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2017 RCAD 2

IN THE CONDUCT MATTER

PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer, “E” Division

Conduct Authority

- and -

Constable Curtis Genest, Regimental Number 58600

Subject Member

Conduct Board Decision

Inspector James Robert Knopp, Conduct Board

January 21, 2020

Mr. John Reid, Representative for the Conduct Authority, “E” Division
Staff Sergeant Brigitte Gauvin, Representative for the Subject Member

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Summary

A Notice of Conduct Hearing (Notice) pursuant to Part IV of the *RCMP Act* was served upon the Subject Member September 14, 2015. The Notice, issued on August 13, 2015, by the Commanding Officer and Conduct Authority for "E" Division, contains three allegations. The Subject Member admitted the three allegations. A conduct measures hearing was held in Vancouver, British Columbia on Tuesday, December 6, 2016.

Introduction

[1] On December 18, 2015, the Member Representative (MR) filed the Subject Member's response to the three allegations. For the sake of clarity and completeness, the Subject Member's responses are reproduced *verbatim* (listing the particulars one by one and providing specific responses to each particular). The Subject Member's responses are in italics.

> **Allegation 1**
>
> On or between the 1st day of June, 2012 and the 31st day of May, 2013, at or near Pitt Meadows, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> *[The Subject Member] admits to accessing police databases for a non-duty related reason, but submits that this particular conduct is covered under s. 4.6 of the Code of Conduct (members use government-issued equipment and property only for authorized purposes and activities). S.7.1 (discreditable conduct) should only be used in relation to a conduct that is not otherwise provided for under the Code of Conduct.*
>
> **Particulars of [Allegation 1]**
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> Reply: *Admit*.
>
> 2. Between May 1st, 2012 and June 28th, 2012, you were contacted by [A.A.] who informed you of an individual who was charged criminally who wanted to know if there was anything you could do for him, or something to that effect. [A.A.] informed you that the individual was "willing to pay".
>
> Reply: *Admit; May 1st, 2012 is outside the date range of the allegation (1st day of June, 2012 and the 31st day of May, 2013). During that communication, [the Subject Member] informed [A.A.] there was nothing he could do.*
>
> 3. On June 28th, 2012, while on duty, you met with [A.A.] and [A.C.] in the area of the Meadowtown Shopping Center, in Pitt Meadows, British Columbia. You were driving a police vehicle and you were in full uniform.
>
> Reply: *Admit; [the Subject member] was in the police vehicle, parked at the Meadowtown Shopping Centre, working on a file on his mobile station when he was contacted by [A.A.] who requested to meet with him. [A.A.] and [A.C.] joined him at that location.*

4. [A.A.] sat in your police vehicle and requested that you queried [A.C.] on your Work Mobile Station. [A.A.] told you "run him and we see if we can get some money".

Reply: *Admit.*

5. You queried and accessed information about [A.C.] on RCMP electronic information systems available from your police vehicle for a non-duty related purpose.

Reply: *Admit.*

Allegation 2

On or between the 1st day of June, 2012 and the 31st day of May, 2013, at or near Pitt Meadows, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars of [Allegation 2]

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.

Reply: *Admit.*

2. Between May 1st, 2012 and June 28th, 2012, you were contacted by [A.A.] who informed you of an individual who was charged criminally who wanted to know if there was anything you could do for him, or something to that effect. [A.A.] informed you that the individual was "willing to pay".

Reply: *Admit; May 1st, 2012 is outside the date range of the allegation (1st day of June, 2012 and the31st day of May, 2013. During that communication, [the Subject Member] informed {A/A/] that there was nothing he could do.*

3. On June 28th, 2012, while on duty, you met with [A.A.] and [a.c.] in the area of the Meadowtown Shopping Center, in Pitt Meadows, British Columbia. You were driving a police vehicle and you were in full uniform.

Reply: Admit; [the Subject member] was in the police vehicle, parked at the Meadowtown Shopping Centre, working on a file on his mobile station when he was contacted by [A.A.] who requested to meet with him. [A.A.] and [A.C.] joined him at that location.

4. [A.A.] sat in your police vehicle and requested that you queried [A.C.] on your Work Mobile Station. [A.A.] told you "run him and we see if we can get some money" off [A.C.], or something to that effect..

Reply: *Admit.*

5. You queried [A.C.] on your Mobile Work Station and accessed information regarding [A.C.] from RCMP electronic information systems.

Reply: *Admit.*

6. You made available the information retrieved from RCMP electronic information systems with an unauthorized individual, namely [A.A.], for a non-duty related purpose.

Reply: *Admit.*

7. After obtaining the information from your Mobile Work Station [A.A.] advised you that he would talk to [A.C.] and "See if he could get money off him" or something to that effect.

Reply: *[The Subject Member] doesn't admit or deny this particular; it is the same as particular 4, except that it would have been said by [A.A.] after [the Subject Member] conducted the query. [The Subject Member] doesn't recall [A.A.] making a statement to that effect twice during their encounter. [The Subject Member], upon obtaining information from the query, advised that there was nothing he could do. [The Subject Member] explained to [A.C.] that he had to deal with his charge through a lawyer and the court system.*

8. You later contacted [A.A.] and inquired about what had "happened to the money".

Reply: *Admit; [the Subject Member] was never involved in money negotiations or exchange with either [A.C.] or [A.A.]. [The Subject Member] did not know what amount of money [A.A.] had received, if any. [The Subject Member] never received any money for that purpose.*

Allegation 3

On or between the 1st day of June, 2012 and the 31st day of May, 2013 at or near Pitt Meadows, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[The Subject Member] admits to using a marked patrol car for a non-duty related reason, but submits that this particular conduct is covered under s. 4.6 of the Code of Conduct (members use government- issued equipment and property only for authorized purposes and activities). S.7.1 (discreditable conduct) should only be used in relation to a conduct that is not otherwise provided for under the Code of Conduct.

