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2018 RCAD 10

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

a conduct hearing pursuant to the

Royal Canadian Mounted Police Act

Between:

Commanding Officer, "National Headquarters" Division

Conduct Authority

and

Civilian Member Marco Calandrini, Regimental Number C7996

Subject Member

Conduct Board Decision

Inspector James Robert Knopp, Conduct Board

July 12, 2018

Staff Sergeant Jon Hart, Conduct Authority Representative

Ms. Louise Morel, Subject Member Representative

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Summary of findings

Three contraventions of the Code of Conduct were established against the Subject Member for the sexual harassment of a public service employee (PSE) in the workplace. On one occasion, the PSE was at work at a photocopier when the Subject Member approached him from behind, grabbed his buttock and said words to the effect of "you've got a great ass". On another occasion, the PSE was seated at a lunch room table along with others when the Subject Member sat down beside him and grabbed his inner thigh, saying words to the effect of "you've got such

beautiful legs, right guys?". On the third occasion, the PSE was at his work station when the Subject Member approached him from behind and placed his hand inside the PSE's shirt, saying words to the effect of "Oh, nice pecs you got going, it doesn't show!". The Subject Member was joking, engaging in horseplay, but the PSE's aversion to being touched was a matter of general knowledge in the workplace. Despite strong mitigating factors, the gravity of the misconduct was such that dismissal resulted.

BACKGROUND and PRELIMINARY MOTION

[1] Throughout the relevant time period, the Subject Member and the Complainant were both employed by the RCMP in the Explosives Training Unit (ETU) at the Canadian Police College (CPC). The Subject Member is a civilian member of the Force and the Complainant is a public service employee.

[2] Allegations of misconduct arose. On November 26, 2014, the acting Officer in Charge of both the Subject Member and the Complainant became aware of the identity of the Subject Member and the nature of the allegations of misconduct against him. The RCMP was thereby seized with the statutory obligation to commence conduct proceedings within one year of this date.

[3] On September 10, 2015, the Conduct Authority, Chief Superintendent Marty Chesser, held a conduct meeting with the Subject Member and established three Code of Conduct allegations. On October 5, 2015, conduct measures consisting of forfeitures of pay were imposed on the Subject Member for each of the three contraventions of the Code of Conduct.

[4] On March 1, 2016, Assistant Commissioner Craig MacMillan, the Review Authority, served the Subject Member with a Notice of Application, pursuant to subsection 47.4(1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*], seeking a retroactive extension of time to initiate a conduct hearing against him. As the duly appointed Review Authority, Assistant Commissioner MacMillan advised the Subject Member of his discretion "to determine if a decision of a conduct authority is clearly unreasonable or the measures imposed are clearly disproportionate to the nature and circumstances of the contravention", as per subsection 9(2) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291.

[5] In his Notice of Application, Assistant Commissioner MacMillan made reference to subsection 41(2) of the *RCMP Act*, which provides:

> A hearing shall not be initiated by a conduct authority in respect of an alleged contravention of a provision of the Code of Conduct by a member after the expiry of one year from the time the contravention and the identity

> of that member as the one who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated.

[6] Assistant Commissioner MacMillan made reference to subsection 47.4(1) of the *RCMP Act*, the relevant portions of which read as follows:

> If the Commissioner is satisfied that the circumstances justify an extension, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limit limited by any of subsections [...] 41(2) [...] for the doing of any act described in that subsection and specify terms and conditions in connection with the extension.

[7] Chief Superintendent Raj Gill was the designated Decision Maker with respect to the application to seek a retroactive extension of time to initiate a conduct hearing. The Subject Member challenged Assistant Commissioner MacMillan's application on the basis that he was statute-barred from doing so by virtue of the requirement to initiate a hearing within one year. The Subject Member also submitted he would be prejudiced by such an extension by virtue of the failing memory of witnesses given the passage of time. In challenging Assistant Commissioner MacMillan's application, the Subject Member also suggested that adverse media and political pressures had factored into the decision of the RCMP to seek a retroactive extension. The Subject Member further maintained to the Decision Maker, Chief Superintendent Gill, that an extension of time was not warranted according to the criteria set forth by the Federal Court in the case of *Canada (Attorney General) v Pentney*, 2008 FC 96 [*Pentney*], at paragraph 31:

a. there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;

b. the subject matter of the appeal discloses an arguable case;

c. there is a reasonable explanation for the defaulting party's delay; and

d. there is no prejudice to the other party in allowing the extension.

[8] On March 30, 2016, Chief Superintendent Gill acknowledged the new issues raised and offered Assistant Commissioner MacMillan the opportunity to make additional submissions, which he did on April 6, 2016, primarily addressing the *Pentney* criteria. In turn, the Subject Member provided a rebuttal on April 7, 2016. Assistant Commissioner MacMillan replied to the Subject Member's rebuttal in an email message directed to Chief Superintendent Gill on April 8, 2016.

[9] In his decision dated May 12, 2016, Chief Superintendent Gill outlined his mandate as per the Commissioner's delegation of authority in the context of the Federal Court of Appeal case *Grewal v Canada (Minister of Employment and Immigration)*, (1985) FCJ No 144 (FCA). To be specific, Chief Superintendent Gill cited the portion of that decision which held the authority to extend certain time limits "must not be exercised arbitrarily or capriciously and the limitation period should only be extended when there are sound reasons for doing so".

[10] At paragraph 22 of his decision, after summarizing the parties' submissions, Chief Superintendent Gill found there is an authority to grant a time extension as set out in subsections 41(2) or 42(2) of the *RCMP Act*. He found that subsection 47.4(1) of the *RCMP Act*:

> […] clearly demonstrates Parliament's intent that the Commissioner (or delegate) be authorized to grant an extension for either or both of the time limitations set out under 41(2) or 42(2), where the Commissioner is satisfied the circumstances justify such an extension.

[11] Chief Superintendent Gill went on, in the following paragraph of his decision, to conclude:

> […] that the authority under subsection 47.4(1) of the *RCMP Act* is unrestricted in the manner referred to in Grewal decision cited herein, save for the requirement to provide due notice to the member, unless that should not be done as per subsection 47.4(1) of the *RCMP Act*.

[12] Chief Superintendent Gill concluded there was no breach of procedural fairness or natural justice, and "in the totality of the circumstances", found that an extension is warranted. Therefore, he granted an extension from November 25, 2015, until June 2, 2016.

[13] On May 30, 2016, a Notice to the Designated Officer requesting a conduct hearing pursuant to subsection 41(1) of the *RCMP Act* was signed by Assistant Commissioner MacMillan. On June 23, 2016, a Notice of Conduct Hearing was issued containing the three following allegations:

> **Allegation 1**
>
> On or between August 31, 2012, and October 29, 2013, at or near the [CPC], Ottawa, in the Province of Ontario, [the Subject Member] failed to treat every person with respect and courtesy and also engaged in harassment, contrary to section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*
>
> **Particulars of Allegation 1**
>
> 1. At all material times you were a civilian member of the Royal Canadian Mounted Police and posted to the [ETU] at the [CPC], in the Province of Ontario.
>
> 2. At all material times, public service employee [Mr. A] was employed as the office/course administrator for the [ETU]. You did not supervise [Mr. A], however, it was permissible for you to task him with completing various administrative work related tasks for you.
>
> 3. You engaged in disrespectful and demeaning conduct of a sexually belittling nature directed towards [Mr. A] in the workplace.
>
> 4. On one occasion while [Mr. A] was using the photocopier, you approached him from behind and proceeded to sexually harass him by first physically touching his buttocks and then sliding your hand towards his inner thigh area. You then informed [Mr. A] in a sexually suggestive manner that "you've got a great ass." [Mr. A] immediately indicated that your physical contact was unwanted and to never touch him again. You replied by stating that you were simply joking around.
>
> **Allegation 2**
>
> On or between August 31, 2012, and October 29, 2013, at or near the [CPC], Ottawa, in the Province of Ontario, [the Subject Member] failed to treat every person with respect and courtesy and also engaged in harassment, contrary to section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*
>
> **Particulars of Allegation 2**
>
> 1. At all material times you were a civilian member of the Royal Canadian Mounted Police and posted to the [ETU] at the [CPC], in the Province of Ontario.

2. At all material times, public service employee [Mr. A] was employed as the office/course administrator for the [ETU]. You did not supervise [Mr. A], however, it was permissible for you to task him with completing various administrative work related tasks for you.

3. You engaged in disrespectful and demeaning conduct of a sexually belittling nature directed towards [Mr. A] in the workplace.

4. On one occasion while [Mr. A] was seated in the common lunch room area, you sat next to him and then proceeded to sexually harass him by sliding your hand towards his inner thigh area. You further humiliated [Mr. A] by openly verbalizing to the other employees present in the lunch room that: "you've got such beautiful legs. Right guys? Hahahaha". [Mr. A] immediately indicated that your physical contact was unwanted and to never touch him again. You replied by stating that you were simply joking around.

Allegation 3

On or between August 31, 2012, and October 29, 2013, at or near the [CPC], Ottawa, in the Province of Ontario, [the Subject Member] failed to treat every person with respect and courtesy and also engaged in harassment, contrary to section 2.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*

Particulars of Allegation 3

1. At all material times you were a civilian member of the Royal Canadian Mounted Police and posted to the [ETU] at the [CPC], in the Province of Ontario.

2. At all material times, public service employee [Mr. A] was employed as the office/course administrator for the [ETU]. You did not supervise [Mr. A], however, it was permissible for you to task him with completing various administrative work related tasks for you.

3. You engaged in disrespectful and demeaning conduct of a sexually belittling nature directed towards [Mr. A] in the workplace.

4. On one occasion while [Mr. A] was seated at his office desk working, you sneaked up behind him and then proceeded to sexually harass him by shoving your hand inside of his shirt from the collar, sliding your hand across his torso and then stopping on his chest area. You further humiliated [Mr. A] by openly verbalizing that: "Oh, nice pecs you got going! It doesn't show!" [Mr. A] immediately indicated that your physical contact was unwanted and to never touch him again. You replied by stating that you were simply joking around.

[*Sic throughout*]

[14] On May 30, 2016, I was appointed as the conduct board. I was thereby provided with the jurisdiction to hear these allegations.

