Protected A

2017 RCAD 8

Restriction on publication: By order of the Conduct Board, the identity of two persons, and any information that might reasonably identify those persons, shall not be published in any document, or broadcast or transmitted in any way.

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF A CONDUCT HEARING PURSUANT TO THE

ROYAL CANADIAN MOUNTED POLICE ACT

BETWEEN:

Commanding Officer, "E" Division

(Conduct Authority)

and

Constable Benjamin Caram, Regimental Number 51805

(Subject Member)

Conduct Board Decision (CORRECTED)

John A. McKinlay

Protected A

2017 RCAD 8

November 10, 2017

Staff Sergeant Caroline Drolet and Mr. Denys Morel, for the Conduct Authority

Ms. Hélene Desgranges, for the Subject Member

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SUMMARY

The Subject Member faced three allegations of discreditable conduct and one of discourteous and harassing behaviour. He attended a pre-Christmas party with his spouse, organized by members of her Watch. The Subject Member became heavily intoxicated. He slung his arm over the shoulders of Constable A and, without her consent, very briefly played with her nipple over her shirt. This event was laughed off at the time. Later, the Subject Member hugged Constable A from behind with his hands descending, still over her clothing, from her stomach to her groin. Constable B observed this and told the Subject Member to leave the area. Constable A did not consent to this touching, was startled by it, but she had no recollection of it later due to her alcohol consumption. Later, the Subject Member touched the cheekbones of another attendee, Constable C, with her consent. He then made gestures involving the fingers on one hand, which puzzled Constable C. Asked what the gesture meant, the Subject Member stated using a crude term that he wanted to put his fingers in her vagina. Later, the Subject Member placed his arm around the shoulders of Constable C, who was intoxicated and did not consent, and grazed her nipple with his fingers about three times, over her clothing. This was observed by Constable B, who pushed the Subject Member away. A criminal charge of sexual assault was filed respecting Constable C, which was ultimately subject to resolution via an alternate measures program.

The Subject Member admitted to the four allegations, which were found to be established. The Subject Member was diagnosed with a long-standing social anxiety disorder that contributed to his over-consumption of alcohol. Absent his extreme level of intoxication, the Subject Member would not have behaved as he did. The Subject Member has now been abstinent from alcohol, attended Alcoholics Anonymous meetings, and continued psychotherapy for social anxiety, adjustment disorder and duty-related post-traumatic stress disorder issues. Sufficient mitigating factors existed to make loss of employment not proportionate. Female RCMP members

confirmed the Subject Member's ordinarily quiet, respectful disposition and the completely out of character nature of the Subject Member's misconduct. Further misconduct was considered very unlikely. Prior sanction precedents did not reflect contemporary standards respecting sexual misconduct: a reprimand and forfeitures of 10, 10, 5 and 20 days of pay were imposed, together with an order for transfer or reassignment, and the Subject Member's participation in any treatment identified by the Health Services Officer.

REASONS FOR DECISION (CORRECTED)

INTRODUCTION

[1] The Conduct Authority signed the present *Notice of Conduct Hearing* on September 30, 2016. I was appointed Conduct Board in this matter on August 11, 2016. The Subject Member was served with the *Notice of Conduct Hearing* and the accompanying investigative materials on October 17, 2016.

[2] The Member Representative (MR) received an initial extension to file the Subject Member's responses, as per the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. The filing date was December 15, 2016.

PRELIMINARY MOTIONS

Abeyance motion

[3] The MR filed a motion on December 15, 2016, seeking an order to hold in abeyance the Subject Member's production of his responses under subsection 15(3) and section 18 of the *CSO (Conduct)*, as well as the setting of a hearing date, pending the outcome of the Subject Member's criminal proceeding. Initially, it was anticipated that the abeyance motion would be rendered moot by the timely referral of the criminal matter to an alternative measures program; therefore, filing extensions were granted to avoid the expenditure of mainly human resources. Instead, the criminal matter was repeatedly adjourned and rescheduled (never attributable to the Subject Member), causing me to require the completion of written submissions on the MR's abeyance motion by March 16, 2017. My reasons for denying this abeyance motion, issued March 19, 2017, are reproduced below.

[4] The principal arguments advanced in the Subject Member's abeyance motion were summarized and lettered for ease of reference, as follows:

> [A] The Applicant should not be required to meet the obligations required under Sections 15 and 18 of the CSOs (Conduct) and to proceed before the

> Conduct Board before the criminal trial on the basis of not wanting to compromise his ability to defend himself in criminal court.
>
> [B] Being compelled to comply with the obligations in sections 15 and 18 of the CSO (Conduct) would also result in a violation of his rights under section 7, 11(c) and 13 of the [*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]].
>
> [C] Derivative use immunity is available to shield the administrative proceedings from contaminating the criminal proceedings but this protection falls short of the protection necessary as any statements, admissions or materials that the Applicant provides may reveal defence strategy and impact his defence at criminal trial.
>
> [D] Given the nature of the obligations that the *CSOs (Conduct*) impose, the Applicant is being compelled to furnish statements and/or materials that will form part of the record before a board of inquiry (ss. 24.1(3) and 45(2) [*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*]], akin to being compelled to provide testimony.
>
> [E] If any aspect of the conduct board proceedings takes place before the criminal proceedings, it comes at the risk of forfeiting the criminal proceedings due to *Charter* protections
>
> [F] If any aspect of the conduct board proceedings takes place before the criminal proceedings, it affects the right of the member to make full answer and defense in the criminal or disciplinary proceedings, as well as his right to a fair trial or hearing
>
> [G] Given the period of time that can be attributed to the Conduct Authority in advance of service of the Notice of Conduct Hearing, the Conduct Authority cannot invoke a prejudice or an emergency to proceed before the Board overriding the protection of the Applicant's rights.
>
> [*Sic throughout*]

[5] The abeyance motion was denied for the following reasons:

> With respect to Allegations 1 and 2 in the Notice of Conduct Hearing, neither relates to the criminal charge that involves ([Constable (Cst.)] [C]). On this basis, and in addition the broader reasoning below, I am not prepared to hold in abeyance the Subject Member's provision of responses under section 15(3) of the *CSO (Conduct)* for Allegations 1 and 2.
>
> With respect to Allegation 3, the misconduct alleged does involve actions and utterances directed by the Subject Member toward [Cst. C], but they are not the basis for the criminal charge faced by the Subject Member. Accordingly, on this basis, and in addition the broader reasoning below, I

am not prepared to hold in abeyance the Subject Member's provision of responses under section 15(3) of the *CSO (Conduct)* for Allegation 3.

With respect to Allegations 1, 2, and 3, I am not persuaded that the fact that they involve the same commission period and off duty party circumstances as are involved in Allegation 4 warrants treating them in the same manner as Allegation 4 in terms of the need for an abeyance order.

With respect to Allegation 4, the alleged acts and asserted facts in the particulars are in support of a contravention of section 7.1 of the RCMP Code of Conduct, and also form the basis for the criminal charge that involves [Cst. C].

I have carefully reviewed the arguments and judicial decisions cited in the Subject Member's initial motion. The application of these cases, in terms of requiring an abeyance order from me until the criminal charge trial is concluded, is severely limited. In coming to my decision, therefore, I do not rely on any specific [Conduct Authority Representative (CAR)] response submission. Paragraph 15 of the MR's final reply does not constitute proper rebuttal.

It is for the trial judge conducting the Subject Member's criminal trial to safeguard common law trial fairness and the Subject Member's rights under sections 7, 11(c) and 13 of the *Charter*. To the extent that there is some sort of *strategic* advantage that may be lost by the Subject Member filing responses under section 15 of the *CSO (Conduct)*, that is not a compelling consideration given the obligation placed on any conduct board to proceed expeditiously as long as procedural fairness is respected.

Accordingly, I view the arguments noted above under items A, B, C, and F (to the extent they relate to the criminal matter) to be arguments that are properly made to the trial judge presiding at the Subject Member's criminal trial. The conduct process for which I have been appointed a Conduct Board is not one that now engages *Charter* section 7 rights, and is not a process where the Subject Member comes before a board charged with an *offence* engaging *Charter* section 11(c). The Subject Member is free, in his criminal trial process, to raise the protection of *Charter* section 13, but that does not mean this conduct board is prohibited from expediting the adjudication of the allegations in the Notice, which includes consideration of the Subject Member's responses under sections 15 and 18 of the *CSO (Conduct*).

The argument in item C that the filing of section 15 and 18 responses may, if not covered by derivative use immunity, serve to reveal the Subject Member's criminal trial strategy and impact his defence, is speculative and, in any event, is one properly considered by the trial judge.

In item D, there is some confusion in the argument advanced. If the Subject Member's submission is that - even absent a pending criminal trial - he

> should not be compelled to provide responses under section 15 and 18 because of *Charter* section 11(c), then the argument fails given there is no *charge concerning an offence* that is to be adjudicated by this conduct board, as the application of *Charter* section 11(c) has been judicially defined. If the argument is that the Subject Member's responses under *CSO (Conduct)* sections 15 and 18 constitute compelled testimony, then this argument is properly raised in his criminal matter. Whether so-called compelled responses to a conduct board give rise to *Charter* section 7 considerations is also an issue properly raised in the criminal matter, given the Subject Member argues they will affect his ability to "mount his defence" in the criminal matter.
>
> With respect to item E, I would expect that the Conduct Authority would consent to the abeyance motion if the CARs believed the criminal matter would be imperiled by this conduct process being advanced toward adjudication before the criminal trial is concluded.
>
> With respect to item F, I do not find that the existence of a criminal charge and ongoing trial process, as faced by the Subject Member, denies him procedural fairness in this conduct board process simply because the terms of sections 15 and 18 of the *CSO (Conduct)* are being applied.
>
> With respect to item G, I do not find it necessary to identify an emergency interest or prejudice to the Conduct Authority's case in order to advance the adjudication of this matter expeditiously.
>
> [*Sic throughout*]

[6] The Subject Member's responses under subsection 15(3) and section 18 of the *CSO (Conduct)* were filed on March 21, 2017. The parties agreed to a hearing set in the week of May 15, 2017.

Amendment of clerical error in Particular 2 of Allegation 4

[7] At a pre-hearing conference on April 27, 2017, the CAR identified an error in Particular 2 of Allegation 4, which referenced "Coquitlam detachment", whereas Allegations 1, 2 and 3 all correctly referenced "Nanaimo detachment". The CAR asked whether a more formal motion for amendment was required. Notwithstanding the clerical nature of the error, the MR indicated that she would require instructions from her client. The Conduct Board determined that this clerical correction did not require a formal motion to amend and that it did not prejudice the Subject Member. Particular 2 of Allegation 4 was formally amended to reference "Nanaimo detachment".