Particulars of [Allegation 3]

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the Province of British Columbia.

Reply: *Admit.*

2. On June 28th, 2012, while on duty, you used a police vehicle to attend a meeting with [A.A.] and [A.C.] in the area of the Meadowtown Shopping Center, in Pitt Meadows, British Columbia.

Reply: *Admit; [the Subject Member] was in the police vehicle, parked at the Meadowtown Shopping Centre, working on a file on his mobile station when he was contacted by [A.A.] who requested to meet with him. [A.A.] and [A.C.] joined him at that location.*

3. During the meeting you provided personal information about [A.C.] to [A.A.]. You were informed of [A.A.]'s intention to unlawfully obtaining money from [A.C.].

Reply: A*dmit.*

4. You utilized a police vehicle for a non-duty related purpose.

Reply: *Admit.*

[2] Neither the MR nor the Conduct Authority Representative (CAR) offered any additional evidence or made any submissions on the allegations. I rendered my oral decision on the allegations at a pre-hearing conference on July 6, 2016, and on July 8, 2016, supplied the parties with my written decision which follows.

Decision on the three allegations

[3] There exists no difference in the substantive effect of the word "discreditable" as opposed to "disgraceful" conduct. Stated succinctly, the tests applicable under the previous legislation to a finding of "disgraceful" conduct continue to apply with equal vigour to the amended version of the RCMP Act.

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

[5] The second stage involves a determination of whether or not the facts alleged actually took place. The standard of proof applicable to administrative proceedings was a central issue in

F.H. v. McDougall [2008] 3 S.C.R. 41 (hereinafter *McDougall*). Proof must be made by way of sufficient clear, convincing and cogent evidence on the balance of probabilities.

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

[7] Lord Devlin's treatment of the word "disgraceful" in the case of *Hughes v. Architects Registration Council of the United Kingdom*, 1957, 2 All E.R. 436, is instructive. The word "disgraceful" is by no means a term of art, and must be given its natural and popular meaning. The acts must be seen, by the reasonable person, to be such as to disgrace the Subject Member in his capacity as a police officer.

Summary of the three allegations

[8] The three allegations all arise out of the same set of facts, and although the first two refer to events taking place on dates other than June 28, 2012, all three allegations pertain to the Subject Member's direct interactions with an individual named herein as A.A.. The interactions between the Subject Member and A.A. all involved a third individual, named herein as A.C..

[9] A.A. told the Subject Member that A.C. had been charged with a criminal offence, and that A.C. apparently wanted to know "if the Subject Member could do anything for him" or words to that effect. A.A. informed the Subject Member "the individual (that is, A.C.) was willing to pay". In his response to this allegation, the Subject Member acknowledged having had this conversation with A.A., but the Subject Member told A.A. there was, in his own words, "nothing he could do".

[10] On June 28, 2012, the Subject Member met both A.A. and A.C. in a parking lot in his duty area. At this meeting, A.A. sat in the police vehicle with the Subject Member and asked that he query A.C. on the Work Mobile Station (a mobile computer designed to check police database systems), saying "run him and we see if we can get some money". The Subject Member did so, and obtained information about A.C. for a non-duty related purpose. This is the essence of Allegation 1.

[11] Allegation 2 expands upon these circumstances, adding (in paragraphs 6 and 8 of the particulars) that the Subject member shared the results of his unauthorized police database queries with A.A, and that he later contacted A.A. and inquired about what had "happened to the money". In his response to this allegation, the Subject Member admitted as much, but stated, *verbatim*, he "was never involved in money negotiations or exchange with either [A.C.] or [A.A.]. [The subject Member] did not know what amount of money [A.A.] had received, if any. [The Subject Member] never received any money for that purpose."

[12] Allegation 3 similarly revolves around this same transaction, but contains the important admission to the particulars contained in paragraph 3 that he was "informed of [A.A.]'s intention to unlawfully obtaining money from [A.C.]". The Subject Member also admits the particulars contained in paragraph 4 of Allegation 3, namely, that he used a police vehicle for this non-duty related purpose.

[13] In essence, then, the three allegations pertain to the unauthorized use of police information databases (Allegations 1), sharing the results of such queries with an unauthorized person (Allegation 2) and the unauthorized use of a police vehicle (Allegation 3). All three allegations make some form of reference to the context in which these events place, and in establishing these three allegations, I wish to draw very clear boundaries around the misconduct which can and cannot be sanctioned by way of the imposition of conduct measures.

[14] A reasonable person, with knowledge of all of the circumstances of this case, with knowledge not only of policing in general but policing in the RCMP in particular, would find the unauthorized use of police information databases and police vehicles to be discreditable conduct.

A reasonable person would find no duty-related reason for the Subject Member to permit A.A. to be seated in the police vehicle, and there was no duty-related reason to conduct queries of A.C.. There was certainly no reason to share the results of those queries with A.A.

[15] In fact, the true reason underlying this misuse of equipment and information is alluded to in all three allegations: in Allegation 1, "run him and we see if we can get some money", in Allegation 2, "what happened to the money" and in allegation 3, the Subject Member admits he knew of A.A.'s intention to unlawfully obtain money from A.C., but there is no indication as to how A.A. was planning to go about extracting money from A.C., or how the Subject Member came to know about this. Still, the reasonable person would have no difficulty in finding the underlying context for the Subject Member's unauthorized use of vehicles and databases to be disgraceful, and to discredit the RCMP.

[16] On this basis, by way of the clear, convincing and cogent evidence contained in the Subject Member's admissions, I find all three allegations established on the balance of probabilities.