Motion for a Stay of Proceedings

[15] Judicial review was sought of Chief Superintendent Gill's decision to grant a retroactive extension to the Review Authority to initiate a conduct hearing, and of Assistant Commissioner MacMillan's decision to initiate the conduct hearing. These motions were filed in June and July of 2016. On July 19, 2016, I agreed with both parties that since the outcome of the Federal Court's decision with respect to the judicial review requested would greatly impact these proceedings, the hearing must be held in abeyance.

[16] The matters were brought before the Federal Court for consideration in October of 2017.

[17] On January 19, 2018, Justice Mosley of the Federal Court issued his decision, cited at 2018 FC 52. At paragraph 49, he stated:

> Having considered the parties' submissions, the issues for the Court to consider on this application are:
>
> A. What is the standard of review?
>
> B. Is this application premature?
>
> C. Was the decision to grant the extension of time statute-barred?
>
> D. If not statute-barred, was the decision reasonable?

[18] With respect to question A, as per the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], Justice Mosley found the standard of review to be one of reasonableness.

[19] With respect to question B, in finding the application to be premature, Justice Mosley decided at paragraphs 59 to 61, inclusively:

> (59) As I will discuss below, I am satisfied that the application for an extension was not time-barred. Thus, I agree with the Respondent that the decision to extend the time period was an interlocutory decision within the RCMP's disciplinary process. As it remained open to [Assistant Commissioner C. M.] to seek an extension to initiate a hearing after the

> prescribed time had expired, there was an ongoing administrative process which would not be exhausted until every step open to the parties was completed.
>
> (60) The delay in seeking the extension is not an exceptional circumstance that would require this Court to interfere with the RCMP's ongoing administrative process: *Powell*, above, at para. 33. The remedy of judicial review will remain available to the Applicant to challenge the results at the conclusion of the process.
>
> (61) It is premature to predict what the conduct board's ultimate decision will be on the procedures that were followed or the merits of the alleged contraventions; or that of the Commissioner on appeal. The disciplinary scheme should be allowed to run its course. The decision to grant an extension does not bind future decisions by the Commissioner. It is worth noting that the Commissioner who would consider any appeal is not the same Commissioner who was in office when these decisions were made. The conduct board may make findings favourable to the Applicant and those findings may be upheld by the Commissioner. If the Applicant succeeds in the result, the Applicant would have no need to be before this Court seeking redress.

[20] With respect to question C on whether the decision was statute-barred, Justice Mosley found at paragraph 83, after analysis, that "the decision to grant the extension by the Commissioner's delegate was not barred by the expiry of the prescribed time period." This threshold issue becomes important when considering whether the Motion was raised prematurely with the Federal Court.

[21] With respect to question D on the issue of the reasonableness of Chief Superintendent Gill's decision to grant the extension, Justice Mosley held in paragraphs 84 to 94, inclusively:

> (84) My findings that this judicial review application is premature and that the *RCMP Act* provides for an extension of time after the expiry of the limitation period are sufficient to dispose of the first application. However, in the event that I am found to have erred on the first issue, I will set out my reasons for concluding that the decision was reasonable.
>
> (85) The Applicant argues that the decision-maker did not identify or articulate any of the circumstances that justify an extension of the limitation period. The reasons are thus insufficient, he contends, to allow the reviewing Court to understand why the decision-maker made its decision and to permit the Court to determine whether the conclusion is within the range of reasonable outcomes. In the Applicant's view, there is no line of

analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived: *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at para 55, [2003] 1 SCR 247; *Nfld Nurses*, above, at paras 16, 19, 22.

(86) The Respondent submits that the reasons are adequate since they are based on the multiple documents that were before the decision-maker and provide intelligible and clear justification for his decision: *Nfld Nurses*, above, at para 16. The reasons do not have to be perfect or comprehensive and are to be reviewed in the context of the evidence, the parties' submissions and the process: *Nfld Nurses*, above, at para 18.

(87) I agree with the Respondent that the decision maker properly considered the extensive record before him including the documents recording the events and the procedural history. He had the benefit of extensive written submissions from both Assistant Commissioner MacMillan and the Applicant. He was persuaded that the circumstances justified the extension. This Court must give that decision considerable deference and pay respectful attention to the reasons offered or which could be offered in support of the decision: *Dunsmuir*, above, at paras 47 – 48. The Court must first seek to supplement the decision if necessary before it seeks to subvert it: *Nfld Nurses*, above, at para 12.

(88) Applying the reasonableness standard, the role of this Court is not to undertake a complete analysis of the merits of the decision but rather to determine if the reasons provided are intelligible and transparent and that it falls within a range of acceptable outcomes based on the evidence before the decision-maker. I am satisfied that it does.

(89) Circumstances that justify an extension of time, when the legislator chose not to specify any, must be given a broad interpretation and the decision- maker afforded wide discretion within the rule of law. Here, the decision- maker considered the factors set out in *Grewal*, above, regarding the exercise of the discretion. He was satisfied that there was a continuing intention to review the conduct measures imposed on the Applicant in the context of the new procedures recently implemented by the RCMP, that the Applicant would not be seriously prejudiced, that there was a reasonable explanation for the delay, that the application had merit and that other factors militated in favour of the extension. These factors are not conjunctive, *Grewal*, above, at paras 11 – 14, and an extension can be granted even if one of them is not satisfied: *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 33, 154 ACWS (3d) 1238.

(90) The allegations of sexual harassment in a workplace were serious and arose in the context of another investigation of the Applicant's conduct and his return to that workplace. The workplace was part of the CPC providing

services to Canada's national police force and other law enforcement agencies. The public interest called for a thorough examination of the events at the CPC. There was merit in reviewing the failure of the initial conduct decision to consider relevant aggravating factors.

(91) The delay in dealing with the review was not excessive considering the history of the matter and the length of time it took to complete the initial investigation, arrange the conduct meeting and reach a decision. The delay occurred in the context of major changes to the disciplinary procedures within the RCMP and a significant increase in the number of contraventions that would be dealt with by way of a conduct meeting in the same time frame; as was explained by Assistant Commissioner MacMillan in his submissions to Chief Superintendent Gill. This was not simply a lack of due diligence or administrative inattention, as the Applicant contends. The entire organization was adapting to new procedures. This took a considerable time to implement. Thus, it was not surprising that the investigation was not concluded until October 5, 2015, and did not come to the review authority's attention until January 7, 2016.

(92) Assistant Commissioner MacMillan requested advice on the conduct measures imposed on the Applicant the day after he was briefed on the conduct meetings conducted at the National Headquarters in the preceding year. This request was made prior to the CBC news reports on misconduct at the CPC. Assistant Commissioner MacMillan initiated a review under s 9 of the *CSO – Conduct* once he returned from leave and had received a report on February 19, 2016. The amount of time that it then took to submit the request for an extension was not excessive in the circumstances.

(93) The Applicant contends that he is prejudiced simply by reason of the fact that he is now at risk of a finding by the conduct board that his conduct warrants dismissal or a direction to resign. That is, in my view, not the type of prejudice contemplated by the authorities relating to the exercise of the discretion to grant an extension of time. More on point is his argument that he would be prejudiced by [an] extension because of the passage of time, the retirement of key witnesses and failing memories.

(94) I note that the investigative record including witness statements has been preserved and would be available to the conduct board should the Applicant request that it be considered. Otherwise, the hearing would be conducted *de novo*. The facts of the matter are not complex and there are several indications in the record that the Applicant did not dispute them when the initial investigation was conducted by the Ottawa Police Service (OPS) and the [Professional Responsibility Unit]. It will remain open to him to challenge the allegations or to bring forward evidence in mitigation before the conduct board. The Commissioner's delegate was satisfied that no prejudice would result in these circumstances. That conclusion was reasonably open to him, in my view.

[22] Justice Mosley went on to decide that there was no waiver of solicitor-client privilege in an email message containing advice to Chief Superintendent Marty Chesser, and that the Review Authority's exercise of discretion was reasonable under the circumstances, and unfettered by the Commissioner. These specific issues were not found to have been raised prematurely.

[23] As of this writing, I am given to understand the decisions of Justice Mosley have been appealed and will be brought before the Federal Court of Appeal. I am also given to understand a date has not yet been set for the consideration of the merit of this appeal.

[24] On Monday, April 23, 2018, pleadings were filed with me by the Member Representative (MR) on the matters found to have been prematurely brought before the Federal Court. The Conduct Authority Representative (CAR) replied on Tuesday, May 1, 2018. In accordance with the wishes of the parties to make oral submissions on the Motion for a Stay of Proceedings, I permitted each party to summarize their pleadings before me on Tuesday, May 22, 2018. I also permitted the MR a brief rebuttal.

[25] The Subject Member maintains that I lack the jurisdiction to hear this matter because the limitation period expired on November 25, 2015. Furthermore, the Subject Member contends that the granting of the retroactive extension of time to initiate this hearing was statute-barred pursuant to subsection 41(2) of the *RCMP Act*.

[26] In the alternative, the Subject Member seeks a stay of proceedings on the basis that the May 12, 2016, decision by Chief Superintendent Gill, granting the extension of the limitation period to initiate the conduct hearing, was not justified in the circumstances. In particular, the Subject Member maintains as follows:

- There was no continuing intention on the part of the Review Authority to pursue a review of the conduct measures previously imposed and to initiate a conduct hearing.

- The decision to initiate a conduct hearing discloses no arguable case for the purposes of granting an extension.

- There is no reasonable explanation for the delay in the Review Authority seeking an extension of time to initiate a conduct hearing.

- To allow for the initiation of a conduct hearing at this time, more than five years after the incidents are alleged to have occurred and in this environment of extreme political pressures being cast upon the RCMP to exert "strong discipline", would result in serious prejudice to the Subject Member's ability to respond to the allegations.

[27] The CAR and the MR both addressed these issues in their written submissions as well as in their pleadings before me on May 22, 2018. With respect to the time limitation issue, the CAR maintains Chief Superintendent Gill properly took the submissions of both the Subject Member and the Review Authority into account in rendering his May 12, 2016, decision, which was reasonable given the context and in light of all of the surrounding circumstances. In particular, with respect to the bulleted points in the previous paragraph, the CAR replied at paragraph 26 of his pleadings that case law supports the proposition that not all need to be addressed, and that the fundamental consideration, as per the *Grewal* case, is for justice to be done between the parties.