Publication, broadcast, sealing, *in camera* order

[8] While the MR's abeyance motion was denied, the Conduct Board agreed, on March 24, 2017, to issue an interim order to seal the record for this conduct process, instituting a broadcast and publication ban on the proceeding, and conducting the hearing *in camera*. These terms were instituted with the consent of the CAR. These restrictions remained in effect until the outcome of the criminal matter, which became known on July 8, 2017, when the Crown's agreement to refer the Subject Member's criminal matter to an alternative measures program was confirmed. Accordingly, all restrictions under this interim order were lifted on the first morning of the hearing, July 17, 2017.

Publication and broadcast ban order for two persons

[9] Notwithstanding the lifting of the interim order, a separate order remains in effect to protect the identity of Cst. A and Cst. C. A statutory publication ban was issued in the Subject Member's criminal matter respecting the identification of Cst. C and, with the Subject Member's consent, a comparable publication and broadcast bans were ordered by this Conduct Board respecting not only the identity of Cst. C, but also of Cst. A.

[10] The MR brought a number of other pre-hearing motions, all of which were formally denied.

Adjournment pending criminal proceeding result

[11] A motion was brought on May 11, 2017, to adjourn the initial May 15, 2017, hearing date until the Crown's formal alternative measures referral decision was made. The MR argued that the Subject Member's ability to argue conduct measures would be prejudiced if the outcome of the criminal matter remained unknown at the conduct measures phase of the hearing. The motion was denied. Instead, a bereavement leave involving CAR counsel arose on May 11, 2017, and caused the hearing to be adjourned to July 17, 2017.

Production order for "Record of Decision"

[12] An MR motion was brought on May 11, 2017, to compel production of a conduct meeting "Record of Decision" represented to exist by the MR, which involved another RCMP member who received non-dismissal conduct measures. My reasons for denying this motion were issued on May 19, 2017:

1. Even in informal, expeditious pre-hearing motion processes, counsel cannot assert material facts, and then decline to identify the source for those facts. The party making a motion or request for a [Conduct Board] order requiring the production of a document bears the evidential burden.

2. Without information from the MR concerning the evidential basis for the MR's factual assertions, I am not prepared to accept the MR's assertions as accurate, nor am I prepared to find that any "Record of Decision" exists that contains the asserted information.

3. The MR has carefully detailed her persistent but as yet unsuccessful efforts to obtain the purported "Record of Decision" through the Access to Information Act process, and it is reasonable to conclude that the facts the MR has asserted are not contained in an official response to her client's Access to Information Act requests. In addition, I accept what the MR has indicated - she has not seen, and does not have, a copy of the document she seeks.

4. If one assumes the facts asserted by the MR are accurate (which I expressly do not, as explained above), it is reasonable to conclude that the MR is relying on private information created after another RCMP member's private conduct meeting.

5. If one assumes the facts asserted by the MR are accurate (which I expressly do not, as explained above), it is not appropriate for this Conduct Board to order production of a document where a reasonable explanation is that the MR is attempting to justify production by relying on the private information of another member that should not have been disclosed, and should not have been made available to the MR.

6. When a party comes seeking a discretionary remedy from a tribunal, it must come with clean hands. In addition, claims of solicitor-client privilege may correctly serve as a shield, but not as a spear, and any legitimate privilege may be considered implicitly waived where material facts are advanced by a client's counsel.

7. If any purported "Record of Decision" was ordered disclosed by the [Conduct Board] to the MR, in depersonalized form, the MR (and presumably the Subject Member) would nevertheless learn the private conduct meeting information of another specific member, as the MR has confirmed she knows the name of the other specific member. The Top Secret security clearance of the MR is irrelevant in terms of her lack of entitlement to access to the private information of another member. In camera proceedings, publication bans and the like would not address this breach of another member's privacy. I do not find any interest of the Subject Member sufficient to justify this potential privacy breach.

8. The purported "Record of Decision" document that the MR seeks is not exculpatory evidence or information necessary for the Subject Member to make answer to the allegations – he has in fact admitted the allegations.

9. The purported "Record of Decision" document that the MR seeks is instead characterized as a decision that, according to the MR's submissions, must be ordered produced so that it can be included in the MR's "parity of sanction" submissions on appropriate conduct-measures. I understand the MR to seek the purported document not as evidence, but as case law.

10. Given the MR's request relies on an assertion of facts without a supporting evidential basis, and gives rise to concerns about the legal propriety of any such basis, I am not prepared to find that any purported "Record of Decision" in fact relates to the same circumstances as those of the Subject Member.

11. In any event, while "parity of sanction" may be raised in submissions concerning the appropriate penalty (i.e., sanction, conduct measures) for any RCMP member, even the prior decisions of RCMP adjudication boards are not binding. While the principle of

parity of sanction is relevant, I understand this principle does not fetter the discretion bestowed on a conduct board to determine proportionate conduct measures. [See Elhatton v. Canada (A.G.), 2014 FC 67, at paragraph 70.] The MR's submission that she seeks a "legal decision with important legal binding effect" simply does not accord with the law.

12. ". . . [F]indings on the sanctions to be imposed are primarily fact-driven and discretionary determinations." [See Gill v. Canada (A.G.), 2007 FCA 305, at paragraph 14.]

13. In addition, there is a fundamental difference between a record of decision rendered by a conduct authority after a conduct meeting, and the final written decision issued by a conduct board. I am not satisfied that a mere assertion of relevance to the issue of "parity of sanction" justifies the order for production sought here, even if I accept (which I expressly do not) that the present Conduct Authority for the Subject Member's matter also created the purported "Record of Decision" being sought.

14. If another member receives a negative performance log (Form 1004) from their supervisor, instead of the imposition of conduct measures, the potential relevance of the Form 1004 document (also protected by the *Privacy Act*) would not justify an order for disclosure, so that the Form 1004 could be submitted as a precedent to be relied upon for conduct measures arguments. The implication in the MR's submissions, that all potentially relevant employment decisions (however lacking in adjudicative formality, or binding or determinative legal authority) must be ordered disclosed, in order for a conduct board to determine their "weight", is not reasonable.

15. The relatively small number of publicly available conduct board decisions rendered under the "new" conduct system does not justify the ordered disclosure of a purported decision rendered in a meeting that is private not public.

16. It is open to the MR to cite final written decisions of past RCMP adjudication boards, which are publicly available, and which begin in the 1980's, in support of any "parity of sanction" arguments, and therefore the necessity of the type of document sought is not established.

[*Sic throughout*]

Striking/exclusion of documents from the record

[13] An MR motion was brought on May 19, 2017, to exclude from the record 13 documents CAR had filed, which the CAR indicated would be relied upon at the allegation phase of the hearing, as the CAR would be asking that some form of "judicial notice" be taken of these materials in relation to the "realities of policing in the RCMP". The motion to exclude these materials outright was denied. In the interest of efficiency and expeditious adjudication, the Conduct Board did indicate that the CAR's submissions concerning the "realities of the RCMP" were not relevant at the allegation phase, and that the Conduct Board would not rely on these specific submissions and the 13 documents in making decisions on the establishment of the four allegations. The Conduct Board was not prepared to exclude the 13 documents entirely from the record, as they might be the subject of submissions made at the conduct measures phase, where the parties could both make submissions, including on any application of "judicial notice".

Recusal motion

[14] An MR motion for my recusal was brought later on May 19, 2017. The basis for the recusal request was my exposure to certain unvetted information in materials filed on December 23, 2016. My decision to deny the recusal motion, issued on June 15, 2017, clearly does not bind any other conduct board. Nevertheless, commentary on the role and authority of a conduct board may be of assistance in future conduct matters:

> RECUSAL
>
> […]
>
> 5. The unvetted materials that I have decided to exclude from my consideration were filed with this Conduct Board, and copied to the MR, on December 23, 2016.
>
> […]
>
> 8. […] [A] significant period of time elapsed from the CARs' filing of these unvetted materials and the filing of the motion for my recusal. As stated in the majority decision in R. v. Curragh Inc., [1997] 1 SCR 537, at para. 11, it is the general rule that, in order to maintain the integrity of the court's

authority (here applied to a conduct board's authority), allegations of bias must be "brought forward as soon as it is reasonably possible to do so".

9. It appears to me that the general requirement that recusal be requested "as soon as it is reasonably possible to do so" has not been met by the MR in this case. Therefore, on the sole basis of lack of timeliness, it is open to me to deny the recusal request.

10. However, I believe there is a further, independent, substantive basis on which I must deny the recusal motion that deserves to be articulated and forcefully explained. This recusal request reveals a fundamental misunderstanding of the legal basis for seeking recusal, and the role of a conduct board which is expressly authorized, in fact required under the *CSO (Conduct)*, to receive investigative materials and to make determinations on the basis of what it finds appropriate information.

11. The MR relies on the Commissioner's decision in [Cst. G] and "E" Division Appropriate Officer, (2013) 13 A.D. (4th) 366, at paras. 59 - 60, as follows:

> [59] The Respondent submits that the Board ruled properly on this issue. Referring to the Supreme Court of Canada's decision in Wewaykum Indian Board v. Canada, [2003] 2 S.C.R. 259 [Wewaykum], the Respondent argues that there is no evidence that a reasonable right-minded person would find that the Board did not meet the test for a reasonable apprehension of bias.
>
> [60] In addition to the Wewaykum case cited by the Respondent, another key decision of the Supreme Court of Canada on the issue of reasonable apprehension of bias is Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369 [Committee for Justice and Liberty]. In that case, the Court set out the test that has been consistently followed since to determine whether reasonable cause exists for an apprehension of bias (although the test was set out in dissenting reasons at 394-395 by de Grandpré J., it was adopted by the majority):
>
> > …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through— conclude. Would he think that it is more likely than not that [the Chairman of the National Energy Board], whether consciously or unconsciously, would not decide fairly."

12. In the initial hearing involving [Cst.] G, the adjudication board was tasked with adjudicating allegations of misconduct made against [Cst.] G

and another member, [Staff Sergeant (S/Sgt.)] P, involving (among other allegations) the two members engaging in intimate relations on duty.