[17] There are very clear limits, though, to the extent of the misconduct at issue from this point on in these proceedings. It is obvious from the manner in which these proceedings were commenced that the Subject Member's dismissal is being sought. It is also apparent from the material contained in the investigative materials forming part of the record in these proceedings that there is some concern the Subject Member might have been involved in some sort of a conspiracy with A.A. to subject A.C. to some form of blackmail or extortion. This aspect of the case was never proven.

[18] It is crucial that the words "conspiracy", "extortion" or "blackmail" do not appear anywhere in the allegations. Nor do they appear in the Subject Member's admissions. The details of A.A.'s interactions with A.C. are never articulated, nor is the extent of the Subject Member's knowledge of those details. The admissions provided by the Subject Member cannot be used as the basis for speculation. If extremely serious misconduct is being alleged, the precise nature of this misconduct must be clearly articulated in the Notice. A member named in a Notice must be

made aware of the case he has to meet. It would be morally wrong, and wrong in law, to sanction misconduct which has never been alleged.

[19] I am deliberately limiting my findings of misconduct to the unauthorized use of equipment and information and the unauthorized sharing of such information, all in the context of the Subject Member's knowledge of A.A.'s intention to use this information to attempt to obtain money from A.C..

[20] This is not to say the misconduct which must now form the basis for the imposition of conduct measures is not serious. It is serious. It falls short, however, of conspiracy to commit blackmail or extortion.

Conduct measures hearing

[21] The parties convened in Vancouver, British Columbia, on Tuesday, December 6, 2016, to make oral submissions on conduct measures. The Conduct Authority sought dismissal. The Subject Member argued this was disproportionately harsh, and forfeitures of pay would be more appropriate given all the circumstances of the case.

The CAR's submissions on conduct measures

[22] The CAR entered one item of evidence pertaining to conduct measures, namely, an instance of informal discipline. On July 2, 2013, the Subject Member knowingly provided a false, misleading or inaccurate statement concerning a form completed by his doctor, and he altered this document. The Subject Member was reprimanded and RTO (regular time off) was forfeited. This occurred while the Subject Member was awaiting resolution of the present allegations, so it cannot be considered an instance of "prior" discipline.

[23] The CAR submitted nine cases in support of dismissal. The first three cases involved *The Appropriate Officer "K" Division and Constable "P" (Constable P)*. The board decision is cited at (2002) 13 A.D. (3d) 108, the recommendations of the RCMP's External Review Committee are cited at (2002) 16 A.D. (3d) 200, and the Commissioner's decision at (2003) 17 A.D. (3d) 65. This case involved a member who conducted unauthorized, non duty-related database checks on

three individuals, A.B., R.A., and T.A., all of whom were childhood friends of the member. The three individuals were subjects of interest in a Montreal Police Department murder investigation. The member admitted the allegations.

[24] Evidence was called on sanction which established the member's having made a telephone call immediately after he conducted the unauthorized database checks. The call was to S.B., one of the individuals whose names the member had checked. The Appropriate Officer argued a reasonable inference could be drawn that the member shared the results of the database query with S.B., and the board agreed:

> The Board concludes the CPIC queries made on September 11, 1999 were for an improper motive and the results were discussed with [S.B.]. The Board does not accept the member's assertion the queries were done out of simple curiosity. The query on [R.A.], a mere acquaintance according to [the member], in the middle of a phone conversation with S.B. cannot rationally be explained otherwise. The latter query was on the last suspect of five suspects of a murder, all made in the space of a few minutes. We agree with Sgt.-Det. "N" when he stated it would be a rare occasion when someone queries precisely all of the suspects in a murder case. We specifically reject [the member's] testimony on this issue.

[25] The board dismissed Constable "P" on the basis of his having shared the results of his database queries with S.B., thus severely compromising the Montreal police investigation. On appeal, it was argued, *inter alia*, that the board erred in basing its sanction decision on facts not particularized or alleged in the Notice of Disciplinary Hearing. The Chair of the ERC, at paragraphs (26) and (27), stated,

> (26) . . . My own view is that the Board made the correct decision in law in ruling that the Respondent was entitled to present, at the sanction hearing, evidence of collateral facts. Such evidence could potentially be very useful to the Board in assisting it in its task of assessing the gravity of the Appellant's misconduct, because it addressed both the reasons for the CPIC enquiries and the consequences that stemmed from them. I am also satisfied that the evidence of collateral facts was sufficiently convincing to justify the Board's conclusion that it was more probable than not that the Appellant had disclosed information to S.B. about a police surveillance operation.
>
> (27) I do not have any difficulty with the logic of the Board's position that evidence of the Appellant's telephone calls to S.B. and of his PIRS enquiries

> was inadmissible at the hearing on the allegations but admissible at the sanction hearing. There is no contradiction in the Board's position because both hearings served entirely different purposes. The purpose of the hearing on the allegations was to determine whether the Appellant had, as alleged, made unauthorized CPIC enquiries on May 16, 1999 and September 11, 1999 and, if so, whether those enquiries were susceptible of bringing discredit upon the Force . . . The purpose of the sanction hearing, however, was to enable the Board to assess the gravity of the Appellant's misconduct, which meant that it had to identify all of the aggravating and mitigating factors.

[26] The ERC recommended rejection of the member's appeal. The Commissioner accepted the ERC's recommendation and upheld the board's decision to dismiss the member. The CAR argued Constable "P"'s breach of trust (in conducting the unauthorized database queries) was the rationale for his dismissal, and since the Subject Member has similarly committed the same breach of trust in the present case, he should likewise be dismissed.