Findings on Motion for a Stay of Proceedings

[28] I find there is a threshold issue, namely, in whether or not the RCMP was statute-barred from pursuing an extension of time, as per subsection 47.4(1) of the *RCMP Act*. Justice Mosely did not consider the issue of whether the Motion on retroactivity had been prematurely raised until he definitively decided this specific threshold issue. At paragraph 62 of his decision:

> As noted, my conclusion that the administrative process had not been completed rests largely on the question of whether the extension of time pursuant to s.47.4(1) of the *RCMP Act* was statute barred.

[29] Justice Mosely finds, at paragraph 83, "the decision to grant the extension by the Commissioner's delegate was not barred by the expiry of the prescribed time period." Therefore, I find this specific threshold issue to already have been decided by Justice Mosely. At the opening of the hearing on May 22, 2018, in Ottawa, I advised the parties that I did not need to decide this particular issue.

[30] I also advised the parties that, in the event I am found to have erred in not making this decision, I adopted Justice Mosely's reasoning on the specific issue of whether or not the RCMP was statute-barred from pursuing an extension of time as per subsection 47.4(1) of the *RCMP Act*. Justice Mosely conducts a thorough and well-documented legal analysis at paragraphs 62 to 82 of his decision before arriving at what I find to be the proper conclusion. In arriving at his decision, Justice Mosely takes into account the same pleadings that were brought before me.

[31] With respect to the core issue on the Motion, I find the standard of review for Chief Superintendent Gill's decision to be one of reasonableness as opposed to correctness, as per the direction provided by the Supreme Court of Canada in the case of *Dunsmuir* at paragraph 60.

[32] Chief Superintendent Gill was appointed to decide the matter between Assistant Commissioner MacMillan and the Subject Member. As an RCMP adjudicator charged with the responsibility of deciding a matter touching upon the integrity and professionalism of the RCMP, Chief Superintendent Gill's decision is owed a considerable degree of deference, as per the Federal Court and the Federal Court of Appeal decisions *Elhatton v Canada (Attorney General)*, 2013 FC 71 (CanLII) and *Canada (Attorney General) v Gill*, 2007 FCA 305 (CanLII).

[33] The reasons provided by Chief Superintendent Gill were not extensive, but I find that they were transparent, clearly written and sufficient to permit me to analyze them with respect to their reasonableness.

[34] After considering the extensive submissions made by both the Subject Member and Assistant Commissioner MacMillan (the Review Authority), Chief Superintendent Gill applied the analytical framework first suggested in the Federal Court of Appeal case of *Grewal* and later refined by Justice Lemieux of the Federal Court in *Pentney*. The four-part test examines:

- a continuing intention to pursue the proceedings;
- an arguable case;
- a reasonable explanation for the delay, and

- the prejudice, if any, inherent in granting an extension of time.

[35] Chief Superintendent Gill found there was a continuing intention to pursue the proceedings on the basis of Assistant Commissioner MacMillan's submissions to the effect that all conduct matters brought forward under the auspices of the amendments to the *RCMP Act* in November of 2014 were subject to review. This is a reasonable conclusion: Assistant Commissioner MacMillan, at the behest of the Senior Executive Committee of the RCMP, was conducting a review of proceedings under the amended *RCMP Act* to evaluate whether the legislative amendments with respect to the RCMP disciplinary process were effective. The sheer volume of cases under review was found to be a reasonable explanation for the delay, and I agree. It is not difficult to imagine that a matter decided in October 2015 was not properly reviewed until January of 2016. The delay was complicated by an unfortunate turn of events that saw Assistant Commissioner MacMillan absent for personal reasons while the Subject Member's case was under review.

[36] It might be tempting to speculate about the extent to which the review of the Subject Member's case was influenced by political and/or media forces, but I found no direct or tangible evidence of this. Assistant Commissioner MacMillan had already commenced his review (by first requesting advice on the conduct measures imposed by the Conduct Authority) by the time the news articles referred to by the Subject Member had surfaced. Assistant Commissioner MacMillan frankly stated the Commissioner "had an opinion about the case". I found nothing to indicate his discretion was fettered in any way by the Commissioner or by anyone else.

[37] Chief Superintendent Gill quite rightly, in my view, decided there was no prejudice inherent in permitting the matter to proceed before a duly appointed conduct board.

[38] On the basis of the above analysis, I find Chief Superintendent Gill's decision to grant the Review Authority an extension of time within which the matter could be brought before a conduct board to be a reasonable one. There will be no Stay of Proceedings.

[39] With this decision in place, the hearing into the merit of the allegations brought against the Subject Member opened on Wednesday, May 23, 2018, in Ottawa, Ontario.

TESTIMONIAL EVIDENCE: The Subject Member, Mr. A, and Sergeant Marelic

[40] Throughout the period encompassed by the three allegations, Mr. A worked as an administrative assistant in the Explosives Training Unit (ETU) at the Canadian Police College (CPC) in Ottawa, Ontario. From the moment of his arrival in 2009, Mr. A felt out of place in an environment characterized by a certain amount of teasing and joking around among the employees who worked there, many of whom had a police or military background (or, like the Subject Member, both) and were accustomed to this kind of a "locker-room" environment.

[41] The ETU delivered explosives-related training to other accredited agencies, mostly other police forces. There were initially nine instructors, of which the Subject Member was one. The Subject Member's area of specialization was Explosive Forced Entry.

[42] Mr. A's job consisted of providing assistance and support to the instructors who needed it, to aid in the preparation and delivery of the ETU's training programs. Financial cutbacks eventually reduced the number of instructors from nine to four, and to make matters worse, one of the four was only available on a part-time basis. These resourcing issues created a considerable amount of tension in the workplace. The witnesses collectively described how pranks and jokes were one way of relieving this tension.

[43] Mr. A was the recipient of some of the workplace jokes or comments. Some had to do with his clothing; in particular, he was accused of wearing "flood pants" because the hem of his pants was high. He was called "supermodel", presumably because he was tall and thin. Although he could not specifically recall any joke or prank in particular, Mr. A said that some had sexual connotations and, for personal reasons, these types of jokes made him uncomfortable.

[44] Mr. A testified to three separate incidents which occurred during the summer of 2012. With regard to the incident which forms the basis for Allegation 1, Mr. A was working at the photocopier, located in an area of the building in which all of the instructors had their offices.

[45] Mr. A testified to being in the vicinity of the photocopier at the time of this incident, when the Subject Member came up behind him, cupped his hand on one of his buttocks and slid

his hand around to the inside of this thigh. The Subject Member said something like "you've got a great ass". Mr. A screamed at him and told him to stop. Later, after he calmed down, Mr. A went to the Subject Member and told him his actions were inappropriate and unwelcomed. Mr. A testified that the Subject Member told him it was just a joke and that he would not do it again. Mr. A did not report this to anyone else at the time.

[46] The incident at the photocopier was not witnessed by any other person. The Subject Member testified that this incident did not happen at all.

[47] Another incident took place in the workplace lunch room, forming the basis for Allegation 2. There was a course going on at the time, so there were guest instructors present in the lunch room as well as the usual staff of the ETU. Mr. A was seated at the lunchroom table when the Subject Member came to sit next to him and, as he sat down, Mr. A said the Subject Member placed his hand on his inner thigh, and while he was doing this, said something like "You have great legs, right guys?" and people at the table broke out laughing. Mr. A testified to being angry and telling the Subject Member, probably in French, to take his hand away. Mr. A testified to the Subject Member having said that it was just a joke.

[48] This incident was witnessed by Sergeant Marelic, who was in the lunchroom at the time. He saw the Subject Member go to sit down next to Mr. A and, as he was doing so, place his hand on Mr. A's inner thigh. Sergeant Marelic said Mr. A screamed when he was touched, and people seated around the table broke out laughing at Mr. A's reaction. Sergeant Marelic testified it was common knowledge around the office that Mr. A did not like being touched.

[49] The Subject Member agreed this incident happened, but he testified to placing his hand just above Mr. A's knee, not on his inner thigh. The Subject Member said he could not recall his exact words, but he may have said something like "Hey, sexy" as he did this.

[50] Mr. A was not sure which of these two incidents occurred first. However, he recounted a third incident, which he was certain occurred after the first two. In this third incident, which is particularized in Allegation 3, Mr. A was seated at his desk and was working with Staff Sergeant B, the Director of the ETU, on a spreadsheet for cost calculations. The Subject Member

approached Mr. A from behind, reached around and slid his hand down the open collar of his shirt, across his chest, saying something like "nice chest you have". Mr. A testified that both the Subject Member and Staff Sergeant B laughed at this. Mr. A said he screamed at the Subject Member to remove his hand right. Mr. A recalled Staff Sergeant B telling the Subject Member that he "probably shouldn't have done that."

[51] Staff Sergeant B did not testify at this hearing and has indicated in his statements that he has no recollection of this incident.

[52] The Subject Member testified to seeing Mr. A's shirt partially unbuttoned and open, and he admitted to placing his hand inside Mr. A's shirt as a joke.

[53] Mr. A testified to an aversion to being touched and did not give consent to any of the touching. On each occasion, he told the Subject Member he did not want to be touched and to never do it again. Mr. A described the incidents as intrusive, humiliating and degrading. Collectively, Mr. A stated, the incidents have had a significant negative impact on his work and on his personal life.

Statement discrepancies

[54] On cross-examination, Mr. A admitted to having provided differing versions of the details of these three occurrences in various statements. The MR produced a table summarizing these differences. The table was introduced into evidence.

[55] With regard to the acts alleged in Allegation 1 (the incident at the photocopier), in his statement dated November 26, 2014, Mr. A said the Subject Member "grabbed my ass and ran his hand down my thigh". In a statement he provided a few days afterward, Mr. A said he "grabbed my posterior and moved that hand toward the inner thigh". In his statement dated January 6, 2015, Mr. A said the Subject Member "took his left hand, slid it over my butt, and . . . like around my thigh, kinda towards the front . . .". In a statement he provided on March 8, 2016, Mr. A said: "I walked towards the photocopier, turned towards it, I grabbed my paperwork, looked at it and then I felt a hand on my buttocks."