13. At one point in the proceedings, the adjudication board accepted and relied upon an Agreed Statement of Facts filed by S/Sgt. P, to the effect that the intimate relations were consensual but nevertheless improper. The adjudication board then imposed non-dismissal sanctions for this member's admitted misconduct.

14. The same adjudication board then went on to continue adjudicating the outstanding allegations faced by [Cst.] G, allegations to which she raised abuse of authority by S/Sgt P, a superior non-commissioned member, and asserted non-consensual relations had taken place.

15. The Commissioner determined that a reasonable apprehension of bias arose, stating at paras. 68 - 70:

> [68] I find that the Board had a strong predisposition to conclude the Appellant's hearing a certain way, namely that she was in a consensual relationship, since the Board had already concluded this in the other hearing. As the Appellant points out, "a reasonable person would find it intellectually difficult, if not impossible, for anyone to disregard the incontrovertible evidence given in the two days prior to the Board considering the final submissions of the Appellant" (Appeal: para. 93).
>
> [69] I find that a person with knowledge of all the relevant circumstances and who is able to carry out a dispassionate investigation of this case, would reasonably apprehend that the Board was biased regarding the issue of "consent" in the Appellant's matter. Additionally, I am of the opinion that this same person would find that evidence and arguments which the Appellant presented in support of her defence were ignored, since the Board had already concluded to a consensual relationship in the other matter.
>
> [70] I find that a suitably informed and reasonable person would properly apprehend that the Board's ability to judge fairly and impartially, and make a finding as to the Appellant's credibility, had been rendered untenable in light of the evidence it accepted in the [P] hearing. When the parties made their submissions on the allegation in the Appellant's hearing, I do not believe that the Board was free to entertain and act upon different points of view (i.e. accepting the Appellant's defence) with an open mind.

16. There are fundamental differences between the situation encountered by the adjudication board in [Cst.] G's matter, and [the Subject Member]'s case. The [Subject Member] has made formal written admissions to all four of the allegations contained in his Notice, but I have yet to render my decisions concerning the establishment of the allegations. I have not made

any findings that the allegations are established that in any manner rely upon or adopt as established the unvetted materials in issue in the motions before me. I remain able to fairly and impartially adjudicate the allegations, and I necessarily remain free to exclude from consideration the unvetted materials.

17. Moreover, I remain able to exclude the unvetted materials from my consideration, as any judge or adjudicator does when they must decide on the admissibility or exclusion of contested evidence.

18. While neither party provided legal authorities on this point, it is very apparent that at law it is not a disqualifying event for a decision maker presiding over a litigated matter (whether adjudicator or judge) to simply consider contested, potentially prejudicial evidence, and then formally determine it should be excluded, in some manner, from admission or consideration.

19. There are numerous judicial decisions that support this legal principle. Given its brevity, I adopt the reasoning found in the decision ***R v Noah***, 2010 NUCJ 22, at paras. 19-21, where it is observed that in the course of conducting a *voir dire* the judge will "... routinely hear evidence that may be damaging from a Defence perspective. Similar fact evidence or evidence of propensity may paint the accused in a bad light. Evidence of a confession may appear damning"." Nevertheless, "[i]t is expected that a judge will objectively and dispassionately consider the evidence led on the voir dire", make an informed ruling that may well involve issues of credibility where the accused has testified, and then "go on to determine the greater issue of guilt or innocence." "This is so even in circumstances where the judge has disbelieved the evidence of the accused given in a voir dire. This is so even in circumstances where a judge in a voir dire has been exposed to highly prejudicial evidence implicating the Defendant. The gatekeeping function is fundamental to the judge's role in the adjudicative process."

20. The decision in *Noah*, at para. 22, goes on to state that a judge "... is expected to 'compartmentalize' the evidence heard in the course of performing his or her duties at trial. [...] An informed member of the public expects the judge to have the legal training, experience and intellectual discipline necessary to do so. Objectivity and impartiality must be maintained regardless of what evidence has been heard and what rulings have been made earlier in the proceeding. This is what being a judge is all about."

[…]

22. In order to serve as a member of a conduct board, the RCMP's Conduct Board Member's Code of Ethics has required me to execute a solemn affirmation that "I will faithfully, impartially, honestly, and to the best of my knowledge and abilities, fulfill all the duties and exercise all the powers

of a member of a board appointed under Part IV of the RCMP Act" in accordance with that ethical code. In applying the standard of an "informed person, viewing the matter realistically and practically—and having thought the matter through" it is reasonable to take into account the terms of this solemn affirmation, and the attributes of the person appointed as conduct board for [the Subject Member]'s matter.

23. The ability to segregate information is one that is developed very early in the practice of law, as explained in the decision In Re Nieman and the Queen (1981), 65 CCC (2d) 18 (Yukon Supreme Court), at paragraph 9:

> [9] Early in the practice of law the lawyer learns to segregate information. He is duty bound not to disclose his client's affairs without the client's prior authority. Over the years he is the repository of a multitude of secrets which he never discloses to anyone to whom he should not divulge them. It becomes second nature to the lawyer to mentally categorize knowledge into useable information and unusable information. When he goes to the bench it is an easy transition to segregate and put aside what he may have heard outside the trial or that which he has heard within the trial but which he has ruled inadmissible, from that which is evidence in the trial.

24. In the circumstances of this motion for recusal, no meaningful difference exists between the ability ascribed to a judge to disabuse their mind of inadmissible, prejudicial evidence and my ability to do so as a conduct board. I am guided by the reasons provided in 9801 v. Registrar, Real Estate and Business Brokers Act 2002, 2016 CanLii 102504 (Ontario Licence Appeal Tribunal), at pages 5-6:

> The Registrar's Counsel argues that in the criminal context, judges are frequently required to rule on the admissibility of documents, and despite being exposed to such material, judges are accustomed to ignoring inadmissible evidence when rendering a decision. Judges are routinely called upon to disabuse their minds of evidence which they have heard but which, as a matter of law, is not admissible in that trial before them. It is fundamental to their role to decide the case only on the evidence properly admissible in that case.
>
> Counsel for the Appellants sought to draw a difference between tribunals and courts, in terms of the ability to disregard inadmissible evidence even after having seen or heard it. There is no basis for this distinction, in law or in practice. Like judges, tribunal adjudicators are often faced with material or testimony that they are exposed to, but that may be ruled inadmissible or irrelevant. For example, although tribunals are permitted to accept hearsay evidence, there are occasions when a tribunal could rule that certain hearsay testimony is too remote or too prejudicial to be accepted, or that it will be accepted but perhaps given little weight. This

> does not lead to a reasonable apprehension of bias situation that requires the adjudicator to step aside.
>
> 25. I find that any apprehension of bias on my part is not a reasonable one, and that reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, would find no reasonable apprehension of bias to exist simply because of my "exposure" to the unvetted materials. An informed person, viewing this recusal matter realistically and practically—and having thought the matter through—would not conclude that an apprehension of bias exists. An informed person would not think that it is more likely than not that I, whether consciously or unconsciously, would not decide [the Subject Member]'s matter fairly.
>
> 26. It bears repeating: the motion for my recusal reflects a fundamental misunderstanding of the law, and the circumstances involving the unvetted materials. No reasonable apprehension of bias arises simply because potentially inadmissible, potentially prejudicial information or evidence has been filed with me as Conduct Board. No reasonable apprehension of bias arises that precludes me from considering the MR's objection to the appropriateness and consideration of this information, where I have been asked to determine if it should be excluded from consideration in the allegation phase of [the Subject Member's]'s conduct hearing.
>
> [*Sic throughout*]

Striking/exclusion of unvetted materials from the record

[15] The Conduct Board also denied on June 15, 2017, an alternative request by the MR to exclude the impugned unvetted information from the record entirely. The Conduct Board found that consideration of the information was not necessary or appropriate for the allegation phase of the hearing and that it would not be considered as part of the Conduct Board's decision-making on the establishment of the allegations.

ALLEGATIONS

[16] On the morning of July 12, 2017, the Subject Member faced four allegations:

> **Allegation 1**
>
> Between the 28th day of November, 2015 and the 29th day of November, 2015, inclusive, at or near Nanaimo, in the Province of British Columbia, [the Subject Member] engaged in 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 "E" Division, Nanaimo detachment in British Columbia.

2. Between the 28th day of November, 2015 and the 29th day of November, 2015, while off duty, you attended a Christmas social gathering organized for the "D" Watch members of the Nanaimo RCMP Detachment held at a private residence.

3. At one point during the evening, you went downstairs and stood beside Constable [A] who was observing other guests playing a game of billiards. You then put your arm around her shoulder and placed your hand outside her clothing on her left breast.

4. You then touched her left breast and played with her nipple for approximately five seconds .

5. At that time Constable [A]was intoxicated, did not consent and could not have consented to you touching her.

6. Your actions amounted to unwanted sexual touching and were performed in plain view and in close proximity to attending guests.

Allegation 2

Between the 28th day of November, 2015 and the 29th day of November, 2015, inclusive, at or near Nanaimo, in the Province of British Columbia, [the Subject Member] 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 "E" Division, Nanaimo detachment in British Columbia.

2. Between the 28th day of November, 2015 and the 29th day of November, 2015, while off duty, you attended a Christmas social gathering organized for "D" Watch members of the Nanaimo RCMP Detachment held at a private residence.

3. At one point during the evening, you approached Constable [A] while she was standing on the balcony, put your arms around the front of her torso and slowly dropped both your hands overtop her clothing in a sensual manner stopping at her groin.

4. At that time Constable [A] was intoxicated, did not consent and could not have consented to you touching her.

5. Constable [A] was startled when your hands reached her groin area.

6. Constable [B] intervened and had to instruct you to leave Constable [A] alone and go back inside the house.

7. Your actions amounted to unwanted sexual touching.

Allegation 3

Between the 28th day of November, 2015 and the 29th day of November, 2015, inclusive, at or near Nanaimo, in the Province of British Columbia, [the Subject Member] made offensive remarks and engaged in harassment contrary to Section 2.1 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 "E" Division, Nanaimo detachment in British Columbia.

2. Between the 28th day of November, 2015 and the 29th day of November, 2015, while off duty, you attended a Christmas social gathering organized for "D" Watch members of the Nanaimo RCMP Detachment held at a private residence.

3. You approached Constable [C] downstairs near the bar area and began putting your hands up towards her face, complimenting her cheekbones. You asked to touch her face and she allowed you to do so as she felt it was harmless.

4. You then removed your hands from her face, made a gesture with your hands by holding all your fingers together and told her that you wanted to "fist her" and "wanna put these right up your vagina right now" or words to that effect.