[27] The next case relied upon by the CAR in seeking the Subject Member's dismissal was a case from the Newfoundland Supreme Court (trial Division), cited as *Fox v. Chief of Police, RNC* (1995) 127 Nfld & PEIR 340 (*Fox*). This case involved a probationary constable who lived in a common- law relationship with V.T.. She did not conduct unauthorized database queries on V.T. (it was her field trainer who did, and then shared the results of those queries with her, along with specific instruction not to disclose those results to V.T.). She ultimately did share the results of the unauthorized database queries with V.T. and consequently her status as a probationary constable was terminated. The CAR brought this case forward for consideration because, although dated, it highlights the importance of absolute confidentiality. At paragraph (49),

> (49) It follows, therefore, that in any case where it is properly proven that a police officer has broken the rule of confidentiality, he or she can expect dismissal.

[28] The next case submitted for consideration by the CAR, *The Appropriate Officer "E" Division and Constable "K"*, (2010) 5 A.D. (4th) 172 (*Constable K*), does not deal with confidentiality. Rather, it is a shoplifting case, but the reason for its submissions was the set of underlying principles. Members are expected to live up to higher standards of behaviour than

that which is expected of members of the general public. In this decision, the Commissioner's observations from a case cited at (1990) 3 A.D. (2d) 62 (p.67) were quoted:

> The public reasonably expects that those entrusted to enforce the law, will themselves obey that law. When this expectation is not met, there can be an erosion of the public confidence so essential to the police. When members of the Force engage in service, they voluntarily accept the burdens imposed by these facts; they know their behaviour will be subject to scrutiny and judged to a standard higher than required of the general population.

[29] Since the Subject Member's breach of trust was deliberate, argued the CAR, he should face dismissal.

[30] Another reason the case cited at 5 A.D. (4^{th}) 172 was submitted for consideration was its treatment of stress as a mitigating factor in determining sanction, anticipated by the CAR to be argued as a mitigating factor in the present case.. Stress, argued the CAR, is an everyday fact of life, and we all must learn to cope with it. Good character includes the ability to withstand life's difficulties.

[31] Also submitted for consideration was the ERC decision cited at 28 A.D. (2d) 213. Although this case did not deal with police database issues, it contained a useful analysis of the viability of good performance as a mitigating factor on sanction. Near the bottom of the fifteenth page of the decision (neither the pages nor the paragraphs are numbered in this decision), the Chair of the ERC observed,

> In general, a good work ethic and a dedication to duties can be indicators (among many other indicators) of a good character. Indicators of good character, in turn, are relevant to a decision to proceed with a sanction such as termination of employment. Furthermore, it may be expected that a member with previous good service and a dedication to the Force generally will be more likely, after an incident of misconduct, to rededicate himself or herself to proper performance of Force duties. Obviously a good work ethic and a dedication to duties are not perfectly reliable indicators of good character. However, no perfectly reliable indicators of good character exist. Good character is not a matter subject to scientific proof and certainty; instead, I look to accepted principles of professional and employment discipline in assessing a good work ethic and a dedication to duties as factors relevant to consideration of good character.

[32] The CAR, anticipating submission of performance evaluations as a relevant factor in assessing appropriate conduct measures in the present matter, drew attention to aspects of the Subject Member's performance that were not particularly flattering. For the year encompassed by April 1, 2012 to March 31, 2013, under the heading, "Conscientiousness and Reliability", the following narrative appears:

> During the upcoming year [the Subject Member] must improve his file documentation and ensure that his investigations are completed in a timely manner. At the six (5) month assessment period I observed an improvement in his file documentation; however, this has not been maintained. [The Subject Member should also strive to increase his productiveness. While working in a general duty capacity, his proactive work, specifically street checks and vehicle checks, were disappointedly low and could be improved upon. The Subject Member also lacks experience with impaired investigations and IRPs. During the last year he did not investigate an impaired investigation or issue an IRP or 215; the result was extremely low. And (the Subject Member) has been requested to focus on improvement. (The Subject Member) may require extra training with the Traffic Section to gain experience in this regard.

[33] The CAR submitted the Subject Member is in fact a poor performer.

[34] Still with the case cited at 28 A.D. (2d) 213, the CAR pointed to the Chair of the ERC's position on factors to consider when considering dismissal:

> I further acknowledge that good character and rehabilitative potential are normally central to considerations of appropriate sanction; principles of progressive and positive discipline for a single act of misconduct will normally require a sanction of less than termination where general good character and rehabilitative potential are present. However, the presence of general good character and rehabilitative potential do not absolutely require a sanction less than termination; rather, these factors still must be measured against the severity of the misconduct. There may be disciplinary situations where these factors, while relevant, are not sufficient to overcome the employer's right to terminate the employment relationship.

[35] The Subject Member's having attracted a record of informal discipline while awaiting resolution of the present matter brings his character into question.

[36] The case of *The Appropriate Officer "K" Division and Sergeant "B"*, (1990) 3 A.D. (2d) 62 was submitted by the CAR to illustrate that where misconduct is serious, dismissal will still result even if evidence of stress is accepted. The member in that case had twenty-seven years of good service, but suffered eight independent significantly stressful events, and he was still dismissed for theft.

[37] In the case cited as *The Appropriate Officer "K" Division and Constable "A"* (1995) 23 A.D. (2d) 157, the Commissioner stated,

> The only mitigating circumstance, in my opinion, worthy of close scrutiny is the isolated character of the act. This must be carefully weighed, however, against the gravity of the act, given Cst. A's position of trust and the public expectations of its police. I firmly believe that the breach of public trust in this case far outweighs the questions of rehabilitation, potential for recurrence or remorse. The sanction imposed is in keeping with the public's expectations and the reputation of the Forceand its members. Anything less would impose an undue, unreasonable and unfair burden on the Force and would bring into serious question the public's expectation that the Force's members be above reproach.

[38] The aggravating factors suggested by the CAR were the following:

- The involvement of another police department
- The lack of confidence of the Commanding Officer
- The incident resulting in the imposition of informal discipline, which indicates a lack of good character;
- The Subject Member's motivation, namely, loyalty to his friend rather than loyalty to the Force;
- The repeated queries (this was not an isolated act);
- The Subject Member's having knowingly assisted A.A. in committing a fraud on A.C.