[56] With regards to words the Subject Member may have uttered during the photocopier incident, Mr. A made no mention of any in his statements of January 6, 2015, or March 8, 2016. In his statement of November 26, 2014, Mr. A said: "I'm sure he said something offensive about me having a nice ass, I can't remember . . . it's the kind of joke he'd make and that's why I can't remember because it happened so often, I couldn't tell you which joke he made at that time." In the summary he provided a few days after the statement of November 26, 2014, Mr. A stated: "I don't believe he said anything while approaching but did say something derogatory along the lines of 'You've got a great ass'."

[57] There were other discrepancies with respect to Allegation 1, noted by the MR and summarized in the table provided, concerning (among other things) words Mr. A might have said to the Subject Member along the lines of "don't do that again", as well as whether or not others may have been present or in the vicinity of the photocopier.

[58] Similarly, with respect to the acts alleged in Allegation 2 (the lunchroom incident), in his statement dated November 26, 2014, Mr. A said the Subject Member "sat down beside me, and as he sat down he put his hand on my thigh". In a summary he provided a few days afterward, Mr. A said he "placed his hand on my inner thigh, either in his motion to sit beside me or already sitting and reaching from his seat". In his statement dated January 6, 2015, Mr. A said "It was either when he was sitting down or just as he sat down, [the Subject Member] reached his left hand over and grabbed my thigh". In a statement he provided on March 8, 2016, Mr. A said "He sat down and as he sat down, he reached over in my inner thigh . . .".

[59] With regard to words the Subject Member may have uttered during the lunchroom incident, Mr. A made no mention of any in his statement of November 26, 2014. In the summary he provided a few days after the statement of November 26, 2014, Mr. A stated that the Subject Member said, while doing this, "You've got such beautiful legs. Right guys? HAHAHAHA." In his statement dated January 6, 2015, Mr. A said that the Subject Member said "Oh wow supermodel, you . . . you've got great or firm legs . . ." In his statement of March 8, 2016, Mr. A stated that the Subject Member said "I had nice legs".

[60] There were other discrepancies surrounding Allegation 2, noted by the MR and summarized in the table provided, concerning (among other things) words Mr. A might have said to the Subject Member along the lines of "don't do that again" or "don't touch me", as well as whether or not others may have seen the Subject Member touch him in the lunchroom.

[61] Likewise, with respect to the acts alleged in Allegation 3 (the incident at Mr. A's desk), in his statement dated November 26, 2014, Mr. A said "I was just sitting at my desk, in my chair, and he came up behind me and slid his left hand on my chest and went down to um my rib cage, above my abs." In a summary he provided a few days afterward, Mr. A said that the Subject Member "sneaked up behind me, and shoved his hand inside my shirt from the collar, and slid his hand across my chest crossing my torso until his hand was completely inside my shirt and just above my stomach". In his statement dated January 6, 2015, Mr. A said "Out of nowhere, [the Subject Member]'s behind me, he slides his left hand under my shirt . . . When he put his hand in my shirt . . . I . . . to this day I can still feel his hand on my chest." In a statement he provided on March 8, 2016, Mr. A said "I'm working at my desk, sitting down […] And because [Staff Sergeant B] is standing on my left I can't see [the Subject Member] coming in the office, but he comes in and he reaches down my shirt."

[62] With regard to words the Subject Member may have uttered during the incident at Mr. A's desk, in his statement of November 26, 2014, Mr. A said "He said something like, 'Oh, you're well built'". In the summary he provided a few days after the statement of November 26, 2014, Mr. A stated "He says, 'Ow, nice pex you got going! It doesn't show!'". In his statement of January 6, 2015, Mr. A said "He says, 'Oh my God! You've got a great chest!'". In his statement of March 8, 2016, Mr. A said "He says, what a great chest, no wonder you're a supermodel'".

[63] There were other discrepancies with respect to Allegation 3, noted by the MR and summarized in the table provided, concerning (among other things) words Mr. A might have said to the Subject Member along the lines of "don't do that again" or "don't touch me", as well as whether or not it was Staff Sergeant B who was present, or where he might have been precisely

situated, or whether or not Staff Sergeant B may have said something to the Subject Member to the effect that he should not touch Mr. A.

Delay in filing a complaint

[64] Mr. A stated he did not report these incidents because he knew he was obliged to report them to his supervisor, Staff Sergeant B, whom he felt was sympathetic towards the Subject Member. Mr. A also felt Staff Sergeant B was a willing partner in the office horseplay, certainly with respect to the incident at Mr. A's desk (Allegation 3).

[65] An internal (Code of Conduct) investigation was commenced against the Subject Member involving incidents of nudity in the workplace, and an internal investigator sat with Mr. A on April 25, 2014, to obtain a statement. Mr. A testified that the internal investigator told him that he was only there to investigate the incidents of nudity, and that they could not talk about anything else. Mr. A said this was the reason, on April 25, 2014, he did not mention any of the three incidents which ultimately gave rise to the present Notice of Conduct Hearing.

[66] Mr. A testified to his ongoing attempts to rationalize the Subject Member's behaviour and, at one point in time, he wondered whether the Subject Member might be gay. Overall, though, Mr. A was of the opinion the Subject Member's behaviour was consistent with the type of bawdy humour that was regularly practised in and around the ETU, in which the Subject Member was a frequent and active participant.

[67] From time to time in the period in which the Subject Member and Mr. A worked together, the two of them would go out for lunch together at restaurants near the CPC. Sometimes others were present and sometimes the two of them were alone. There was no inappropriate behaviour on these occasions. Frequently, the Subject Member bought lunch for Mr. A.

[68] The Subject Member was eventually suspended from duty in May of 2014; therefore, he was no longer in the same workplace as Mr. A. Mr. A was aware of the Code of Conduct matters formally brought against the Subject Member for nudity in the workplace: he was aware of the

disciplinary proceedings that took place and generally aware of the forfeiture of pay imposed upon the Subject Member. Mr. A testified that he was constantly being reminded, by others around him in the workplace, of the Subject Member's impending return to the same workplace. Mr. A was very uncomfortable at the prospect of having to work with the Subject Member again.

[69] Ultimately, at a "town hall" engagement at which certain Union members were present, Mr. A finally decided he had to make a formal report of what had happened to him. Therefore, he approached a Union representative who provided direction and advice. On November 25, 2014, Mr. A acted on that advice and approached his supervisor at the ETU, Staff Sergeant Jean Seguin, to whom Mr. A provided a brief summary of what the Subject Member had done. Since this was at the end of the work day, Staff Sergeant Seguin instructed Mr. A to return the following day at which time a more precise and detailed account could be provided.

[70] Mr. A was aware senior management was consulting with RCMP Legal Services with respect to the next steps. Mr. A was eventually instructed by RCMP senior management to attend the Ottawa Police Service (OPS) to make a formal complaint of sexual assault. The statement Mr. A provided on January 6, 2015, to an OPS investigator was a result of Mr. A's having personally attended the OPS Headquarters, requesting an investigation.

SUBMISSIONS ON THE ALLEGATIONS: CAR

[71] These allegations were brought forward under the provisions of the Code of Conduct dealing with sexual harassment in the workplace as opposed to the usual "discreditable conduct" provisions. Consequently, the test for establishing an allegation of this type is slightly different. The RCMP's *Conduct Measures Guide* adopts the Treasury Board definition of harassment, as follows:

> Improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s), or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also

> includes harassment within the meaning of the Canadian Human Rights Act […]

[72] Sexual harassment is defined by the Treasury Board as:

> Any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee, or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or any opportunity for training or promotion.

[73] The RCMP's Code of Conduct deals with workplace harassment as follows:

> While harassment is often a series of incidents, a particularly severe incident that has a lasting impact on the victim could also qualify as harassment.
>
> Harassment in the RCMP has been at the forefront of a number of media reports in recent years, and the prevention, effective investigation, and successful resolution of behaviours that could be construed as harassment has become a national priority. The new Act provides for the establishment of an RCMP-specific process that will align the Treasury Board harassment policy and focuses on addressing breakdowns in workplace relations. In addition, the Code of Conduct will establish a clear expectation that members will not engage in conduct that amounts to harassment or discrimination.
>
> The severity of harassment will be dependent on a variety of factors, including, but not limited to:
>
> - Frequency of the harassment;
> - Harassment of a sexual nature;
> - Persistent harassment despite being told of the offensive nature of the conduct;
> - Exploitive use of position to make unwanted sexual advances, and
> - Effect on the complainant.
>
> A review of the third digest demonstrates that RCMP Adjudication Boards have imposed sanctions ranging from 1-10 days in cases of harassment that have been determined to be disgraceful conduct, with an average financial penalty of 5.1 days. Harassment-related cases recorded in the fourth digest have seen an increase in the frequency of such types of misconduct, leading in turn to the creation of a higher range varying from 5-10 days, with an average of 8.4 days. OFCC data revealed a handful of harassment cases ranging from 2- 5 days.

> Considering the intense public scrutiny, the negative effect on employee morale and well-being, and the apparent increase in reported cases, a broader range of measures should be available for cases of workplace harassment that are deemed sufficiently serious to warrant conduct measures.
>
> For clear cases of harassment that involve relatively frequent incidents, provoked the need to make administrative adjustments of the detachment/unit, impacted morale, or was repeated, a normal range of measures from 11-20 days is suggested.
>
> Where the member's conduct was relatively isolated in nature, had little effect on the unit morale, and did not pertain to sexual harassment or racially insensitive content, a mitigated range of remedial measures to 10 days is recommended.
>
> Where the harassment is persistent in the face of warnings or repeated requests to desist, where it involves pressuring an employee towards an intimate relationship, or where harassment is based on ethnic origin, sexual orientation, or cultural backgrounds, an aggravated range of 20 days to dismissal should be imposed.
>
> Sexual harassment should be treated as a particularly serious form of harassment that will not be tolerated in the RCMP workplace. Any employee found to have engaged in sexual harassment should expect to face harsh conduct measures. Unless significant mitigation can be found in the fact pattern of the case, an instance of sexual harassment would justify measures in the aggravated range.