5. Constable [C] stated "no" and immediately walked away from you.

6. Your actions and offensive remarks upset Constable [C].

Allegation 4

Between the 28th day of November, 2015 and the 29th day of November, 2015, inclusive, at or near Nanaimo, in the Province of British Columbia, [the Subject Member] 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 "E" Division, Coquitlam detachment in British Columbia.

2. Between the 28th day of November, 2015 and the 29th day of November, 2015, while off duty, you attended a Christmas social gathering organized

> for "D" Watch members of the Nanaimo RCMP Detachment held at a private residence.
>
> 3. At one point in the evening, you followed Constable [C] who was downstairs and then placed your arm around her.
>
> 4. You placed your hand down the left side of her body, outside her clothing and rubbed your hand up and down her left breast approximately three times.
>
> 5. Your actions upset Constable [C] and she asked you to leave but you remained and continued to touch Constable [C]'s hair.
>
> 6. Constable [B] intervened, told you to leave and pushed you away from Constable [C].
>
> 7. Your actions amounted to unwanted sexual touching.
>
> [*Sic throughout*]

[17] For the allegation phase, the record was comprised of the initial investigative materials that accompanied the *Notice of Conduct Hearing* (received from the Registrar on October 26, 2016), the CAR's list of potential witnesses under section 18 of the *CSO (Conduct)* (filed October 27, 2016), materials filed by the CAR on December 23, 2016 (subject to the decision rendered on June 15, 2017), January 9, 2017, February 7, 2017 (initially via the access-restricted N Drive, and also by email), February 16, 2017, and the responses and materials filed by the Subject Member, including those filed under subsection 15(3) and section 18 of the *CSO (Conduct).*

[18] The parties worked on a *Summary of Facts*, with a small number of disputed facts remaining at the outset of the hearing on July 12, 2017. The parties agreed that I would render my decisions on the establishment of the four allegations on the basis of the allegation phase record, and the written submissions of the parties, including the latest version of their *Summary of Facts*. It was understood that the summary agreed upon by the parties did not restrict the findings the Conduct Board could make upon its review of the record.

[19] On July 12, 2017, I provided an oral decision on the four allegations, which included certain contextual findings drawn from the evidence. At that time, I indicated my abbreviated oral decision might be expanded upon and that I reserved the right to clarify and explain my findings in greater detail in my final written decision.

FINDINGS OF FACT

[20] At all material times, the Subject Member was posted to "E" Division, in "C" Watch, at the Nanaimo Detachment, in British Columbia. His regular schedule consisted of two 12-hour day shifts, followed by two 11-hour night shifts. The member worked day shifts on the 24th and 25th of November 2015, and night shifts on the 26th and 27th, arriving home on November 28, 2015, between 6:30 and 7:00 a.m. after his shift ending at 6:00 a.m.

[21] He slept from about 7 a.m. until about 10 a.m. the morning of the 28th. He ate a normal sized lunch, but he did not consume much, if anything, in the afternoon as the get-together was a "pot luck" and it was expected that there would be a lot of food there. He had no further naps or sleeping through the day. His wife, Cst. S.C., previously told him that they would be attending her Watch's ("D" Watch) Christmas get-together, which was taking place at a member's private residence the night of November 28, 2015.

[22] On November 28, 2015, while off-duty, the member and his wife attended a Christmas social gathering organized for "D" Watch members of the Nanaimo Detachment, held at a private residence.

[23] The Subject Member did not drink alcohol before going to the party. He brought four beers with him. The Subject Member and his wife live near the residence where the party was taking place and left their house at approximately 7:00 p.m. He knew a few members, but it was his wife's work Christmas party.

[24] Upon arrival at the party, the Subject Member began to drink one of his four beers. During the party, the Subject Member recalls drinking other alcohol, namely two Jell-O shots and two shooters he had not brought to the party. The Subject Member recalls another male member motioned him over to try a 'shooter' he mixed up, which the Subject Member recalls drinking. It is at this point in time that the Subject Member's memory becomes hazy at best with regard to the later events of the evening. The Subject Member recalls brief flashes of faces and snippets of conversation. He does recall having a second shooter (this recollection by way of a

"hazy flash") before his memory becomes blank. It is likely that he drank more beers and shooters, but he has no recollection in that regard.

[25] The next morning, the Subject Member awoke in the spare bedroom of his house. He was fully dressed and was wearing his shoes. He felt quite hung over, ill and rested most of the day at home on November 29, 2015. His wife and he had left the car near the party's residence and they got it back later.

[26] The Subject Member became very intoxicated by alcohol at the party and states that he does not recall any of the misconduct outlined in allegations 1, 2, 3 and 4. However, the Subject Member admits to all four allegations and to most of the particulars outlined in the *Notice of Conduct Hearing* dated September 30, 2016, except as identified in his response under subsection 15(3) of the *CSO (Conduct)* and written submission.

[27] At the time of the events, Cst. A and Cst. C were members of "D" Watch and were at the party with their spouses. The Subject Member had previously worked with Cst. A while posted at the Comox Valley Detachment, in "E" Division. The Subject Member and his wife, Cst. S.C., had been friends with Cst. A and her spouse at the time, Corporal C.L., for over 10 years.

[28] Cst. A had no intention of getting intoxicated the night of the party. She thinks that the shooters she drank at the party and that were not prepared by her were the cause of her intoxication. She believes that there must have been a lot of alcohol in the shooters and the intoxication came out quickly; one minute she was fine and the other minute she was intoxicated.

[29] As per Cst. B's recollection, Cst. A had a couple of drinks, some beers, while the Subject Member was intoxicated and was smelling of alcohol more than anybody else. Another attendee, J.G., described the Subject Member's level of intoxication as highly intoxicated.

[30] The Subject Member had limited knowledge of Cst. C and had only passing familiarity with her. He never associated with her at work or otherwise before the party. Cst. C noticed that the Subject Member was quite intoxicated and that he obviously had a lot to drink. She recalls

that he had left at some point and that they heard a crash down the stairs. Somebody looked over and stated that the Subject Member had spilled his drink while moving downstairs.

Allegation 1

[31] Cst. A recalls that the Subject Member appeared very intoxicated at the party. At one point during the evening, the Subject Member went downstairs and stood beside Cst. A, who was observing other guests playing a game of billiards. According to Cst. B, Cst. A and the Subject Member were talking about sex, but jokingly at first. The Subject Member then put his arm around her shoulders, she laughed, he placed his hand over her clothing on her left breast and played with her nipple for approximately five seconds. Cst. A was observed wearing a jacket over a t-shirt; the Subject Member's hand remained over the t-shirt. It is Cst. A's recollection that she and the Subject Member joked about it, laughed and she states that she never thought anything of it afterwards. According to Cst. A, if this would have bothered her, then she would have told him to stop or would have pushed him away. At that time, I am satisfied that Cst. A was intoxicated, that she did not consent and that, given her degree of intoxication, she may have lacked the capacity to consent to the Subject Member touching her breast in the manner he did.

[32] The Subject Member stopped touching Cst. A without being asked to.

[33] The Subject Member's actions were witnessed by Cst. B.

[34] The Subject Member's actions amounted to unwanted sexual touching and were performed in plain view and in close proximity to attending guests.

Allegation 2

[35] Later in the evening, the Subject Member approached Cst. A, while she was standing on the balcony (of the house hosting the party) and bent over the balcony's railing. The Subject Member put his arms around the front of Cst. A's waist and the interaction started like a hug from behind. Cst. A was laughing. While the Subject Member's hands were on Cst. A's waist, he slowly dropped both his hands overtop her clothing, in a sensual manner, and stopping at her groin. Cst. A was startled when the Subject Member's hands reached her groin area. She was

heard to utter, “What the fuck?” or similar words when the Subject Member’s hands reached her groin area. At this point, the Subject Member stopped what he was doing. The Subject Member’s hands remained outside Cst. A’s clothing throughout the event. There is insufficient evidence to conclude that he ever placed his hands in a manner that further intruded into Cst. A’s private area. At the time of this event, Cst. A was intoxicated, did not consent and, given her degree of intoxication, may have lacked the capacity to consent to the Subject Member touching her the way he did.

[36] Cst. B witnessed this incident and intervened to instruct the Subject Member to leave Cst. A alone and to go back inside the house from the balcony.

[37] The Subject Member’s actions amounted to unwanted sexual touching.

[38] When she was interviewed by the Code of Conduct investigator on December 1, 2015, Cst. A recalled being told that the Subject Member put his hands between her legs and grabbed her bum while she was out on the deck. She did not remember it, nor did she recall him grabbing anywhere around her groin area. Furthermore, in her letter dated December 5, 2016, Cst. A indicated that she remembers the Subject Member coming out onto the deck (balcony), that he put his arms around her and then that Cst. B told him to leave her alone as she was not feeling well. When Cst. B told Cst. A about what happened on the deck, she was not upset, nor did she feel like a victim of assault, but she felt that it was inappropriate behaviour.

Allegation 3

[39] Later on that same evening, the Subject Member approached Cst. C downstairs, near the bar area, and began putting his hands up towards her face, complimenting her cheekbones. The Subject Member asked to touch Cst. C’s cheekbones, she allowed the Subject Member to do so and she was laughing at him as he was so drunk. There is no suggestion that this aspect of the Subject Member’s initial interaction with Cst. C constituted discreditable conduct.

[40] The Subject Member then removed his hands from Cst. C’s face, made a gesture with his hands by holding all his fingers together, she laughed at him and asked something to the effect,

"what does this mean?", mimicking his gesture. The Subject Member then told her that he wanted to "fist her", "wanna put these right up your vagina right now" or words to that effect. Cst. C said "no" and immediately walked away from the Subject Member. I am not satisfied that the Subject Member remained and continued to touch Cst. C's hair, as stated in Particular 5, as observations of the Subject Member touching the hair of Cst. C are more likely to pertain to the slightly earlier, unobjectionable "cheekbones" interaction, before the Subject Member's objectionable gesture and utterances.

[41] The Subject Member's actions and offensive remarks upset Cst. C.

Allegation 4

[42] A short time later, the Subject Member followed Cst. C, who was downstairs, and then placed his arm around her. The Subject Member placed his hand down the left side of Cst. C's body, over her cotton dress, and rubbed his hand up and down her left breast very fast about three times. The Subject Member's actions upset Cst. C. Cst. C's recollection is that he rubbed her breast, not an actual grab.