[39] I questioned the CAR on the last aggravating factor, namely, the Subject Member's having knowingly assisting A.A. in committing a fraud. This was not particularized in the Notice of Conduct Hearing, and the imposition of conduct measures for misconduct not alleged would run afoul of the principles articulated by the Federal Court of Canada in the case of *Gill v. The Attorney General of Canada* (2006) FC 1106 (*Gill*).

[40] The CAR indicated he did not agree with the Federal Court's decision in *Gill*. In any case, the Subject Member knew all along the case he had to meet, and has had an opportunity to provide a full explanation. The Subject Member admitted he knew the database information he was providing to A.A. was going to be used by A.A. to acquire some money from A.C., who was facing an impaired driving charge. Regardless of how the money was going to change hands, the Subject Member should not have provided the database information to A.A.

[41] Taking all of the above factors into account, argued the CAR, the Subject Member should be dismissed from the Force.

The MR's submissions on conduct measures

[42] The MR took issue with some of the aggravating factors put forward by the CAR. The decision on the allegations clearly limited the misconduct at issue. The unauthorized disclosure of database information was more of an error in judgment than it was a breach of trust. There was no underlying criminality, and criminal activity such as fraud, extortion or blackmail was never alleged and therefore cannot be the basis for the imposition of conduct measures.

[43] The involvement of another police department was minimal, and limited to the Subject Member's having attended the offices of a different police force for a statement. This can hardly be said to tarnish the reputation of the Force, and cannot be considered an aggravating factor.

[44] The MR further argued that should any weight at all be placed on the record of informal discipline, the Subject Member along with the Line Officer who imposed informal discipline should be permitted to testify as to the surrounding circumstances. The prejudicial effect of this item far outweighs its probative value, and should be disregarded.

[45] With respect to the Commanding Officer's loss of confidence in the Subject Member, the new conduct regime implies as much when dismissal is sought, so this cannot be considered an aggravating factor.

[46] The MR took issue with the case law provided by the CAR in support of dismissal. The cases, almost all of which are very dated, revolved around much more serious misconduct, such as theft, or taking sexual advantage of intoxicated females in custody. The theft cases involved criminal convictions, which are absent here. Even the *Constable P* case, which although it dealt with misuse of police databases, was much more serious than the present case because the member's misconduct impeded a murder investigation. Also, seriously aggravating factors were taken into consideration in the cases involving *Constable P* and *Constable K* which are simply absent from the present matter, such as a lack of remorse or a willingness to re-establish the trust relationship with the Force.

[47] The *Fox* case is easily distinguished because it involved a probationary member. Also, it is so dated, the principles no longer apply. In *Fox* it was held that where a police officer has broken the rule of confidentiality, he or she can expect dismissal. This is no longer the case, and there are many cases involving members who have broken the rule of confidentiality yet were retained.

[48] The Subject Member's performance evaluations, while not overwhelmingly positive, show his potential to succeed. These evaluations reflect the unfortunate decision to return to work too soon after a debilitating injury. As indicated in the Subject Member's written apology, with just a little under a year's service, the police vehicle he was driving was struck by an impaired driver, and the collision was so violent the "jaws of life" were required to extract the Subject Member from the police vehicle. He suffered lingering physical injuries and psychological issues including Post- Traumatic Stress Disorder, yet due to personnel shortages at his detachment, he felt obliged to return to work, which turned out to be much sooner than he should have. His performance suffered as a result.

[49] Although the allegations were found to have been established under section 7.1 of the Code of Conduct (discreditable conduct), the conduct measures guide offers greater precision if section 4.6 is considered. This is the section dealing with the unauthorized use of police equipment. The unauthorized use of a police vehicle, which is the essence of Allegation 3, calls for conduct measures in the aggravated range of a forfeiture of pay between one and ten days. With respect to misuse of police databases, the range of conduct measures is very wide, calling for forfeitures of pay unless the queries are done for an illegal or nefarious purpose. It has been made abundantly clear the Subject Member did not do anything for an illegal purpose.

[50] The case law submitted by the MR in support of conduct measures falling short of dismissal and consisting, rather, of forfeitures of pay, are the following:

- *The Appropriate Officer "K" Division and Constable "M"* (2007) 1 A.D. (4th) 103, in which the member admitted four allegations of having accessed police databases to obtain information on persons associated to his former common-law spouse. One of the allegations pertained to his having shared database information with an unauthorized person. The Board in this case accepted a joint submission on sanction and imposed a global sanction consisting of a reprimand and the forfeiture of five days' pay.

- *The Appropriate Officer "E" Division and Constable "K"* (2008) 2 A.D. (4th) 86, in which the member admitted an allegation to the effect that she, as a monitor of intercepted private communications, disclosed details of these communications to an unauthorized person. In another allegation, she admitted to having conducted unauthorized police database queries for personal reasons. The Board accepted a joint submission and imposed a global sanction consisting of a reprimand plus the forfeiture of ten days' pay. A serious aggravating factor was that she conducted these queries despite clear contemporaneous instructions to the contrary.

- *The Appropriate Officer "E" Division and Constable "S"* (2009) 4 A.D. (4th) 284, in which the member admitted one allegation of having conducted, on numerous occasions, police database queries on individuals for personal reasons, and of having shared the

information he obtained on one occasion. The Board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of five days' pay.

- *The Appropriate Officer "E" Division and Constable "G"* (2010) 10 A.D. (4th) 70, in which the member admitted an allegation of having queried a relative of his girlfriend's on a police database, and of having subsequently informed his girlfriend of the results of the query. The Board accepted a joint submission and imposed a sanction consisting of a reprimand plus the forfeiture of two day's pay.