[74] The Treasury Board's definition of harassment is accepted by the Supreme Court of Canada in the case of *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252.

[75] The CAR introduced into the record recent labour law cases: *Foerderer v Nova Chemicals Corporation*, 2007 ABQB 349 (CanLII) (*Foerderer*) and *Calgary City and CUPE, Local 709 (Schmaltz), Re* 2017 CarswellAlta 308 (*CUPE*). These cases have adopted the language of the Supreme Court of Canada on the matter of harassment in general and sexual harassment in particular. The lack of intention to cause harm does not relieve the individual of culpability: The test is whether, in the eyes of the reasonable person, the individual knew or ought to have known their actions would cause harm. One could also be found to have been reckless in one's actions, with sexual harassment being the result.

[76] The CAR submits the sexual nature of the acts must be assessed from the perspective of the reasonable person, and must be determined on an objective standard. The Subject Member's admission he used words like "Hey, sexy" when he touched Mr. A's leg would be construed by a reasonable person as being sexual in nature regardless of the Subject Member's intentions. For each of the three allegations, whether sexual in nature or not, the acts still amount to workplace harassment, according to the CAR.

[77] The CAR describes Mr. A's testimony as credible and reliable because his version of events never wavered. The differences pointed out by the MR do not amount to contradictions, rather, they are perhaps indicative of mounting frustration on Mr. A's part, and attributable to his recollection of the events at different times. No significant change occurs whenever Mr. A recounts his version of events. This is especially important with respect to Allegation 1, which is denied by the Subject Member. Allegations 2 and 3 are essentially admitted by the Subject Member.

[78] In each case, Mr. A testified to having reacted violently and adversely to the touching. He told the Subject Member in no uncertain terms that he did not want to be touched and to never do it again.

[79] According to the CAR, Mr. A provides a credible explanation for the delay in coming forward with the allegations. His supervisor, Staff Sergeant B, was obviously a willing participant in the joking-around. Staff Sergeant B was supposed to be the protector, the person to whom one was supposed to turn in order to make a complaint, so how was Mr. A able to complain? Mr. A was in a very unfortunate situation.

SUBMISSIONS ON THE ALLEGATIONS: MR

[80] The MR submits that harassment is usually a series of incidents which take place over a period of time. For a single incident to be considered harassment, it must be serious and of a grave nature. None of the three incidents, argued the MR, meet this threshold.

[81] The MR turns to the *CUPE* decision for the proposition that societal attitudes towards sexual harassment in the workplace have changed over time. What was acceptable five or six years ago is not necessarily acceptable today; one must recall that these events occurred in the ETU five or six years ago. An objective assessment of the context in which these events occurred must take into account the unique environment of the ETU, which can be compared to a Special Weapons and Tactics (SWAT) or Emergency Response Team. If someone were to look in on this workplace environment and assess this behaviour, would it really be off the charts, or would it be more or less what a reasonable person might expect?

[82] The MR submits the Subject Member could not have known his comments or actions were offending Mr. A. The evidence of witnesses points to an environment in which these acts were more in line with being a prank or a joke: a way to get a rise out of people in the office. They were not sexual in nature.

[83] The MR submits Mr. A was not a credible witness. He was evasive, combative, and showed that he had a selective memory. Despite complaining about being made the subject of jokes when he arrived at the ETU, Mr. A could not recall a single example.

[84] Mr. A attributes his lack of detail or the changing versions of his stories to his having been distraught when he made the statements. Despite conceding that his memory would have been better closer in time to the events, Mr. A is seen to elaborate or provide additional detail as time goes by.

[85] When asked why he did not make a complaint at the first available opportunity, namely, to the internal investigator who had asked questions about unrelated acts in the workplace, Mr. A said he was instructed by the internal investigator to limit his observations of other unrelated behaviour. Effectively, Mr. A said he was not permitted to make the complaints that form the basis for these allegations. This, submits the MR, is very hard to believe. On the contrary, the internal investigator would most likely be keen to accept as much as people will give, and if necessary, go back and expand the mandate of the internal investigation. This aspect of Mr. A's testimony detracts from his credibility.

[86] Similarly, Mr. A's tendency to describe what happened to him in the terms that are used in the legislation detract from his credibility. He says "he felt belittled and humiliated". These are not words someone uses on a day-to-day basis; they are the words found in the definition of harassment, so they deliberately are the words Mr. A used when he testified.

[87] According to the MR, the bizarre explanation for what happened at the offices of the OPS cannot be believed. Mr. A says he arrived to file a complaint of sexual assault, yet he was told "no one's available; give us your name, and we'll call you back". This is simply not believable. Later, Mr. A recounts how the OPS detective told him "there was no reasonable prospect of conviction since this was man-on-man". When cross-examined on this point, Mr. A conceded he did not want criminal charges to ensue because he did not want any publicity. He did not want his community to know what was going on at work.

[88] In short, the MR contends there is no air of credibility to what Mr. A has to say about his involvement with the OPS. What he describes is simply not consistent with what reasonable people know about the policing environment or the way police agencies function.

[89] With respect to Allegation 1 (the photocopier incident), the varying ways in which Mr. A describes this, as well as the time it took him to come forward, collectively suggest the Subject Member is correct in saying this incident never happened at all. Especially troubling is Mr. A's contention that he approached the Subject Member afterward to discuss the matter, because he said "this is what he learned to do". It does not make sense for someone who claims to have been sexually assaulted (an event so traumatic the person testifies they cannot sleep) to go back to the aggressor to have a nice little one-on-one discussion about what just happened and why they didn't like it. This does not have the air of reality about it, contends the MR.

[90] There were no witnesses to the photocopier incident, which the MR submits is hard to believe because it occurred right in the middle of the day. The photocopier is where all of the work stations and instructors' offices are. This is not a confined space; if Mr. A screamed, then someone would certainly have heard it.

[91] The MR submits the Subject Member, unlike Mr. A, was consistent in his responses. In the same way he admits to some of the circumstances of Allegations 2 and 3, the Subject Member insists, each and every time he is asked, that the photocopier incident never happened.

[92] Looking at the context in which all of this occurred, Mr. A's version of events regarding the photocopier incident does not make any sense. The Subject Member plays pranks and does things to get a laugh out of people around him. He does things in front of other people. The photocopier incident, since it is supposed to have happened when no one else was around, makes no sense.

[93] The MR submits there is no credible evidence supporting Allegation 1 on a balance of probabilities.

[94] With respect to Allegation 2 (the lunchroom incident), Mr. A seems to want to make the situation worse and worse every time he tells the story. There is no mention of the Subject Member's hand being close to genitalia until much, much later. The Subject Member readily admits he put his hand on Mr. A's leg near his knee. Even Mr. A concedes, in the statement he provided dated November 26, 2014, "I'm sure [the Subject Member] in his head – and it was always jokes – he was just joking".

[95] The MR contends these actions do not amount to sexual assault. Sergeant Marelic testified to a tendency to joke around by sitting in certain people's "favourite chairs". This is consistent with the statement Mr. A provided to the OPS, in which he says: "I could have been sitting in [the Subject Member's] chair. There was a game of musical chairs; some people were possessive about them."

[96] The Subject Member does not dismiss what he did, but he does not recall Mr. A getting overly upset about his having touched his knee. If he had, he would have apologized and tried to make things right. He was looking out for Mr. A and trying to help him fit in.

[97] With respect to Allegation 3 (the incident involving the open shirt), there are no independent witnesses, yet the Subject Member admits to having put his hand in Mr. A's shirt

because he felt Mr. A was dishevelled, with his shirt unbuttoned halfway down. He flatly denies the sexual innuendo that seems to have been inserted into this allegation, to the effect that he "slid" his hand down the chest. Again, if one looks at Mr. A's statements, the matter gets progressively more descriptive and more offensive. Right after this occurred, in front of the supervisor, Mr. A does not deny they likely all got up and went to lunch, which is not the way people would behave after a sexual assault.

[98] The MR maintains that this behaviour is not consistent with sexual harassment. At no time did the Subject Member receive any indication from Mr. A that his behaviour was offensive or hurtful. The Subject Member was taken by surprise; he was shocked in December 2014 when informed that Mr. A had lodged a complaint and made these allegations. He never saw this coming. Mr. A testified that he continued to interact with the Subject Member in a friendly manner after the incidents, even going for lunch with him from time to time.

[99] These allegations are of sexual harassment, from 2012 to 2014. Sexual harassment is usually a series of continuing actions, not two isolated events in the span of five years. Even so, why would Mr. A continue to place himself in situations where he's one-on-one at lunch or in a vehicle, interacting with his supposed aggressor? The MR submits these allegations should not be established.

Rebuttal by the CAR

[100] The CAR drew attention to the cases which present a number of reasons why victims do not come forward immediately. For example, there could be a power imbalance, as there was here. Mr. A made it very clear that it was only after repeatedly being informed of the Subject Member destined return to Mr. A's workplace that he brought the matters out into the open.

Decision on the allegations

[101] The Supreme Court of Canada case of *F.H. v. McDougall,* [2008] 3 SCR 41 [*McDougall*] is frequently cited as the definitive stance on the burden of proof in civil matters such as these. While the decision must be made on a balance of probabilities, the Supreme Court made it clear

the decision maker must not be unmindful of the consequences of such a decision. I was mindful from the outset of these proceedings that the CAR is seeking the Subject Member's dismissal. The stakes are the highest they can possibly be in these proceedings.

[102] These allegations have not been brought under the standard wording of "discreditable" or "disgraceful" conduct; rather, under the auspices of section 2.1, colloquially sexual harassment in the workplace. The elements to be proven are somewhat different as a result.

[103] However, there are some commonalities with "discreditable conduct" cases. First, the identity of the member must be established. The next step is to establish whether or not the acts occurred as alleged. The third, and arguably the most important step, is to establish whether or not the acts are indicative of a lack of respect and courtesy, amounting to harassment, sexual or otherwise? In this respect, these allegations carry a familiar objective component. To carry forward the language with which we are all familiar, and to combine it with the accepted definitions of workplace harassment, the test is this: Would a reasonable person, with knowledge of all of the facts of the case, and knowledge not only of policing in general but policing in the RCMP in particular, have known or ought to have known their acts or words were belittling, degrading or humiliating, or would give offence or cause harm, and was the harassment sexual in nature?

