at paragraphs 94 to 96, 127 and 128.

the RCMP, which was the reason why the Respondent was constantly targeted and harassed; and that it was discrimination against white females, that she made several inappropriate comments to Officer L.B. (for example: don't they think they should be spending more time on people who are likely to blow up planes; some groups are just more likely to commit crimes; it's a known fact that CBSA don't like RCMP; I arrest people for a living so it's possible I have traces of drugs; why are you not using your discretion; why it took so long to do paperwork when it takes "them" 10 minutes to arrest a terrorist; this is how this country thanks me after all I've done; it's a fuckin' gong show) and indicates that the Respondent's overall comments and behaviour were inappropriate towards Officer L.B., an employee of a partner agency, and caused her to feel that the Respondent was trying to intimidate her.

[114] In addition, in his submission on conduct measures, the CAR did not mention the Respondent's racist comments as an aggravating factor.

[115] Overall, the Conduct Board addressed in its decision most of the factors mentioned by the Appellant in his appeal submission. In doing so, the Conduct Board appropriately focused its analysis on the primary issues identified by the Appellant as being the aggravating factors for this matter. Given that the Appellant himself (through the CAR) identified these factors as aggravating ones, the Appellant's argument on appeal that the racist comments should have been considered as an independent aggravating factor that should have been addressed by the Conduct Board is less persuasive.

[116] The SCC has underscored that an administrative decision maker's reasons should "meaningfully account for the central issues and concerns raised by the parties", but they need not "respond to every argument or line of possible analysis".[143] Given how the Appellant presented his submission, I cannot conclude that it is clearly unreasonable for the Conduct Board to not have characterized those comments independently as a separate aggravating factor by virtue of their racist character.

[143] *Vavilov*, at paragraphs 127 and 128.

F. Did the Conduct Board err by failing to consider pursuit of personal gain as an aggravating factor?

[117] On appeal, the Appellant submits that the Conduct Board failed to consider the pursuit of personal gain as an aggravating factor. More specifically, he argues:

> […]
>
> Having set aside the Respondent's testimony with regards to all allegations and more particularly [A]llegation 1 that pertain to the false declarations she made at customs, the only reasonable conclusion the [Conduct] Board could have arrived at as to why those declarations were made was that they were for the Respondent's personal gain by not having to pay taxes on her merchandise:
>
> a) The Respondent throughout her interaction with the CBSA officer gave hints on numerous occasions that she was working for national security or otherwise for the government in law enforcement.
>
> b) The Respondent, in her interview with [Sergeant S.B.] from Special Investigations, admitted that, at the time she would cross the border between British Columbia and the state of Washington, CBSA officers would let her clear customs without further questions after learning that she was working for the RCMP.
>
> We submit that the [Conduct] Board erred in not considering the personal gain sought by the Respondent by making false declarations at customs as an aggravating factor.
>
> […]

[118] The Respondent counters that personal gain was not pleaded as an aggravating factor at the hearing. She claims that the Appellant cannot raise it now and claim that it was clearly unreasonable for the Conduct Board not to consider it. The conduct board decision provided by the Appellant on appeal, which refers to the importance of personal gain as an aggravating factor, was never brought to the Conduct Board's attention by the CAR for that purpose. As a result, the issue of sanction was very much left to the Conduct Board's discretion. The Respondent alleges that the Appellant cannot now argue that the exercise of that discretion was clearly unreasonable.

[119] Relying again on *Athey*,[144] the Appellant submits that he is allowed to raise these new arguments on appeal as these points are not legally or factually different from what was before the

[144] *Athey*, at paragraph 51.

Conduct Board. He further points out that the Respondent is not prejudiced as she has been able to address the argument in the appeals process.

[120] The ERC summarized the Conduct Board's findings respecting the alleged pursuit of profit by the Respondent as follows:[145]

> [147] As noted previously in this report, the [Conduct] Board found Allegation 1 established and in so doing raised concerns about the Respondent's credibility in that her explanations for failing to fully declare her purchases contained inconsistencies. The Conduct Board expressed those concerns in its oral decision finding the allegations established.[146] However, the [Conduct] Board, in its oral decision, accepted the CAR's position that no proof of an intent to deceive or to make a willful false declaration was required to establish the allegation.[147] In its oral reasons explaining why the conduct was discreditable, the [Conduct] Board noted that the act of making the false declarations to the CBSA officers would appall a reasonable person. The [Conduct] Board did not find that the Respondent had intentionally misled Officer L.B. to avoid paying duties.[148]

[121] The ERC relies on its previous recommendations in other matters to suggest that the use of the broad term "any new information" in paragraph 25(2)(b) of the *CSO (Grievances and Appeals)* reflects an intent that new arguments that could have been made before the original decision maker be prohibited from an appeal. It further added the following:

> [156] Paragraph 25(2)(b) is reflective of the general rule, consistently recognized in jurisprudence, that entirely new issues cannot be entertained on appeal. The rationale for this rule is that "it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal."[149] Appeal courts are reluctant to entertain new issues, because they are deprived of the trial court's perspective.[150] However, this general rule is "preclusive but not unyielding."[151] The burden is on the appellant to persuade the appellate body that "all the facts necessary to address the point" are before it "as fully as if the issue had been raised at trial." In the end, the decision of whether to allow a new argument is discretionary and guided by the balancing of the interests of justice as they

[145] ERC Report, at paragraphs 147 and 148.
[146] Transcript, Volume 3, at page 5.
[147] Transcript, Volume 3, at page 2.
[148] Transcript, Volume 3, at page 13.
[149] *Kaiman v Graham*, 2009 ONCA 77 (CanLII) [*Kaiman*], at paragraph 18.
[150] *R. v J.F.*, 2022 SCC 17 [*R. v J.F.*], at paragraph 40.
[151] *R. v Reid*, 2016 ONCA 524 (CanLII), at paragraph 38.