- *The Appropriate Officer "C" Division and Corporal "P"* (2010) 6 A.D. (4th) 250, in which the member admitted an allegation of having accessed RCMP databases, on several occasions, to obtain information which he subsequently disclosed to a private investigator. The member received no direct financial reward from the private investigator for the disclosure of the database information, but in a separate allegation, he admitted disgraceful conduct in permitting the private investigator to buy him lunch. The Board accepted a joint submission and imposed a sanction consisting of a reprimand plus the forfeiture of ten days' pay for the allegation pertaining to the unauthorized database access.

- *The Appropriate Officer "O" Division and Constable "E"* (2012) 10 A.D. (4th) 269, in which the member admitted one allegation to the effect he had, over the period of over three years, conducted numerous police database queries of individuals for personal reasons. On several occasions he disclosed the results of those queries to unauthorized individuals. The Board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of seven days' pay.

[51] In addition, the MR relies on two decisions rendered under the new conduct regime, namely, 2016 RCAD 2 and 2016 RCAD 3, both of which were cited for the proposition that appears in both cases but was first cited at paragraph (110) of 2016 RCAD 2: "where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors absent." The MR

submits this applies to the present case, since the Subject Member did not seek or obtain personal gain. There are also significant mitigating factors present.

[52] The most significant mitigating factor originates with his police motor vehicle accident, because the attendant injuries and psychological damage further corroded his relationship with his wife. They eventually divorced, and share custody of their daughter, who was three years old at the time of their separation. Following the divorce, the Subject Member moved in with a friend he knew and trusted, his former RCMP troopmate A.A., who is named in the allegations as the party on whose behalf the Subject Member conducted the unauthorized police database queries.

[53] Medical reports indicate the Subject Member was experiencing anxiety while on the road owing to the lingering trauma from his police motor vehicle accident. In addition, he was suffering from a diagnosed sleep disorder, which was also affecting his performance and his judgment. In the most recent report, the Subject Member's treating physician relates, "I believe [the Subject Member] was significantly depressed, which would have impaired his cognitive capacities and judgment and reasoning. I would suspect that his judgment would have been sub-optimal during this time, and it would have contributed to his poor decision-making. I believe he had been suffering with these psychological challenges for a number of years before I met him."

[54] The doctor concludes, '[The Subject Member]'s conditions are improved. He's sleeping better. His moods are stable. He's experiencing fewer flashbacks and intrusive thoughts. [The Subject Member] indicated that he was in a much better frame of mind. He's better physically, mentally, he's healthier and much clearer in his decision-making." He ends his letter by saying, "I would suspect that there is little probability that he would repeat his prior acts in his current state of mind."

[55] The MR offered these observations from the Subject Member's treating physician not to excuse his misconduct, but rather, to provide some background as to his personal circumstances at the time.

[56] Another mitigating factor, submitted the MR, is the Subject Member's degree of cooperation, not only with the internal investigation, but with these proceedings. He admitted the allegations at the first opportunity, and has acknowledged his misconduct. He told the truth, which takes a lot of courage and shows good character.

[57] The Subject Member has no record of prior discipline. The record of informal discipline occurred after the allegations that are the subject of these proceedings.

[58] The Subject Member has sought and received treatment for the conditions which may have contributed to his misconduct.

[59] The letter of reference on file highlight the Subject Member's desire to help others. His coaching and leadership skills make him a valuable member of his family and of the community.

[60] The database queries were out of character, argued the MR, and the result of a momentary lapse of judgment. There is minimal likelihood of recurrent behaviour.

[61] The quantum of conduct measures, according to the MR, should consist globally of a reprimand plus a forfeiture of fifteen days' pay plus the forfeiture of fifteen days' annual leave. The reason for dividing the forfeitures up into pay and annual leave is to minimize the financial impact on the Subject Member, who has monthly child support obligations to honour.

[62] Such a sanction, argued the MR, would be in keeping with the spirit and intent of the RCMP Act and would be consistent with the principles articulated in the Conduct Measures Guide, at pages 6 and 7: "a soft maximum equivalent to thirty days' pay for a contravention containing aggravating features, but where dismissal was not considered in the circumstances. The vast majority of cases should normally warrant a measure of thirty days or less, or an equivalent sanction. It is suggested that a financial penalty at the thirty-to-forty day range may be considered as a guideline in determining what should be considered as a maximum measure to be imposed on a member."

Decision on conduct measures

[63] The RCMP's External Review Committee has established a well-accepted framework for the analysis of appropriate conduct measures. First, the range of appropriate measures must be considered, and then the aggravating and mitigating factors. Finally, the conduct measures to be imposed must be fair and just, and appropriate to the gravity of the misconduct at issue.

[64] The cases provided by the Representatives dealing with instances of unauthorized use of police databases and unauthorized disclosure of the results of searches of those databases were all heard under what we have now come to term the "old" *RCMP Act*. One of the reasons for amending the Act was to expand the range of potential sanctions, now referred to as conduct measures, applicable to police misconduct. Under the "old" RCMP Act, the maximum possible sanction short of dismissal (setting aside, for the moment, the concept of demotion) was a reprimand plus the forfeiture of ten days' pay. Disciplinary boards faced with the obligation to sanction misconduct that clearly merited more than just the forfeiture of ten days' pay had nowhere to turn other than dismissal.

[65] There is no such limit under the "new" or "amended" *RCMP Act.* While this would theoretically allow for the forfeiture of an infinite number of days' pay, the Conduct Measures Guide has placed what is, to me, a realistic limit. To paraphrase the Guide, on any given contravention, if one is considering forfeiture of anywhere near forty-five days' pay, one should really be considering dismissal.