Step 1: Identity

[104] The Subject Member's identity was never in question in these proceedings. The Subject Member himself, although he denied the allegations, clearly indicated that he was the one implicated in the Notice of Conduct Hearing.

Step 2: Proof of the alleged acts

[105] The acts particularized in each of the three allegations must be proven to have occurred as alleged on a balance of probabilities. The Representatives have insisted, and I agree, that this case must be decided on the basis of the credibility of the witnesses.

[106] The *McDougall* decision provides important direction on the assessment of the credibility of witnesses, especially in cases such as Allegation 3, where the positions of two key witnesses are diametrically opposed.

[107] Rothstein J. delivered the reasons of the Supreme Court in *McDougall*. In so doing, he addressed the approach to be taken by the trier of fact in making such decisions under such circumstances:

> [57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:
>
> > In this case there were a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]
>
> [58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence in order to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[108] These important tests for credibility hearken back to a dated, but still very useful, triumvirate of cases. In *Wallace v Davis*, [1926] 31 OWN 202, the test is at page 203:

> [...] the credibility of a witness in the proper sense does not depend solely upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the

> firmness of his memory to carry in his mind the facts observed, his ability to resist influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind [...] all these are to be considered in determining what effect to give to the evidence of any witness.

[109] In *MacDermid v Rice* (1939), 45 R. de Jur. 208, Archambault, J. said at page 210:

> [...] when the evidence of an important fact is contradictory [...] the Court must weigh the motives of the witnesses, their relationship or friendship with the parties, their attitude and demeanour in the witness box, the way in which they gave evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one.

[110] In *Faryna v Chorney*, [1952] 2 DLR 354, the test was set out by the court at page 357:

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

[111] That last sentence, although somewhat baroque in its style, is the most important aspect of this analysis. Simply stated, does a witness's story, given all of the circumstances, have the clear ring of truth to it?

[112] All three witnesses gave their testimony in a clear and forthright manner. With respect to Mr. A's testimony, I agree with the MR, there are several inconsistencies in his depiction of some of the surrounding details of each of the three events. I also agree his descriptions became more colourful and more damning of the Subject Member as time went on. I also agree that collectively these inconsistencies are not insignificant.

[113] However, I find the inconsistencies are not so significant as to prove fatal to Mr. A's credibility. He shows unwavering consistency in his description of each of the core events (at the photocopier, in the lunchroom and at his desk). For each of the three incidents, he provides a

clear account of what the Subject Member did to him, what the Subject Member said each time, how he expressed how he felt about being touched, and, most importantly, to never do it again. Mr. A was unflinching in his delivery, each and every time he was invited to share his story.

[114] Allegation 2 is set in the lunchroom. All three witnesses provide a remarkably similar account of what happened as the Subject Member sat down beside Mr. A at the lunchroom table. The Subject Member said he grabbed Mr. A's leg just above the knee, but Sergeant Marelic and Mr. A said the Subject Member placed his hand higher up the leg and on the inside of the thigh. The Subject Member admits he may have said something like "Hey, sexy" as he did this, but Mr. A claims the words were more along the lines of, "hey, he has nice legs, right?" All three witnesses describe a noticeably physical reaction from Mr. A, and all three witnesses recall the laughter of the others sitting around the table at what had just happened.

[115] Sergeant Marelic supports Mr. A's contention that Mr. A said something like "Don't fucking touch me" to the Subject Member. I find their testimonies convincing on this point.

[116] I find the acts alleged in Allegation 2 to have been established on the basis of clear, convincing and cogent testimony.

[117] Similarly, in Allegation 3, the Subject Member admits to having put his hand down Mr. A's open shirt. The only other potential witness to this event, Staff Sergeant B, told investigators that he did not recall this event and, in any case, he did not testify at this hearing.

[118] Much time was spent on whether or not the Subject Member "slid" his hand down Mr. A's chest. Unless the shirt was completely unbuttoned and wide open, it would be difficult to imagine how a hand could be inserted and come to rest on the chest area without at least a little bit of "sliding". Therefore, I find the acts alleged in Allegation 3 to have occurred on a balance of probabilities.

[119] I did not treat the allegations in order in this analysis because I want to emphasize that I am not using my findings with respect to Allegations 2 and 3, in which the Subject Member

admitted (more or less) to the acts in question, as a basis for my findings of fact on the acts alleged in Allegation 1.

[120] With respect to Allegation 1, I prefer the version of events provided by Mr. A. On the basis of his testimony, which I did not find to be evasive at all, as well as on the basis of the consistent account he provided at each and every opportunity, I find the acts occurred as alleged. Mr. A was at work at the photocopier and, without warning or provocation (by design, because I find these gestures were all a form of coarse office horseplay), the Subject Member came up behind him, grabbed him by one of his buttocks, and said something like "you've got a great ass".

[121] I do not find it damaging to Mr. A's credibility that he did not lodge a formal complaint about these incidents at his first available opportunity. Mr. A is not a police officer and he is unfamiliar with investigative protocol. It is entirely within the realm of possibility that when the internal investigator outlined the mandate and the parameters for the statement he was about to take (on unrelated conduct matters), Mr. A thought the investigation was only about nudity in the workplace and not about anything else. In any case, he was not ready to come forward yet. This bears mentioning because I also do not find it fatal to Mr. A's credibility that he only brought matters forward because of constant reminders in his workplace that the Subject Member was going to be returning to work alongside him again. If permanent reassignment had taken place, it is quite likely these events would never have seen the light of day. I find Mr. A was desperate to avoid having to work with the Subject Member again, because of what the Subject Member had done to him in the past.

[122] Unlike Allegations 2 and 3, there were no witnesses to the events forming the basis for Allegation 1. In finding the events to have occurred as alleged, I prefer Mr. A's version to the Subject Member's. Mr. A has no motive to fabricate this story. Like many assault victims, he had a great deal of difficulty coming forward with a formal complaint and, like many, he has suffered greatly for having done so. He has been obliged to recall the events on a surprisingly large number of occasions. When the inevitable discrepancies appeared, he has been obliged to weather the cross- examination on those discrepancies. Like many victims, I expect Mr. A has

had his moments of doubt, questioning whether or not it was worth all the trouble, and whether or not he would have been better off simply keeping matters to himself. He certainly had nothing to gain from coming forward with a formal complaint. On the contrary, he had a great deal to lose by doing so.

[123] I find Mr. A to have acted courageously in this regard, and I find his credibility unassailable.

[124] I appreciate that the words uttered by the Subject Member may not have been word-for-word the expressions appearing in paragraph 4 of the particulars in each one of the three allegations. As per Mr. A's testimony and the accounts he has provided, I find the Subject Member uttered words along the lines of "You've got a great ass" (Allegation 1), "You've got such beautiful legs, right guys? Hahahaha" (Allegation 2), and "Oh, nice pecs you got going, it doesn't show" (Allegation 3).

[125] I find, on the basis of clear, convincing and cogent evidence, the acts particularized in each of the three allegations to have occurred as alleged.

[126] The remaining step in this analysis now becomes the most important.

Step 3: Did the Subject Member's acts and words amount to sexual harassment in the workplace?

[127] Much was made in this hearing of the context in which these events took place. The ETU was in a state of flux; there was controversy over management. There was also uncertainty over delivery of the training sessions, which, of course, is the *raison d'être* of the Unit. It was revealed that the usual complement of nine instructors was, at one point, reduced to four, which made it impossible to deliver certain training sessions. A good sense of humour was essential in coping with this uncertainty.

[128] Judicial notice can be taken of the importance of humour in the workplace. Morale is directly linked with motivation, so it is in everyone's best interests if there is a bit of levity from time to time. The physical effects of laughter include the release of endorphins, which increase

one's ability to cope with difficult situations. Humour can also break down barriers: witnesses referred to the Subject Member's ongoing campaign to make everyone feel as though they "fit in". A shared joke establishes common ground between people.

[129] There is also the issue of the unique work environment itself. The subject-matter experts in the ETU are highly specialized in a very dangerous line of work.

[130] Witnesses compared the work environment in the ETU to that of similar units such as the Emergency Response Teams and other high-stress environments in which the membership needs a healthy outlet for job-related tensions. Judicial notice can be taken of the importance of the relatively dark humour that seems to permeate certain professions, to name but a few: firefighting, the military, emergency medical services, front-line policing. I accept that life in the ETU was no different, and that a certain "black" or "edgy" type of humour might be expected.

[131] There is a threshold question of whether or not the actions of the Subject Member were indeed jokes, or did they in fact betray a sexual purpose. On the basis of the testimony of the witnesses and the context provided by the written material contained in the record, I find no sexual motivation on the part of the Subject Member. He was not interested in making sexual advances upon Mr. A, and his use of words such as "sexy" or "supermodel" were in jest and betrayed no sexual interest. This is a very easy finding of fact to make. Succinctly stated, there is no question in my mind that the Subject Member was not sexually attracted to Mr. A. It is not necessary, however, to prove a sexual purpose for the acts to have a sexual component to them.

[132] I find the Subject Member was simply trying to "get a rise" out of Mr. A, or play a joke on him in front of others at Mr. A's expense.

[133] The issue remains whether or not the jokes or pranks played by the Subject Member were appropriate, and whether or not the nature of these pranks crossed the line into unacceptable workplace behaviour.

[134] The cases supplied by the CAR were instructive. In the *Foerderer* matter, the Court of Queen's Bench of Alberta heard of the well-established culture of sexual conduct in a workplace

staffed by technicians and engineers (predominantly male) in a chemical engineering plant in central Alberta. Paragraphs 31 to 43 describe behaviour of an overtly sexual nature, which one of the witnesses described (at paragraph 37) as "joyful banter". Some of the comments made in this particular workplace include "She has a nice body" and "her ass looks great in jeans", which are similar to some of the comments made by the Subject Member in the present matter.