[43] Cst. B observed the Subject Member's actions and intervened, telling the Subject Member to go upstairs, and pushed the Subject Member away from Cst. C. Cst. C did not have any further contact with the Subject Member. Cst. C stayed downstairs; the Subject Member went upstairs and left the party sometime later.

Findings on Allegations

[44] Based on my findings of fact, I am satisfied that sufficient particulars are proven on a balance of probabilities to establish each allegation. For Allegations 1, 2 and 4, I am guided by the interpretation given to section 7.1 of the Code of Conduct by the RCMP External Review Committee (ERC) contained in ERC recommendation C-2015-001 (C-008), dated February 22, 2016, at paragraphs 92-93:

> [92] Section 7 of the Code of Conduct requires that "[m]embers behave in a manner that is not likely to discredit the Force". Section 7 differs from its

> predecessor provision, found in subsection 39(1) of the prior Code of Conduct. Subsection 39(1) required that members not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force. The ERC and the Commissioner have stated that the test under subsection 39(1) asked whether a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would be of the opinion that the conduct was a) disgraceful, and b) sufficiently related to the employment situation so as to warrant discipline against the member (ERC 2900-08-006 (D-123), para. 125; ERC 2400-09-002 (D-121), Commissioner, para. 100).
>
> [93] Section 7 of the Code of Conduct does not import the requirement of disgraceful or disorderly conduct in order to discredit the Force. However, the Force's Code of Conduct Annotated Version (2014) largely adopts the test under the prior Code of Conduct for discreditable conduct under the new section 7, noting that "discreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour" (p. 21). The language used in the Code of Conduct Annotated Version (2014) is consistent with the tests established in other police jurisdictions to establish that misconduct is "likely" to discredit a police force. As pointed out in P. Ceyssens, Legal Aspects of Policing, Vol 2 (Toronto: Earlscourt, 2002, pp. 6-17, 6-18), where statutory language governing discreditable conduct addresses acting in a manner "likely" to discredit the reputation of a police force, actual discredit need not be established. Rather, the extent of the potential damage to the reputation and image of the service should the action become public knowledge is the measure used to assess the misconduct. In conducting this assessment, the conduct must be considered against the reasonable expectations of the community.

I find that the conduct described in the established particulars, when considered by a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general, and the RCMP in particular, discredits the RCMP. I find Allegations 1, 2 and 4, alleging contraventions of section 7.1 of the Code of Conduct, to be established.

[45] For Allegation 3, I am satisfied that sufficient particulars are proven on a balance of probabilities to establish a contravention of section 2.1 of the Code of Conduct, which states: "Members treat every person with respect and courtesy and do not engage in discrimination or harassment."

[46] I find that the Subject Member made the gestures and offensive remarks identified in Particular 3, and that Cst. C was upset by them. I find that the Subject Member clearly failed to treat Cst. C with respect and courtesy. However, as a matter of law, I do not find that the Subject Member's clearly offensive behaviour constitutes harassment or discrimination. I fully acknowledge that certain inappropriate conduct need not take place in the workplace, or during work hours, or as part of an employer-sponsored or -organized event, to constitute harassment. But here, there are a number of factors that, together, cause me to find the behaviour clearly discourteous and disrespectful, but not harassment. These factors include:

- the off-duty, private residential setting and unofficial nature of the social gathering;
- the fact that the Subject Member attended the party as the spouse of a Watch "D" member;
- the lack of any workplace connection between the Subject Member and Cst. C beyond common employment with the RCMP;
- the single disrespectful and discourteous interaction (not, at that time, a pattern of discourteous behaviour); and
- the degree to which this interaction upset Cst. C at the time it occurred.

[47] On this basis, I find that the Subject Member contravened section 2.1 of the Code of Conduct, and that Allegation 3 is established.

CONDUCT MEASURES

[48] Subsection 24(1) of the *CSO (Conduct*) states:

> In determining the appropriate conduct measures to impose, the Conduct Board may examine any materials submitted by the parties and hear their oral submissions and any witness, including those referred to in subsection 18(1).

[49] No witnesses testified in the allegation phase of this hearing, which is encompassed by subsection 18(1) of the *CSO (Conduct).* The Subject Member testified in the conduct measures phase. Dr. O was subject to teleconference cross-examination by the CAR on the written expert opinions filed by the MR.

CAR motion for judicial notice

[50] On May 11, 2017, the CAR's request that the Conduct Board take judicial notice of the "realities of policing in the RCMP" based on 13 filed documents was deemed inappropriate for the purpose of the allegation phase of the hearing. It was left open to the parties to make submissions at the conduct measures phase concerning the documents and the application of the principle of judicial notice. The CAR then filed written submissions and three further documents on July 10, 2017, identified as Exhibit CAR-1. At the outset of the conduct measures phase, the CAR renewed its motion concerning judicial notice. One document, an RCMP media release concerning the Subject Member's criminal charge, was clearly a relevant consideration when determining proportionate conduct measures. The CAR took the position that, based on the 16 documents, the Conduct Board should accept as proven "the issues the RCMP has with sexual misconduct and harassment" without the requirement of proof. The MR opposed the motion, but her submissions in opposition were curtailed by the Conduct Board.

[51] The Conduct Board denied the motion, finding the obligation to consider that the maintenance of public trust was implicit in the conduct management system, as captured in the stated purposes of Part IV of the *RCMP Act*, section 36.2. It remained open to the CAR to put the filed documents to the Subject Member in cross-examination during his testimony in the conduct measures phase. There was plainly an institutional understanding that the Force had been criticized about certain issues, which were referenced in the RCMP *Conduct Measures Guide* issued at the time that the new conduct system came into force on November 28, 2014.

Evidence submitted by the CAR

[52] The CAR identified the Cst. C's first victim impact statement, dated June 1, 2016, previously filed. The CAR then filed a second statement, dated May 10, 2017, which was marked as Exhibit CAR-2.

[53] While only provided to the MR on the morning of July 12, 2017, and subject to objection by the MR, the Conduct Board accepted an excerpt from a Crown counsel policy manual, which apparently set out criteria for the alternate measures program in British Columbia. This information had been copied by the CAR from the web and was marked as Exhibit CAR-3.

Evidence submitted by the MR

[54] For the conduct measures phase, reports dated January 10, 2017, and April 11, 2017, from the Subject Member's treating psychologist, Dr. W, were considered (Exhibits MR-7 and MR-9).

[55] Also, the report dated February 9, 2017, and the email dated May 2, 2017, from an independent psychiatrist retained for the purposes of this conduct process, Dr. O, were considered (Exhibits CAR-4 or MR-8, and MR-10).

[56] These expert opinion materials were deemed by the Conduct Board to take the place of testimony-in-chief by Dr. W and Dr. O, on behalf of the Subject Member. The CAR did not request cross-examination of Dr. W. By agreement of the parties, Dr. O was cross-examined by telephone in the conduct measures phase. The parties agreed with the Conduct Board's qualification of Dr. W as an expert in psychology, including assessment, diagnosis, treatment and prognosis, and of Dr. O as an expert in psychiatry, including assessment, diagnosis, treatment and prognosis.

[57] In addition, the MR filed a diagram created by the Subject Member during his direct examination concerning a traumatic accident experience (Exhibit MR-1), his letters of apology to Cst. A and Cst. C (Exhibits MR-2 and MR-3, the latter not yet delivered), a letter confirming the Subject Member's volunteer work at the Nanaimo Community Hospice (Exhibit MR-4),

performance evaluations and career-related documents (Exhibit MR-5) and performance logs, a letter and certificate (Exhibit MR-6).

[58] To formally confirm that the Crown had agreed that the Subject Member's criminal matter would be referred to an alternative measures program, the MR filed the confirmatory email received by the Subject Member's criminal defence counsel from the Crown, dated July 7, 2017 (Exhibit MR-12). The Conduct Board did not consider this communication to be protected by any form of privilege and found consideration of the email necessary for reasons of hearing fairness. The MR also filed the affidavit of criminal defence counsel, which established that the Subject Member was prepared to accept responsibility under an alternative measures program soon after he was charged, and that the adjournments and elapse of time before the Crown's decision on referral to alternative measures could not be attributed to the Subject Member (Exhibit MR-13).

Testimony of the Subject Member

[59] Consistent with the observations I expressed in my abbreviated oral decision, I find the Subject Member's testimony, scrutinized over an extended period, during both his direct and cross- examinations, to be extraordinary. The Subject Member exhibited unstinting frankness. He exhibited innate courtesy in not only his demeanour while testifying, but in his thoughtful, never self- aggrandizing choice of words. I consider the Subject Member's testimony to have been among the most impressive I have observed in over 15 years of work involving RCMP disciplinary matters. The Subject Member did not shade the truth. He did not seek to distort anything to benefit his case. He made admissions that were heartfelt and commendable. His testimony only enhanced his credibility as a dedicated member; it resonated with the observations of good character contained in the reference letters of supportive RCMP members.

[60] The MR took the Subject Member through a detailed review of aspects of his life before the misconduct perpetrated at the November 28, 2015, party, including:

- His family and upbringing;

- Childhood experiences with bullying;
- Feelings of low self-esteem, engagement in solitary sporting activities;
- Two-year honours diploma in Law and Security Administration, followed by temporary private security employment;
- Four-year B.A. degree in Psychology, followed by private loss prevention employment, and then brief rehabilitation specialist employment with brain injury clients;
- Graduation from the RCMP Training Academy at "Depot" Division, on January 25, 2005;
- Marriage to his spouse, a troop-mate, on September 9, 2006;
- Birth of daughters, now ages seven and five years old, with the elder daughter encountering initial sleep issues and development of an anxiety condition;
- Feelings of sleep deprivation and fatigue;
- Guilt whether their elder daughter's anxiety was inherited from him;
- Feeling never really at ease and at home in his own skin, viewing social gatherings as nightmares requiring rehearsal of conversations before group social events;
- Exhaustion after social events;
- Father and paternal grandfather suffering from alcoholism;
- Mother treated for ovarian cancer from 2006 until her death in 2012;
- Feelings of detachment experienced during personal life experiences.