[66] Compared to the "old" *RCMP Act,* this more than quadruples the range of potential sanctions and provides a considerable expanse of middle ground between forfeiture of pay (or suspension) and dismissal. I am convinced these amendments are a reflection of Parliament's desire to allow conduct authorities to assign conduct measures severe enough to reflect the gravity of the misconduct at issue while still retaining the member.

[67] The database and unauthorized disclosure cases referred to by the Representatives reveal quite a disparity in approach over the years. The cases provided by the MR are much more recent than the relics unearthed by the CAR, which one would expect to provide a more accurate

reflection of the Force's position on issues pertaining to confidentiality of police information. Institutional sensitivity surrounding privacy interests has certainly become more acute, when the *Constable P* case was decided, but at first glance the MR's cases do not seem to reflect this, since dismissal was not sought in any one of them. Rather, the cases were all the subject of joint submissions in expedited hearings, and in all but two of them, a forfeiture of pay of less than the maximum was agreed upon.

[68] Unfortunately, sanctions imposed as a result of an agreed statement of facts and joint submissions carry little precedential weight. The negotiation process is protected by privilege, and decision-makers are rarely provided even a glimpse into the factors underlying an agreement to proceed by way of joint submission. It is for this reason that joint submissions are considered to be virtually sacrosanct, and may only be disregarded in the most extreme cases.

[69] Frequently, joint-submission cases provide guidance and assistance in considering an appropriate range of applicable conduct measures. Unfortunately, the opinions of the seven different boards which heard the seven different database cases submitted by the MR varied widely:

- In the case cited at 13 A.D. (4^{th}) 302, the board established a range of sanction for the database-related contravention to be "from a reprimand, to a reprimand and a forfeiture of pay in the mid-to-upper range of the scale, depending upon the circumstances of the case."

- In the case cited at 10 A.D. (4^{th}) 269, the Board "agree[d] with the parties that the appropriate range of sanctions in this case is a reprimand and the forfeiture of between five and ten days' pay."

- In the case cited at 10 A.D. (4^{th}) 67, the board established a range "from a reprimand and the forfeiture of pay in the low range up to, and including, dismissal".

- In the case cited at 2 A.D. (4th) 86, the board " . . . consider[ed] the appropriate sanction range for this conduct to be from a reprimand with a significant pay forfeiture to dismissal, for particularly egregious conduct."

- In the case cited at 1 A.D. (4th) 103, "[t]he Board considered an appropriate sanction range for this conduct to stretch from informal discipline to a pay forfeiture."

- In the case cited at 6 A.D. (4th) 250, "The Board considers the appropriate sanction to fall within the middle or upper end of the range of acceptable sanctions". This vague and confusing statement, in light of the sanction ultimately imposed (a reprimand plus the forfeiture of ten days' pay), seems to imply a range of sanction short of dismissal. Puzzling, though, is the strong language of the board in considering the sensitivity of database-related issues: "In support of its law enforcement activities and those of other Canadian police services, the RCMP is the custodian of CPIC and plays the role of trustee of the information contained therein. The RCMP has every right to expect, as do other Canadian police services and the public, that its employees comply with the terms and conditions of agreements entered into by the Force in its role as trustee, i.e. that employees not misuse the system. This compliance helps to build a relationship of trust between the RCMP, other Canadian police services and the public with respect to the management of personal information."

- Finally, in the case cited at 4 A.D. (4th) 284, "the appropriate range of sanction for this type of misconduct [is] from a reprimand to a forfeiture of pay in the middle range of the scale."

[70] The cases suggest dismissal as an option only in the most extreme and egregious cases. Had the Conduct Authority alleged a conspiracy to commit blackmail, fraud or extortion in the present matter, and had such an allegation been proven by way of sufficient clear, convincing and cogent evidence, this may have been such a case. There is a very good reason the phrase "conspiracy to commit blackmail" or the word "extortion" were not used to particularize the misconduct. There is simply no evidence of such a plan.

[71] At worst, the Subject Member was reckless or careless with the information under his care, and while this still amounts to serious misconduct, the range of sanction implied by the case law for misconduct of this nature falls short of dismissal.

[72] The two recent conduct matters brought forward by the MR, cited at 2016 CARD 2 and 2016 CARD 3 respectively, both state ". . .where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors absent." I continue to agree.

[73] The Subject Member admitted a lack of integrity in having conducted database queries and shared the results of those queries with A.A. having been "informed of [A.A.]'s intention to unlawfully obtaining money from [A.C.]" (*sic*). The manner in which A.A. planned to unlawfully separate A.C. from an unknown quantity of money was never particularized, and I find there is a good reason for this. There is no proof of it in the investigation report. I find the Federal Court in *Gill* to provide ample precedent for my refusal to sanction misconduct that has not been alleged.

[74] Given the lack of particularization, the use of the word "unlawfully" in Allegation 3 is particularly vague. There is only one person who can lawfully use the database information, namely, the Subject Member, and even then, only in the course of his duties. A.A., despite his status as an ex-member of the RCMP, can only use it in an "unlawful" manner. The unqualified use of this word in the allegation does not establish a degree of moral turpitude that would merit the Subject Member's dismissal from the Force. It bears repeating that no personal gain was sought or obtained.

[75] The Subject Member, throughout the course of the investigation and these conduct proceedings, was consistent in claiming no knowledge of what A.A. was planning to do with the information the Subject Member provided him with. No evidence to the contrary was forthcoming. At worst, then, I find the Subject Member was reckless or careless with the database information, which still makes this a serious form of misconduct. There is increasing

awareness and sensitivity surrounding privacy issues, and it is in the best interests of the Force to take a firm stand on its stewardship of the information contained in its databases.

[76] I do not find the other aggravating factors brought forward by the CAR to be of sufficient weight to swing the circumstances of this case anywhere near dismissal.