[135] In considering whether or not the conduct in question amounted to sexual harassment, the Alberta Court of Queen's Bench found eight factors to be of relevance (see paragraph 91 of *Foerderer*):

i. The nature and degree of the conduct;

ii. Whether the offending employee was told the impugned conduct was unwelcome or offensive;

iii. Continuation of the unwelcome or offensive behaviour after being advised that it was unwelcome;

iv. The nature of the employment relationship between the offending employee and victim, particularly if the offending employee was in a position of authority over the victim;

v. The nature of the employment relationship between the offending employee and employer, including their length of service and position, and whether there were implied or express terms of the employment contract which gave rise to additional obligations on the employer's part, such as warnings or the opportunity to respond;

vi. Whether any warnings had been given that the misconduct was inappropriate and that dismissal was a possible consequence of further similar misconduct;

vii. The existence of a formal and known sexual harassment policy that was enforced by the employer, and

viii. Condonation of the behaviour by the employer.

[136] I agree with the CAR that the test to be applied is an objective one. To rephrase the objective test for disgraceful or discreditable conduct: Would a reasonable person, with knowledge of all of the facts of the case, and knowledge not only of policing in general but policing in the RCMP in particular, find that the acts or comments would cause offence, humiliation, or harm?

[137] There are two aspects to this objective assessment. The first is from the viewpoint of the perpetrator, because the *Conduct Measures Guide* speaks of acts "the individual knew or ought reasonably to have known would cause offence or harm". The second is an objective assessment of the acts themselves, as the Treasury Board definition refers to "any conduct, comment, gesture or contact of a sexual nature that is likely to cause offence or humiliation to any employee".

[138] On the basis of the testimony of all three witnesses, I find Mr. A's aversion to being touched and his sensitivity to matters of a sexual nature were matters of common knowledge amongst the office staff at the ETU. The Subject Member himself made references to certain traits or characteristics that singled Mr. A out from the group. Indeed, the Subject Member maintained that he was playing these pranks in an effort to allow Mr. A to "fit in" with the group.

[139] Given the physical and overtly sexual nature of the pranks, a reasonable person could readily see they would have the opposite effect. Allegation 2, the lunchroom incident, resulted in laughter directed at Mr. A from the other people seated at the table.

[140] If these three separate incidents were not purposefully designed to embarrass or humiliate Mr. A, they certainly had that effect. Indeed, it is hard to imagine a different result, regardless of the Subject Member's stated good intentions. A reasonable person would see these acts as something beyond mere pranks, jokes or horseplay. They were harmful, and the Subject Member ought to have known as much.

[141] With respect to the second aspect of this objective test, I find a reasonable person would view the grabbing of a buttock, the touching of an inner thigh, and the touching of a chest to be "contact of a sexual nature that is likely to cause offence or humiliation".

[142] Aligning the facts of the present matter alongside the criteria articulated by the Alberta Court of Queen's Bench in *Foerderer*:

i. The nature and degree of the conduct

As per my analysis, above, the acts in question would be seen by the reasonable person to cause offence, humiliation, or harm.

ii. Whether the offending employee was told the impugned conduct was unwelcome or offensive

Mr. A's testimony makes it clear that on each occasion, the Subject Member was told, in no uncertain terms, that the touching was unwelcome.

iii. Continuation of the unwelcome or offensive behaviour after being advised that it was unwelcome

Although there is some uncertainty surrounding the precise chronological ordering of the events, it is clear that on each occasion the Subject Member was told not to touch Mr. A again.

iv. The nature of the employment relationship between the offending employee and victim, particularly if the offending employee was in a position of authority over the victim

The Subject Member may not have been Mr. A's direct supervisor, but the hierarchy of the Unit was clear. There was a set of instructors whose job it was to deliver training, and there was a set of employees whose job it was to assist the instructors. In some sense at least, the Subject Member was in a position of authority over Mr. A.

v. The nature of the employment relationship between the offending employee and employer, including their length of service and position, and whether there were implied or express terms of the employment contract which gave rise to additional obligations on the employer's part, such as warnings or the opportunity to respond

The RCMP does not have a collective bargaining regime containing express or implied terms of the employment contract. The obligation upon every member to treat every person with respect and courtesy is clearly articulated in the RCMP Code of Conduct as well as in the core values of honesty, integrity, professionalism, compassion, accountability and respect. The Code of Conduct contains ample warning of the consequences for not doing so.

vi. Whether any warnings had been given that the misconduct was inappropriate and that dismissal was a possible consequence of further similar misconduct

The Force gave no such warnings because the matter did not come forward in a timely way. This is not fatal to a finding of sexual harassment.

vii. The existence of a formal and known sexual harassment policy that was enforced by the employer

From the time Commissioner Paulson took office in November of 2011, he made it plain, in a series of regularly issued bulletins to all employees, that a primary area of concern was sexual harassment in the workplace, and that a zero-tolerance policy would prevail.

viii. Condonation of the behaviour by the employer

Again, management of the RCMP was not in a position to be seen to condone the Subject Member's behaviour, because it was simply not made aware of it until after the fact.

[143] On the basis of this analysis, I find the words and actions of the Subject Member as particularized in the three Allegations, in each case as well as collectively, amount to sexual harassment in the workplace.

[144] All three Allegations of the contravention of the Code of Conduct are thereby established on a balance of probabilities. Therefore, appropriate conduct measures must be considered.

CONDUCT MEASURES

Representations by the CAR

[145] The CAR submits dismissal is appropriate given the gravity of the contraventions. Sexual harassment in the workplace is a serious form of misconduct. The negative impact of these events upon Mr. A was clearly established in the course of his testimony.

[146] The cases outline a spectrum of applicable conduct measures. Reading from the *Foerderer* decision at paragraph 162:

> The law is clear that, while all sexual harassment must be taken very seriously, there is a spectrum of misconduct. Not all sexual harassment will justify dismissal. Sexual harassment involving a non-consensual physical component is at the most serious end of the spectrum. Since such conduct is a criminal act and an employer is not [obliged] to warn employees not to commit criminal acts, one transgression can warrant summary dismissal. At the lower end of the spectrum are the "less serious" forms of harassment, including sexual verbal remarks, crude jokes, suggestive words, and suggestive gestures.

[147] Similarly, in the *CUPE* decision, at paragraph 129, reference is made to a 2001 decision of the Alberta Court of Queen's Bench in which the Court held:

> Courts and tribunals have consistently drawn a line between "serious" forms of harassment involving improper physical contact (touching, rubbing, forced kissing, fondling) from "less serious" forms of harassment (sexually verbal remarks, crude jokes, suggestive words or gestures). Many courts and arbitrators have been quick to recognize that harassment with a physical component constitutes a form of sexual assault. While there are some exceptions, the penalty of discharge has been consistently upheld in cases involving inappropriate physical contact or assault. Where the harassment takes the form of verbal comments, innuendoes, jokes, teasing, obscene or suggestive gestures and so on, it is more likely that an arbitrator or court will substitute a lesser penalty for discharge. Again, there are some exceptions.

[148] In the context of an RCMP work environment, maintains the CAR, there is a precedent for dismissal where the sexual harassment in question carries an overtly physical component. The CAR makes explicit reference to the analysis contained within the 2017 RCMP Disciplinary

Board decision in *The Appropriate Officer "K" Division and Constable [P.C.]*, 17 A.D. (4th) 111 [*Constable P.C.*]. The CAR submits that a reasonable person would find the manner in which the Subject Member touched Mr. A to be sexual in nature. In similar fashion to the *Constable P.C.* case, dismissal should result.

Evidence and submissions by the MR

[149] The MR called one witness on conduct measures, Staff Sergeant T.G., who first met the Subject Member in 2004 while he was a candidate on a tactical police explosives course instructed by the Subject Member. Later, the two worked together on training matters. This witness highlighted the Subject Member's unique status as a subject-matter expert on tactical matters, especially Explosive Forced Entry techniques. This witness described the Subject Member as a key player in this area, and a valuable resource not only to RCMP officers, but to every explosives disposal technician in the country. The Subject Member is also well-respected internationally.

[150] After his work in the military, the Subject Member joined the RCMP and eventually arrived in the Unit, which was under this witness's command. In all his dealings with the Subject Member, he never received any form of complaint about his behaviour or of any incident of inappropriateness in the workplace.

[151] This witness is fully aware of the nature of the contraventions of the Code of Conduct that are the subject of this hearing, and unequivocally states that, regardless of this, he would take the Subject Member back to work with him.

[152] The MR tendered the performance evaluations encompassing the two years in which these contraventions occurred, as well as an affidavit and a series of letters of reference.

[153] The MR cautions against placing weight on Mr. A's contention that he suffered from post- traumatic stress disorder as a result of these events, because there was no evidence adduced to support such a claim.

[154] The MR draws attention to the lack of criminal charges in this case, despite close examination of the matter by the OPS.

[155] The MR notes this case arose under the "new" conduct regime. However, the principle of parity of sanction must be respected regardless of which system of discipline is in place. In support of measures falling short of dismissal, the MR referred to *The Appropriate Officer "HQ" Division and [the Subject Member]*, 15 A.D. (4th) 322 (2015). This was a disciplinary board decision involving the Subject Member's inappropriate behaviour in the workplace which did not involve Mr. A, which took place in the same period as the present matter. In this case, the board took note of the unique work environment: it was a close, all-male work unit. The board noted that the Subject Member was a practical joker, and that he would not knowingly make someone feel uncomfortable with his humour. The board in that particular matter imposed a sanction consisting of a reprimand plus the forfeiture of five days' pay. This case provides support for a point brought out by the witnesses in the present matter, namely that the nature of the pranks in the ETU took a distinct turn for the worse upon the arrival of Staff Sergeant B.

[156] Other cases pertaining to the principle of parity of sanction include *The Appropriate Officer "C" Division and Constable T-L.L.*, 14 A.D. (4th) 520 (2014), in which the member in question engaged in physical contact with an individual on a number of occasions. The nature of the contact in that case was arguably more serious in nature than in the present case because it was intended to be sexual. The female subject member entered the men's change room while the complainant was showering, opened the shower curtain and placed her hand on his back. Then, in a group photograph, she reached around behind her back and touched the complainant's genitals. At an official function with dignitaries and other policing partners, she grabbed his genitals. The board in that particular case accepted a joint submission and imposed a sanction consisting of a reprimand plus the forfeiture of ten days' pay for each of the three incidents. Under the restrictive provisions of the previous statute, the maximum forfeiture of pay on any one Notice of Disciplinary Hearing was ten days, so this was effectively the sanction that was imposed.