[61] The Subject Member was first posted to Alexis Creek, British Columbia, located in excess of 700 km north of Vancouver. This was a limited duration posting that ran until the end

of 2006; it also involved policing on four First Nations territories. Very early in his service, the Subject Member was exposed to two fatal alcohol-overdose scenes and he often worked in a community atmosphere he perceived as adversarial toward the police. I am satisfied that the Subject Member was directly exposed to a victim of an axe attack, with an almost severed leg requiring transport in a police vehicle. He was directly involved in an overwhelming fatal motor-vehicle-related event in June 2006, involving multiple victims with grotesque injuries and screams for assistance, and which required his 10-hour attendance securing the scene. I find that subsequent calls respecting motor- vehicle accidents triggered flashbacks in the Subject Member, involving a grotesque victim image and screams. I accept that the Subject Member developed a sense of emotional detachment in order to get through subsequent work traumas and stressors.

[62] At the end of 2006, the Subject Member was transferred to Comox Valley, on Vancouver Island. He was required to control hysterical family members after the discovery of a 17-year-old victim of suicide by hanging. He was involved in an extreme physical struggle with a drug-intoxicated person seeking to access a knife to use on himself or the Subject Member. He was directly exposed to a suicide victim involving a gruesome skull gunshot. He attended a call involving a wrist-slashed suicide victim, creating an extensive blood trail and permeating post-mortem smells. He recalls a close-call involving wrestling over a loaded shotgun with a suspected suicidal person. He recalls a close-call where an impaired, suicidal person was swinging a length of lumber stating, “Kill me, kill me”.

[63] The Subject Member was then transferred to Nanaimo Detachment. It was at this posting that the Subject Member was involved in a violent struggle with an individual with self-inflicted wrist cuts on November 3, 2015. The Subject Member’s actions caused the individual’s arm to break at the location of an earlier healed break. This injury resulted in a stressful investigation by the Independent Investigation Office for British Columbia. The investigation made the Subject Member reluctant to apply the required level of force in two arrests later in November 2015. The Subject Member admitted to deliberate avoidance of suicide and fatal motor-vehicle accident scenes in Nanaimo, where he knew other members were responding.

[64] I accept the Subject Member's testimony concerning his mental state upon his arrival at the party on November 28, 2015. He felt "marked anxiety", began to sweat and sensed a rising heart rate. He wanted to leave right away. Given that other members were party guests, he felt that they were looking at him and judging him, causing nervousness about his appearance. He testified that he was feeling heightened anxiety, which is not a comfortable feeling. To deal with these feelings, he decided he would "have a beer, maybe two, and then those weird anxiety feelings would just start to dissipate".

[65] The party continued into the early hours of November 29, 2015, which was a scheduled day- off for both the Subject Member and his spouse. On November 30, 2017, the Subject Member was contacted by Superintendent M.F., who came over to the house and advised him that there had been complaints about the Subject Member's behaviour at the party. It had been decided that the Subject Member would be immediately transferred to X Detachment. After taking a pre-approved family vacation from December 2 until December 15, 2015, the Subject Member began work out of X Detachment on December 17, 2015. At that time, he was served with notices of temporary transfer and Code of Conduct investigation. Cst. C lived in X and complained after observing the Subject Member as he left a coffee shop one morning. Cst. C's place of residence had simply been overlooked administratively, and the Subject Member was therefore temporarily transferred to Oceanside Detachment, effective February 23, 2016. The Subject Member continued to perform front-line, uniformed general duties out of Oceanside Detachment until his suspension with pay on May 26, 2016. The suspension coincided with the filing of a criminal charge for sexual assault upon Cst. C.

[66] While on vacation in Ontario, the Subject Member used the Force's "1-800" self-referral service and, together with his spouse, he met with a counsellor, J.C., on January 16, 2016, in Nanaimo, "about the stress and what was going on". He met the counsellor again on February 24, 2016, and found talking with someone other than his spouse helpful. I accept that clinical documentation was sought from this counsellor concerning the two sessions, but apparently given the nature of the self-referral and counselling system, none was provided. This issue was never raised by the MR in any pre-hearing conference; therefore, it was never addressed by way of a production order from the Conduct Board.

Considerations when imposing conduct measures

[67] Subsection 24(2) of the *CSO (Conduct*) states: "A Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct." The RCMP *Administration Manual*, Chapter XII.I "Conduct", section 11.15 indicates:

> Aggravating and mitigating circumstances must be considered in determining the appropriate conduct measures in relation to the subject member's contravention of the Code of Conduct (See Appendix XII 1.20).

The appendix provides a fairly exhaustive list of potential aggravating and mitigating factors or circumstances.

Aggravating factors

[68] The CAR submitted a number of aggravating factors for consideration by the Conduct Board; the following are found to be applicable:

- The serious nature of the allegations, involving acts of uninvited sexual touching, and in the case of Cst. C, however transient, the Subject Member's admitted non-consensual touching of Cst. C's nipple over her clothing. While the Crown supports referral to an alternative measures process, the misconduct under Allegation 4 is particularly serious as it initially attracted a criminal charge. In addition, the vulgar gesture, which prompted the Subject Member's even more vulgar and upsetting utterances to Cst. C, both touched on the bodily integrity of Cst. C.

- With respect to Cst. C, the Subject Member's actions under Allegation 4 took place despite Cst. C clearly finding the Subject Member's earlier gesture and utterance under Allegation 3 objectionable and her indicating this to him by saying "no" and immediately curtailing her interaction with him. I accept that, in this specific sense, there was therefore an element of persistence.

- While not constituting formal workplace harassment, the Subject Member's gesture and utterances under Allegation 3, and misconduct under Allegation 4, were directed to a "co-worker", although the Subject Member and Cst. C had never worked together, or otherwise interacted in the workplace.

- Cst. C came to experience negative personal and professional impacts as a result of the Subject Member's misconduct, which impacts may have exacerbated existing challenges she was experiencing. It must be noted that, notwithstanding the content of the two impact statements received from Cst. C, she was noted, on January 11, 2016, as being satisfied with strictly internal processes being followed. It must also be noted that a significant portion of Cst. C's second document (dated May 10, 2017, Exh. CAR-2) does not concern the effect of the Subject Member's misconduct, but appears to relate to other unsatisfactory administrative circumstances she had encountered or continued to encounter.

- The Subject Member was an experienced member, who exhibited discreditable behaviour in a purely off-duty social setting, but nevertheless one involving other members. I expressly do not find that this constituted any sort of breach of trust.

- There was not a single or isolated act of misconduct, but four contraventions.

- With respect particularly to Allegation 2, the object of the Subject Member's uninvited touching was somewhat vulnerable, as Cst. A was feeling unwell when the Subject Member's hands were applied to her stomach, stopping at her groin area. I expressly do not find that the Subject Member sought out either Cst. A or Cst. C because either was vulnerable due to their alcohol intoxication, but their level of intoxication may have vitiated their consent, had consent been expressed.

- While the CAR admitted that the Subject Member's established contraventions would not affect his ability to testify as an investigator (otherwise a potential concern as a result of the *McNeil* decision), his disciplinary record might create some administrative burden on the Force. I do not accept that the established contraventions preclude the Subject

Member from performing the full-range of investigations expected of a general duty investigator.

- There was a negative effect on the Force's image resulting from the media coverage that followed the RCMP's own press release concerning the Subject Member's suspension and investigation.

Mitigating factors

[69] The CAR accepted as a mitigating factor the Subject Member's admission of responsibility, which could have been absolute had he provided an immediate statement to investigators, and had his MR not disputed discrete aspects of the particulars in written submissions, etc. I note that the Subject Member's limited recall of his discreditable actions and utterances at the party, which I accept as genuine, would have reduced the value of any statement he provided to investigators

[70] The MR submitted a number of mitigating factors for consideration by the Conduct Board; the following are found to be applicable.

[71] The Subject Member took full responsibility and recognized his actions were not appropriate, as demonstrated by:

- his formal admission of all allegations in his initial *CSO (Conduct)* response;

- his support of publication bans protecting the identity of not only Cst. C, but also Cst. A;

- his criminal defence counsel consistently expressing the Subject Member's willingness to take responsibility by participating in an alternative measures program concerning the criminal charge respecting Cst. C filed on May 26, 2016; and

- his admissions in the conduct process and agreeing to adjudication based on the evidentiary record alone, saving expenditure of resources and avoiding potential testimony.

[72] The Subject Member's genuine apology and remorsefulness, as demonstrated by:

- the specific apologies made during his testimony;
- his apology to Cst. A through his wife on the day after the party, when he had yet to understand that his behaviour was more than that of being a "sloppy drunk";
- his written apology to Cst. A in January, 2016;
- his preparation of a written apology to Cst. C that, for sound reasons, was never delivered to Cst. C after discussions with senior officers on February 23, 2016, nor after a prohibition of contact was issued on May 26, 2016;
- his willingness to participate in the victim-offender reconciliation component of the alternative measures program;
- the deep remorse and shame exhibited by the Subject Member, confirmed in the letter submitted by the MR from his wife, and in the clinical observations of the expert witnesses.

[73] The Subject Member's medical status, including:

- his untreated social anxiety disorder since childhood;
- the alcoholism the Subject Member believes exists for his father and paternal grandfather;
- that he was, according to the email re-statement of independent psychiatric expert Dr. O, undiminished by cross-examination, to be suffering from recognized mental disorders at the party—social anxiety, adjustment disorder and extreme alcohol intoxication—and symptoms consistent with post-traumatic stress disorder (PTSD) from occupational exposure to stressful events;

- that while he had the ability not to drink alcohol at the party, he started to drink in order to control or suppress his social anxiety, to "self-medicate", and simply "lost control and got drunk";

- while not diagnosed with alcoholism, the Subject Member has nevertheless been abstinent since January 2017; and since February 2017, he attends regular Alcoholics Anonymous meetings;

- according to the Subject Member's treating psychologist, Dr. W, the Subject Member's consumption of alcohol at the party served to decrease his symptoms of PTSD, which Dr. W diagnosed and treated instead of an adjustment disorder;

- the Subject Member has been recognized as suffering from PTSD by the federal disability claims system administered by Veterans Affairs Canada.