[77] Another police department was only peripherally aware of the presence of an internal investigation in the RCMP, and although all internal investigations are unsavoury affairs, they are an unfortunate fact of life for every police force. This alone is not enough for me to conclude the Subject Member has, by his actions, tarnished the reputation of the Force in the eyes of any particular police department.

[78] I continue to decry the Commanding Officer's "lack of confidence in the member" as an aggravating factor. By operation of law, the only conduct matters I will ever hear under the amended *RCMP Act* are those cases in which the Commanding Officer of a Division, as the Conduct Authority, is seeking a member's dismissal. What greater indication of a lack of confidence can there possibly be? To bring this forward as an aggravating factor is a tautology.

[79] I accept the instance of informal discipline as a rebuttal to the Subject Member's expression of good character, but because it arose after these proceedings were initiated, I cannot accept it as an aggravating factor in considering conduct measures.

[80] I do accept the fact that more than one query was conducted to be an aggravating factor.

[81] The mitigating factors in this case are significant. First and foremost are the set of factors underlying the Subject Member's behaviour throughout the time period encompassed by the allegations. It is significant that while he was on duty, in the first year of his service, the Subject Member was rammed by a drunk driver. The impact was so severe, the "jaws of life" were required to extract him from his crumpled police car. He suffered severe physiological and psychological damage as a result of this collision, to the point where powerful medication is prescribed, and Post Traumatic Stress Disorder and depression are diagnosed.

[82] This underlying condition was a factor in the dissolution of his marriage. A marriage breakup is a traumatic event in and of itself, especially where the custody of a three-year old girl is involved. The next link in this chain of very unfortunate events is the loss of the family home, which obliges the Subject Member to find other accommodation. He moves in with a troopmate, Mr. A.A., whom the Subject Member knew and trusted. Shortly thereafter, Mr. A.A. takes full advantage of the Subject Member in his vulnerable state, and makes a request he never should have made, for motives which are still quite unclear.

[83] It is under these very trying circumstances that the Subject Member makes a serious error in judgement and conducts database queries, sharing the results of those queries with A.A. This was not a pattern of activity, although he did it more than once. I can easily distinguish this set of facts from those cases submitted for consideration which involved a member conducting checks on an ongoing basis for a private investigator, or doing checks on ex-spouses (or the people connected to the ex-spouse).

[84] Although the acts amount to serious misconduct, they do not betray a fundamental character flaw. My intention in imposing a significant forfeiture of pay and annual leave is to provide both a general and specific deterrent, but I am confident this misconduct will never be repeated by the Subject Member.

[85] Another strong mitigating factor is the Subject Member's acceptance of responsibility. He cooperated with internal investigators. There were no inconsistencies, either internal or external, between the various statements he provided, including his admissions before me.

[86] I find him to be contrite, remorseful, and humbly apologetic. He offers the underlying medical and personal factors not as an excuse, because he clearly acknowledges what he did was wrong, but rather as an explanation.

[87] This matter has been resolved in the most expeditious manner possible given the current state of affairs in the RCMP's conduct and disciplinary unit, collectively referred to as the Recourse Services Branch. Resourcing challenges made it impossible to resolve this matter any

faster, and the Subject Member's admissions greatly facilitated the administration of justice. This is a significant mitigating factor.

[88] I also accept as a mitigating factor the Subject Member's having sought and received treatment for the conditions which contributed to his misplaced trust in A.A. This treatment is ongoing and will play a significant role in his rehabilitation.

[89] One of the ancient cases brought forward for consideration was so old it pre-dated even the 1988 RCMP Act, which was displaced by the current amended Act. The case of *The Appropriate Officer of "K" Division and Sergeant "A"*, cited at (1990) 3 A.D. (2d) 62, hearkens back to what used to be referred to in the RCMP as "Service Court". This was an antiquated, highly militarized disciplinary process which permitted a period of incarceration for serious misconduct. Members on the receiving end of discipline were marched into Service Court wearing their serge plus their boots and breeches, but carrying their spurs in their hand as a reflection of their temporary fall from grace in the ranks of the Mounted Police.

[90] Much has changed since then. In particular, attitudes towards discipline have greatly changed. At the bottom of the second page of that decision (the paragraphs are not numbered), the Commissioner makes reference to submissions made by the prosecuting authority, the Appropriate Officer Representative: "The Appropriate Officer's Representative continued that Sergeant "A"'s employment in an operational or administrative capacity would lead to problems. He said that the Force is not an institution of rehabilitation."

[91] I repeat, much has changed since disciplinary matters were tried in Service Court. I could not disagree more with the last sentence of the previous paragraph. The Force is indeed an institution of rehabilitation where circumstances permit, and most disciplinary action falls into this category. For those members who, like the Subject Member, are prepared to accept the consequences of their actions, provided their misconduct is not so serious as to warrant dismissal, the Force will go a considerable distance in assisting them in their ongoing efforts towards rehabilitation. Our personnel continues to be our greatest asset, and dismissal must only be viewed as a last resort.

[92] I refer to the Conduct Measures Guide in imposing, as conduct measures on Allegation 1, which has to do with the unauthorized database query, a reprimand plus the forfeiture of five days' pay plus the forfeiture of five days of annual leave.

[93] On the second allegation, having to do with sharing the results of those queries with an unauthorized individual for a non-duty-related purpose, the same conduct measures, namely, a reprimand plus the forfeiture of five days' pay plus the forfeiture of five days of annual leave.

[94] On the third allegation, having to do with the unauthorized use of a police vehicle to conduct the transactions articulated in the first two allegations, I likewise impose a reprimand plus the forfeiture of five days' pay plus the forfeiture of five days of annual leave.

[95] I am taking the MR's submissions into account regarding the Subject Member's financial condition and his support obligations. The grand total of thirty days is divided equally into forfeitures of annual leave and of pay, so as to lessen the financial impact upon him.

January 21, 2020

Inspector James Robert Knopp — Date

Conduct Board