> affect all parties.[152] Fairness to all parties is a consideration in this assessment.[153] Finality of the first instance proceedings is also an important consideration, both in the criminal context[154] and in the civil one.[155]

[122] After reviewing this matter, the ERC found that this new evidence is inadmissible for the following reasons: the Record is insufficient to fairly address it; its likelihood of success is unclear; and no explanation has been provided as to why it was not raised before the Conduct Board.

[123] Much like the ERC, I find that this argument was not properly advanced to the Conduct Board. Hence, I find that I cannot consider this argument on appeal.

[124] In reviewing the proceedings in this case, I note from the outset that the Notice and its particulars did not mention anything about the Respondent's misconduct having been done in the pursuit of personal gain.

[125] That being said, the notion of personal gain was nonetheless explored during the allegations phase of the conduct hearing. Upon being asked by the CAR, Officer L.B. speculated on the possible reasons for the Respondent's misconduct (among other reasons, to not pay duties or taxes was one of the possible explanations).[156] In addition, in her testimony in chief, the Respondent testified specifically that she was not trying to avoid any taxes or duties or customs.[157] The Respondent was not cross-examined on this point.

[126] During the exchange of submissions in the allegations phase, the CAR did not raise the pursuit of personal gain but the Subject Member Representative pointed out in his submission to the Conduct Board that the Respondent had no reason or motive to lie.[158] In rebuttal, the CAR explained that the reasons behind the misconduct are part of the factors to take into consideration as to whether something is more aggravated than not.[159] That being said, during the exchange of

[152] *Kaiman*, at paragraph 8; see also RCMP final level decision 2016-335193 (C-058), at paragraph 75.
[153] *R. v J.F.*, at paragraph 41.
[154] *R. v Tello*, 2023 ONCA 335 (CanLII), at paragraph 70.
[155] *Kaiman*, at paragraph 24; *7550111 Canada Inc. v Charles*, 2020 ONCA 386 (CanLII), at paragraph 14.
[156] Transcript, Volume 1, at page 67.
[157] Transcript, Volume 1, at page 113.
[158] Transcript, Volume 2, at page 50.
[159] Transcript, Volume 2, at page 76.

submissions in the conduct measures phase, the CAR did not mention the Respondent's pursuit of personal gain as an aggravating factor.

[127] Considering that the CAR had expressly acknowledged that reasons behind the misconduct were part of the factors to take into consideration when determining if something was aggravated or not, the CAR's decision not to argue the pursuit of personal gain as an aggravating factor appears deliberate.

[128] Interestingly, the Federal Court[160] previously indicated that if the Commissioner relied on evidence in his decision on sanction that was not relevant to a material issue and thus not properly before him to consider then this constitutes an error of law and a breach of procedural fairness. Based on the Notice and the pleadings made at the hearing, I find that the pursuit of personal gain was never raised as a material issue in the Respondent's case.

[129] Nonetheless, the evidence indicates that the concept of the pursuit of personal gain had been canvassed or explored, to some degree, by the Parties during the conduct hearing, but it was never advanced as a material fact or as an aggravating factor to the Conduct Board.

[130] Consequently, I agree with the ERC and the Respondent that the Appellant was introducing "new information" by way of a new argument that was known or could reasonably have been known by the Appellant when the decision was rendered. As already mentioned, the presentation of new arguments of appeal is precluded by paragraph 25(2)(b) of the *CSO (Grievances and Appeals)*.

[131] Although section 32 of the *CSO (Grievances and Appeals)* provides the Commissioner (or delegate) with some flexibility to accept any evidence, when considering an appeal or any matter arising in the context of an appeal. For the following reasons, I do not find that I should apply this discretion in this case.

[132] First, the two specific actions relied by the Appellant for submitting that the Conduct Board erred in not considering the personal gain sought by the Respondent were specifically considered

[160] *McBain v Canada (Attorney General)*, 2016 FC 829, at paragraph 55, finding supported by the Federal Court of Appeal in *Canada (Attorney General) v McBain*, 2017 FCA 204.

by the Conduct Board when dealing with Allegation 2 (inappropriate comments and behaviour),[161] not in consideration of Allegation 1 (lack of honesty and integrity) or Allegation 3 (lack of transparency).

[133] Second, and as previously indicated, in reviewing the outcome reached by the Conduct Board, I must review the written reasons in light of the entire context, including the evidentiary Record and the submissions made by the parties. During the hearing, the CAR chose, perhaps as indicated for very good reasons, not to argue the pursuit of personal gain as an aggravating factor. Now on appeal, the Appellant provided no explanation for introducing this new argument. Contrary to the Appellant's assertion, I do not find that the notion of personal gain had been sufficiently presented to the Conduct Board, except in a speculative manner. I find that the Respondent would be prejudiced if I were to consider this argument on appeal as it would basically permit the Appellant to reargue his case.

[134] Consequently, I will not consider this argument.

DISPOSITION

[135] Pursuant to paragraph 45.16(3)(a) of the *RCMP Act*, the appeal is dismissed and the global conduct measures imposed by the Conduct Board are confirmed.

DIRECTIONS

[136] The OCGA must serve a copy of this decision on the parties.

[161] Appeal Record, at page 27; Conduct Board Decision, at paragraphs 79 and 80.

[137] Those individuals who have been provided a copy of this decision are reminded of their obligation to handle such information properly in accordance with the applicable policies and legislation governing the treatment of personal information.

	November 8, 2023
Caroline Drolet Adjudicator	Date