[74] The Subject Member's willingness to participate in mental health treatment, as demonstrated by:

- his past outreach to a counsellor found through the Force's self-referral process in December 2015, and his regular voluntary psychotherapy with Dr. W since June 2016 (and, upon Dr. W's retirement, voluntary Cognitive-Behavioural Therapy with his identified successor); and, of his own initiative, weekly attendance at Alcoholics Anonymous meetings since February 2017. The Subject Member admitted to what he described as "excessive drinking" on average once or twice per year over his service in the RCMP, with one recent event involving his loss of memory after drinking heavily while out one night with his visiting brother. Before November 28, 2015, there was no episode where the Subject Member's consumption of alcohol resulted in any behaviour that might be considered misconduct. While neither party addressed it in the conduct measures phase of the hearing, I do not view the information captured in the "unvetted" statement of Cst. B concerning text communications she received from Cst. A as establishing any prior similar sexual misconduct by the Subject Member when intoxicated. I do find that, when intoxicated by alcohol, the Subject Member grew more

> extroverted and flirtatious. After all, Cst. B heard the Subject Member and Cst. A discussing something sex-related before he touched Cst. A's breast. But there is no evidence to establish the Subject Member should have known that his excessive consumption of alcohol would result in such a level of disinhibition that he would commit unwanted sexual touching or make clearly discourteous gestures and utterances. He had no history of misconduct while grossly intoxicated. I accept that it took the Subject Member approximately six months from the party to begin seeing Dr. W for formal psychotherapy; but, from the Subject Member's testimony, it was clear that the extent of his misconduct was only made plain upon his receipt of the investigative materials. His earlier efforts to obtain assistance and his initial characterization of his behaviour necessarily reflected his lack of knowledge. On November 28, 2015, he was aware that, when he previously was intoxicated with his brother, he suffered a partial loss of memory concerning his actions the night before. But his actions with his visiting brother involved successfully arm wrestling a number of opponents, and not the one opponent that the Subject Member recalled the next morning. This experience of memory loss would not suggest to the Subject Member that his excessive consumption of alcohol risked inappropriate behaviour, only memory loss.

[75] The Subject Member's formal clinical assessment by Dr. O indicates an extremely low or very unlikely risk of repetitive behaviour, and the absence of any underlying personality disorder or dysfunction. The assessment by Dr. W indicates that he is presenting an extremely low, if not non- existent, chance of drinking to excess or engaging in similar inappropriate behaviour.

[76] While the established misconduct included four separate occurrences, all misconduct occurred at a single social event while the Subject Member was extremely intoxicated.

[77] The support for the Subject Member expressed in letters prepared by other members, including immediate supervisors, familiar senior non-commissioned officers, female members with whom the Subject Member has worked, and Cst. A herself, who felt obliged as a member to confirm the Subject Member's actions but never sought any internal or criminal allegations against him as she viewed his level of intoxication as such a central factor.

[78] While limited to Allegation 1, Cst. A did not find the misconduct serious at the time; in fact, she immediately "laughed it off" with the Subject Member.

[79] The Subject Member's track record shows his exemplary performance of his duties as a police officer, and his status as a "quiet leader", as confirmed in his RCMP performance assessments, relevant letters of support, and Performance Logs (Form 1004). In addition, he received recognition by the provincial Minister of Justice for the courageous rescue of a drowning boater.

[80] All this points to the behaviour of the Subject Member in these allegations as being completely out of character.

[81] The Subject Member maintained a strong commitment to the performance of his duties, demonstrated by his continued exemplary work, notwithstanding his status as a member under investigation, administratively relocated to a different Watch at a different Detachment.

Submissions by the CAR

[82] The CAR submitted the following cases in support of an order for the Subject Member's loss of employment:

- *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252
- *Appropriate Officer for "F" Division and Cst. [GBC]* (1997), 28 A.D. (2d) 213 (E.R.C.)
- *Rendell v Canada (Attorney General),* 2011 FCT 710 (FCC)
- *Cadbury Adams Canada Inc. v UFCW, Local 175* (Arbitrator Kennedy, July 16, 2007)
- *BC (Public Service Agency) v BCGSE,* 2008 BCCA 357
- *R. v McNeil,* [2009] 1 SCR 66
- *Pizarro v A.G. (Canada*), 2010 FC 20 (FCC)

- *Appropriate Officer for "K" Division and Cst. [MAJ]* (2010), 6 A.D. (4th) 173 (Adj. Bd.)
- *Cambridge Memorial Hospital and Ontario Nurses Association*, 2017 CanLII 2305 (Arbitrator Randall, January 19, 2017)
- *Commanding Officer, "E" Division and Cst. [F.V.]*, 2017 RCAD 3 (Conduct Bd.)
- *Stewart v Elk Valley Coal Corp*., 2017 SCC 30

[83] Some cases filed by the CAR were not directly relevant to a determination of proportionate conduct measures, but concerned issues arising in human rights discrimination analysis (*Janzen*), or the retention of an employee who steals while alcohol dependent (*Stewart*). Workplace sexual harassment may constitute prohibited sex discrimination, and termination is defensible, not for an employee's addiction, but for their breach of policy. In another case, one arbitrator determined that where the employee's workplace theft was not compulsive and she did not own up to the full extent of her misconduct, her never-before-raised addiction was disqualified as a mitigating factor (*Cambridge Memorial Hospital*). The CAR submitted that, as the Subject Member initially had the ability to control his consumption of alcohol at the party, consideration of his "disability" was not available as a mitigating factor. The CAR argued that, whatever the Subject Member's health issues at the outset of the party, he had an obligation to seek treatment and that the Force provided opportunities to seek that treatment.

[84] The CAR argued that the Subject Member had failed to establish that, "but for" a psychological condition present at the party, he would not have misconducted himself (*Pizarro, Cst. [F.V.]*); therefore, a strong mitigating factor was absent. In addition, the CAR argued that consideration should be given to a case where the arbitrator denied reinstatement, as he was not convinced that the grievor's further theft was compulsive and the clinical cause of the theft was an episode of anxiety and major depressive disorder (*Cadbury Adams*). The CAR argued that this Conduct Board should make the same determination described in the *Cst. [F.V.]* case, where it was decided that the member's psychological state, on two distinct occasions, did not cause his lapses of judgment when he made a false statement to another member and submitted a false sworn report.

[85] The CAR argued that, despite the existence of a number of mitigating factors, an RCMP adjudication board had imposed loss of employment in an "extreme case" despite strong past performance, the support of fellow members, and the member's self-reporting of his misconduct. However, it must be noted that the circumstances there involved a clear breach of trust that included on-duty sexual misconduct with an intoxicated person in an isolated area, use of a police car, threats to the intoxicated person if the misconduct were reported, and use of a false name (*Cst. [GBC]*). Moreover, the case of *Cst. [GBC]* appears not to involve a recognized intervening psychological disorder, but cumulative stress.

[86] In essence, the CAR submitted that the principle of parity of sanction should only be applied in keeping with the Federal Court's decision in *Rendell*, where it was confirmed that, while relevant, parity should not be applied in a manner that fetters discretion. The CAR argued that many of the cases submitted by the MR failed to adequately reference the victim of misconduct, were the result of non-dismissal joint submissions that required deference and, therefore, adjudication board acceptance, and that they did not reflect sufficient deterrence of workplace harassment. In addition, the CAR relied on *Rendell* for the proposition that, as the Subject Member's misconduct was related to sexual misconduct, this type of misconduct in particular required "a message to be sent" to further general deterrence, and an order for the Subject Member's loss of employment was required.

[87] The CAR referenced the RCMP *Conduct Measures Guide* (November 2014), indicating that while the Guide indicates a range from 2 to 10 days' forfeiture of pay for discourteous behaviour under section 2.1 of the Code of Conduct, the sexual nature and "level of violence" of the Subject Member's gesture and utterances warranted a conduct measure range from 20 days' forfeiture up to dismissal.

[88] With respect to the contraventions under section 7.1 of the Code of Conduct, the CAR relied on the Guide, to the effect that the misconduct, involving sexual assault, called for dismissal. To adequately maintain public confidence and reinforce the Force's high standards, no measures short of dismissal could be justified.

Submissions by the MR

[89] The MR filed the following cases, in support of her submissions, identifying a number of non-dismissal conduct measures, including forfeiture of pay, to address the contraventions individually and collectively:

- *Appropriate Officer for "K" Division and Cst. [JAH]* (1998), 3 A.D. (3d) 60 (Adj. Bd.)
- *Appropriate Officer for "K" Division and Cst. [RHC]* (2000), 7 A.D. (3d) 63 (Adj. Bd.)
- *Appropriate Officer for "E" Division and Cst. [JLJDF]* (1999), 6 A.D. (3d) 90 (Adj. Bd.); (2001), 10 A.D. (3d) 1 (E.R.C.); (2001), 10 A.D. (3d) 159 (Commr.)
- *Appropriate Officer for "E" Division and Sgt. [RFB]* (1999), 6 A.D. (3d) 90 (Adj. Bd.); (2000), 12 A.D. (3d) 43 (E.R.C.); (2001), ERAS-01-4638 (Commr.)
- *Appropriate Officer for "F" Division and Cst. [TJG]* (2003), 18 A.D. (3d) 64 (Adj. Bd.)
- *Appropriate Officer for "J" Division and Insp. [AH]* (2006), 29 A.D. (3d) 165 (Adj. Bd.)
- *Appropriate Officer for "C" Division and Cst. [MNPG]* (2007), 1 A.D. (4th) 30 (Adj. Bd.)
- *Appropriate Officer for "O" Division and Cst. [JM]* (2011), 6 A.D. (4th) 340 (Adj. Bd.)
- *Appropriate Officer for "F" Division and Cst. [JTM]* (2012), 11 A.D. (4th) 427 (Adj. Bd.)
- *Appropriate Officer for "C" Division and Cst. [TL]* (2014), 14 A.D. (4th) 520 (Adj. Bd.)
- *Appropriate Officer for "E" Division and Cst. [RT]* (2015), 15 A.D. (4th) 289 (Adj. Bd.)
- *Appropriate Officer for "K" Division and Cst. [GG]* (2016), 16 A.D. (4th) 178 (Adj. Bd.)

- *Appropriate Officer for "O" Division and Sgt. [MG]* (2016), 16 A.D. (4th) 487 (Adj. Bd.)

[90] Relying primarily on the MR's authorities, the MR submitted that the following forfeitures of pay should be applied as part of the conduct measures imposed:

- Allegation 1: 10 days
- Allegation 2: 4 to 7 days
- Allegation 3: 1 to 3 days
- Allegation 4: 10 days

[91] In answer to questions by the Conduct Board, the MR confirmed that the Subject Member was agreeable to a transfer and that a direction for continued counselling by a health professional or completion of a rehabilitative program was reasonable.

[92] The MR objected to the CAR's use of the RCMP *Conduct Measures Guide* (November 2014), arguing as follows: it had not been filed; there is no indication of who wrote it; there was no evidence concerning any amendments to it since it came into force; and it was an informational guide that did not legally bind the Conduct Board. Moreover, if anything in the Guide suggests that certain types of misconduct result in automatic dismissal, this principle is contrary to past RCMP case law.

[93] Citing the commentary contained in the *Cst. [F.V.]* decision, the MR argued that, while a conduct board is not bound by the decisions of other boards, previously decided cases help to identify the range of applicable sanctions. The principle of parity seeks to achieve fairness by having similar forms of misconduct treated in a similar fashion. Furthermore, the MR argued that a case that would have attracted a non-dismissal outcome under the old system does not become a dismissal case simply because greater higher financial penalties exist under the new system. To conclude her arguments on parity of sanction, the MR pointed out that her submitted cases

include adjudication board decisions rendered under the old system after the new system took effect on November 28, 2014.

Analysis

[94] The range of sanction for matters involving off-duty, inappropriate and sexual touching, based on decisions rendered by past RCMP adjudication boards (constrained by a legal maximum of 10 days' forfeiture of pay), spans from moderate to maximum forfeitures of pay. The range of sanctions for inappropriate, vulgar off-duty utterances ranges from ordinarily low to moderate forfeitures of pay (with guidance available in the RCMP *Conduct Measures Guide* (November 2014) concerning features warranting more severe measures short of loss of employment).

[95] It is apparent from the RCMP case law submitted by the parties that the kind of sexual misconduct established against the Subject Member under section 7.1 of the Code of Conduct has often attracted sanctions from RCMP adjudication boards short of ordered resignation or dismissal, but the range of sanctions has included loss of employment where, for example, violence, a criminal conviction or a record of prior discipline exists. The *Conduct Measures Guide* certainly supports a range which includes loss of employment.

[96] As mentioned when I denied the MR's request for the ordered production related to a "Record of Decision", in *Gill v Canada (A.G.)*, 2007 FCA 305, at paragraph 14, the Federal Court of Appeal has confirmed: "[F]indings on the sanctions to be imposed are primarily fact-driven and discretionary determinations." Accordingly, my determination of proportionate conduct measures has necessarily involved an assessment of the record, including established aggravating and mitigating factors, the disciplinary jurisprudence to be drawn from the RCMP adjudication board decisions and other cases, the relevant commentaries in the *Conduct Measures Guide*, and the nature and circumstances of the contraventions, including relevant aspects of the Subject Member's psychological condition.

[97] One of the CAR's overarching submissions is that the Subject Member had no compulsion or physical addiction that caused him to drink alcohol, and that there was no causal

connection established between his social anxiety disorder and his excess consumption of alcohol, nor between his disorder and the misconduct committed when he was heavily intoxicated. I disagree that this is a situation where a member seeks to avoid severe employment consequences by relying on nothing more than carelessness and imprudence as an excuse for his misconduct.

[98] The Subject Member's testimony, and the expert opinion evidence of Dr. W and Dr. O, establish on a balance of probabilities that the Subject Member's untreated social anxiety disorder (together with either PTSD or the ongoing effects of an adjustment disorder) directly and meaningfully contributed to his eventual over-consumption of alcohol at the party. Having reviewed the observations made of the Subject Member's degree of intoxication within the investigation materials, it is my finding that an extreme level of intoxication existed. The existence of such an extreme level was clearly required for a normally measured and courteous man to not only drop his beer while negotiating the basement stairs, but to be indifferent to the need to clean up his spilled drink.

[99] It is my further finding that, while the Force has a legitimate interest in disciplining the Subject Member for his utterly inappropriate conduct, the Subject Member's extreme degree of intoxication caused his ugly, offensive and assaultive actions because of the level of disinhibition that resulted. These acts of misconduct were completely contrary to his established good character on- and off-duty. The letters of reference filed by the MR, including a number by female RCMP members including Cst. A, place the Subject Member's out of character misconduct in an important context. I am satisfied that the members who expressed unqualified support for the Subject Member's retention, and held no reservations about working with the Subject Member again, did so with a working knowledge of the Subject Member's acts of misconduct. As a result, this support, by members themselves dependent on strong public support for the Force, is viewed as a not insignificant mitigating factor.

[100] There is some disagreement between the two experts relied upon by the MR concerning a diagnosis of PTSD or adjustment disorder for the Subject Member at the time of his misconduct. Having heard the Subject Member's testimony, which included the stress he was experiencing as

a result of the ultimately unfounded use of excessive force investigation that arose earlier in November 2015, I believe the Subject Member's over-consumption of alcohol was not only rooted in his social anxiety disorder, but was directly influenced by the level of stress he was then experiencing, stress in part resulting from recurrent crime scene images. I am satisfied that this level of stress, whether or not it was a symptom of a disorder that can be formally diagnosed as PTSD or adjustment disorder, also played a significant role in the Subject Member's over-consumption of alcohol. While the Subject Member, to a point, retained the ability to stop drinking alcoholic drinks, I find his descent into extreme intoxication was clearly related to his psychological condition at the time.

[101] I am not persuaded that, in order for the Subject Member's psychological condition at the outset of the party to constitute a legitimate mitigating factor, he was required to have sought prior psychological treatment, nor do I find that the Subject Member's admitted instances of prior significant drinking episodes over his lifetime, and very infrequent loss of memory after over- consumption of alcohol, denies consideration of this mitigating factor. The Subject Member's prior experiences with significant drinking episodes did not suggest that he would act inappropriately when intoxicated. His experience dealing with intoxicated clients, his undergraduate study of psychology, and his training as a Datamaster operator conducting impaired driving investigations do not serve to deny him this mitigating factor.

CONCLUSION

[102] I understand that, on the night in question, the person who was perpetrating these acts of serious misconduct was not the person whom the Subject Member ordinarily is. However, unless entirely lacking an appreciation of their actions, members must be accountable for their actions. And while I have identified and given significant weight to a number of mitigating factors, I must emphasize to the Subject Member just how unacceptable his behaviour was on that night.

[103] The RCMP conduct management system, in which this Conduct Board operates, permits greater flexibility in conduct measures than existed for the sanctions available under the old disciplinary system. It is understood that to protect the public interest and maintain public

confidence in the RCMP, and to promote high standards of on- and off-duty behaviour, significantly greater financial penalties can be imposed for serious contraventions.

[104] The RCMP is a law enforcement institution that must never fail to formally address this type of misconduct with the utmost vigilance and sensitivity. The manner in which the Subject Member's superiors immediately responded when seized with preliminary information about his behaviour at the party not only followed the appropriate investigative protocol, but reflected a consistent managerial response that fully supported transparency and accountability.

[105] In this case, notwithstanding the severity of the misconduct, I do not believe that it is proportionate to impose a conduct measure which would result in the Subject Member's loss of employment. However, I do not want to leave the Subject Member, and members of the Force in general, with the slightest impression that this type of behaviour will ordinarily escape the most severe conduct measures available. This is particularly true if, *for any reason*, this type of misconduct is repeated. While there are earlier disciplinary cases where members were fortunate to receive a second or even a third chance, that is simply not the RCMP of 2017.

[106] Based on the foregoing, I hereby impose the following conduct measures:

- Globally, I impose a formal reprimand for all contraventions, which is expressed by this final written decision;

- Globally, I impose an order for transfer, or simply reassignment, in the Conduct Authority's discretion;

- Globally, I direct the Subject Member to undergo any treatment specified by the Health Services Officer for "E" Division; in the interim, I direct that the Subject Member continue the psychotherapy he shall receive from the clinical successor to Dr. W, who is now retired;

- For Allegation 1, I impose a forfeiture of 10 days' pay (80 hours);

- For Allegation 2, I impose a forfeiture of 10 days' pay (80 hours);

- For Allegation 3, I impose a forfeiture of 5 days' pay (40 hours); and
- For Allegation 4, I impose a forfeiture of 20 days' pay (160 hours).

[107] I considered directing the Subject Member to undergo RCMP harassment training, but given the length of his paid suspension, up-to-date training of this kind should be part of any training he receives before he is deployed to even administrative duties. Moreover, the Subject Member clearly understood before his misconduct on November 28, 2015, and clearly understands now, the unacceptable nature of his behaviour, and no online or other training is necessary for educational purposes intended to avoid repeated misconduct.

[108] Furthermore, I considered a time-limited prohibition on promotion, but given my order for transfer, there is little prospect that the Subject Member will be promotable in the next three years, in particular given the break in his operational duties while suspended.

[109] Finally, I considered directing the Subject Member to deliver, as permitted by law, the letter of apology he prepared for Cst. C, but as the Subject Member and Cst. C are willing to participate in relevant components of an alternative measures program, I fully expect that the Subject Member will convey a full apology, as he contemplated in his testimony before this Conduct Board.

[110] In deciding to impose these conduct measures, I have reviewed some of the same considerations that I identified in my decision in *Commanding Officer, "J" Division and Cst. [J.C.], (2016) RCAD 2* (subsequently reviewed by the RCMP External Review Committee, ERC C-2016- 005, C-017), Under the previous disciplinary system, where all formal allegations were adjudicated by an RCMP adjudication board, the maximum forfeiture possible under a single notice of hearing was 10 days' pay, even with multiple allegations established. There is no such restriction on the total amount of forfeiture that may be imposed under a notice of conduct hearing considered by a conduct board.

[111] Therefore, as detailed above, I have imposed a total pay forfeiture of 45 days, or 360 hours. When compared with the sanctions imposed by RCMP adjudication boards in many of the

cases submitted, this represents a significant increase in loss of pay. However, it is apparent that the new conduct regime grants conduct boards the authority and flexibility to impose much greater financial consequences for misconduct in order to impose proportionate measures short of ordering resignation or dismissal. This broader authority is reflected in the pay forfeiture considerations outlined in the *Conduct Measures Guide*.

[112] As articulated above, I find that it is not proportionate to the nature and circumstances of the contraventions to order the Subject Member's loss of employment. I have carefully considered the Guide's suggestion, at page 7, that where a 45-day forfeiture of pay is insufficient, dismissal cannot be too harsh. In this instance, loss of employment is too harsh, but given the clear need for greater general deterrence and protection of the public trust placed in the Force, it is not unreasonable that the Subject Member's total loss of pay reaches 45 days.

[113] The parties may each file an appeal of this decision to the Commissioner, as provided for under the *RCMP Act*.

On November 9, 2017, a written decision in this matter was issued with a number of clerical errors and omissions. The document issued November 9, 2017, is hereby rescinded and replaced by the present written decision, issued November 10, 2017, and further identified as "(CORRECTED)".

November 10, 2017

John A. McKinlay

Conduct Board