[157] In the case of *The Appropriate Officer Division and Constable M* (2011), 6 A.D. (4th) 250, the member in question, while on duty, consumed alcohol in a bar, approached a female member from behind and placed his hands on her hips. Later, he placed his hand between her legs and touched her genital area and her buttocks, without consent. In that case, a joint submission was accepted by the board and a reprimand plus the forfeiture of eight days' pay was imposed.

[158] More recently, in the conduct matter between *The Commanding Officer, "E" Division and Constable B.C.*, 2017 RCAD 8, the member, heavily intoxicated at a private party, slung his arm over the shoulders of a female constable without her consent and played with her nipple. Later, he hugged her from behind with his hands descending over her clothing from her stomach to her groin. He also touched another invitee on the cheekbone, made gestures, and stated he wanted to put his fingers in her vagina. He placed his arms around another constable's shoulder, grazed her nipple with his fingers about three times over her clothing. The member faced a criminal charge for sexual assault for the latter incident, which was resolved by way of Alternative Measures. In all, there were four contraventions of the Code of Conduct, and dismissal did not result. The conduct board imposed forfeitures of pay of 10, 10, 5, and 20 days respectively, as well as ordered a transfer and participation in alcohol treatment. (In his rebuttal, the CAR pointed out that this case involved one drunken party which took place outside the workplace, and can be distinguished from the present matter on that basis.)

[159] In the case of *The Appropriate Officer "E" Division and Civilian Member R.B.*, (2009) 4 A.D. (4th) 293, the member in question made comments to subordinates to the effect that they "touched his ass". He attached a tissue box over the crotch of his pants and walked around the office; he showed a subordinate nude pictures of a woman in a PowerPoint presentation; he would use vulgar language around subordinates; he made belittling and degrading comments, frequently involving sexual innuendo; he was overheard calling a female employee from another unit a "cunt"; and he made comments about his daughter's menstrual period. The board in that case imposed a global sanction of a reprimand plus the forfeiture of ten days for misconduct over a protracted period of time which had a profound impact upon some employees.

[160] In the present matter, there were only three incidents in a relatively short period of time. The Subject Member and Mr. A continued to work together and go to lunch. The Subject Member has greatly modified his behaviour since the events in question. The MR stated that it was important to maintain perspective and to impose conduct measures short of dismissal.

[161] The MR notes the Subject Member's willingness to cooperate with all aspects of the investigations. He contested these allegations because it is his right to do so, but he readily admitted to the actions he took. He was not ordered to attend the OPS to provide a statement, he went there of his own accord, knowing what he was facing.

[162] The Subject Member's performance can only be described as stellar, which must be taken into account as a mitigating factor in assessing appropriate conduct measures.

[163] In summary, the MR contends a significant forfeiture of pay, rather than dismissal, should apply.

Decision on conduct measures

[164] There is a well-established protocol for determining the appropriate sanctions or conduct measures which all professional disciplinary tribunals must consider. First, the range of sanctions or conduct measures must be assessed. Then, the aggravating and mitigating factors must be taken into account. Applicable principles, such as the principle of parity of sanction and the principle of general and specific deterrence must be considered. Finally, a fair and just sanction which is proportionate to the misconduct at issue must be imposed.

[165] The cases provided by the Representatives make it clear: where sexual harassment or other forms of workplace misconduct are concerned, dismissal is within the range of sanctions available.

[166] It is a well-accepted principle on sanctioning professional misconduct that a consistent and sustained pattern of above-average performance can act in a person's favour. I accept the ETU is a highly specialized section whose work is extremely valuable, not only to the RCMP but to other police and military organizations, both at home and abroad. Within this elite Unit, the

Subject Member is recognized as a subject-matter expert. He brings a wealth of experience, dedication, and knowledge to the position.

[167] His performance evaluations reflect the esteem with which he is held. From the 2011-2012 period, it is written, "his expertise makes him a great asset to our unit". Under the heading "Client Centred Service Group":

> [The Subject Member] always exceeds clients' needs and expectations. He prepares and presents his [Explosive Forced Entry (EFE)] courses with optimum scrutiny. EFE is a highly skilled trade where [the Subject Member] truly excels. He always makes himself available to go the extra mile whenever the opportunity arises.

[168] Under the heading "People Skills Group":

> [The Subject Member] has developed and maintained a solid and effective network of subject matter experts willing to assist CPC in the delivery of his [...] Explosives Forced Entry Instructors courses. He has built strong and constructive working relationships and partnerships with the RCMP, [Ontario Provincial Police] and the vast majority of tactical units across the country.

[169] These glowing attributes are repeated in the following year's evaluation. In the Performance Narrative from the assessment for the years 2012-2013:

> [The Subject Member] is an important asset for ETU. His military experience gives him an immense technical and operational knowledge. He is equally comfortable in instructing on EFE courses or on any other courses given at our Unit. He is always used for any facet of a Course, that is, planning, preparation, delivery or trouble shooting. [The Subject Member] is a very resourceful individual that will take care of any issue that comes up.
>
> [The Subject Member] requires no supervision. He is very well organized and all his work is very detailed and done to perfection. I rely often on [the Subject Member] to bounce off ideas for several subjects relating to this Unit.
>
> His knowledge of EFE is at the top of the league. [The Subject Member] is always ready to help in any way, last summer, at the request of [Technical and Protective Operations Facility] he assisted in conducting Forced Entry Assessment on Correctional Facilities in Quebec. [The Subject Member] visited about 7 facilities in Quebec and submitted a report on the Police Capabilities to conduct a successful EFE Operation in the case of an event.

> The quality of the report is a reflection of [the Subject Member]'s knowledge and commitment.

[170] There is a handwritten comment from the Subject Member's Line Officer in the 2012-2013 assessment which reads "[the Subject Member] is an absolute expert in the field and is making a difference here. Keep up the excellent work ..."

[171] Another mitigating factor comes in the form of the support the Subject Member enjoys from his supervisors and peers. Inspector K. F.'s letter makes reference to the Subject Member's arrival to his unit as being "very good news for the [Chemical, Biological, Radioactive, Nuclear, and Explosives] Operations program". Reference is made to the sustained good work he performed in planning and delivering recertification programs and other related projects.

[172] Retired Lieutenant-Colonel M. L. worked alongside the Subject Member in a high-readiness unit in the Canadian Armed Forces. Again, mention is made of the Subject Member's expertise, dedication, and value to the organization. These are recurring themes. Lieutenant-Colonel M. L. recognized that "In this stressful environment, a good sense of humour is a necessity".

[173] Additional recognition of the Subject Member's stature in his field is provided by Sergeant D. W., the Coordinator for the Ontario Provincial Police Explosives Disposal Unit, a position the sergeant has held since 2005.

[174] Another mitigating factor is the Subject Member's rehabilitative potential. The letters of reference all describe an above-average ability to work with others. No incidents similar to the present contraventions have been noted. I have been given no reason to suspect that, should he be permitted to remain with the organization, any further contraventions of a similar nature would ever be committed. There is, therefore, no need to discuss specific deterrence as a principle in sanctioning this member's misconduct.

[175] There is, however, a well-documented need for general deterrence. Well before the dates encompassed by this Notice of Conduct Hearing, issues of sexual harassment in the RCMP were of foremost concern to the Commissioner, who issued a series of internal bulletins to all

employees and engaged in discussions with the media regarding a zero-tolerance policy. Conduct measures imposed for contraventions of this sort must reinforce this stance. These are serious contraventions and, as such, must be seen to merit a serious response in terms of conduct measures. General deterrence is of particular importance in this case.

[176] The aggravating factors are few, but significant. The first is the context in which these events took place. It was against the backdrop of repeated calls for a respectful workplace and for a zero- tolerance approach to workplace harassment that these incidents occurred; this must be seen to be an aggravating factor in considering appropriate conduct measures.

[177] The most serious aggravating factor is the repetitive nature of the attacks on an individual who was notoriously vulnerable to them. The witnesses made it clear that Mr. A did not really "fit in" to the unique workplace environment of the ETU, and that he had a clear aversion to being touched. If this had been a one-time event; if after the first incident the Subject Member were to have heeded Mr. A's forceful directive to never touch him again, the issue of conduct measures might be cast in a different light. As it stands, the repeated touching of Mr. A must be viewed as an aggravating factor.

[178] A final aggravating factor is the negative impact of these events upon Mr. A. The CAR made reference to the "thin-skull rule", a well-accepted principle of tort law. You take your victim as you find him: if it turns out that the recipient of the unwanted attention is unusually vulnerable, the consequences rest squarely on the shoulders of the perpetrator. While I cannot accept that Mr. A suffered post-traumatic stress disorder as a result of the Subject Member's behaviour, owing to the lack of a proper diagnosis in that regard, I find the Subject Member's actions nonetheless had a profoundly negative impact upon Mr. A. Given the impact of these attacks upon Mr. A, there is little wonder that the prospect of the Subject Member's return to the workplace was the catalyst for a formal complaint.

[179] The principle of parity of sanction, as suggested by the MR, is important in sanctioning professional misconduct. I am not bound by previously decided cases, but they can set important guidelines. This principle encourages a decision maker to impose conduct measures that are

proportionate to the misconduct at issue, taking into account similar cases, decided in similar fashion. This is a very important principle of administrative law. Without it, there would be no consistency, no stability, and no value to previously decided cases.

[180] I am mindful of the test set out by the RCMP External Review Committee (ERC) in its decision cited at ERC 2700-99-001 (D-067) for determining parity:

> The question for the arbitrator will be whether, in an individual case, the penalty represents "a departure from an established pattern of discipline", to use the term found in *Re MacMillan Bloedel Ltd. (Powell River Division)* and *C.E.P. Local 76 (Lentz)* (1997), 65 L.A.C. (4th) 240 at 249.

[181] The cases brought forward by the MR for consideration are largely characterized by the presence of Agreed Statements of Fact and by joint submissions; therefore, they have limited precedential value. I do not find the imposition of forfeitures of pay to be an "established pattern of discipline" as mentioned above. This is especially true where forfeitures of pay are imposed, rather than dismissal, as a direct result of a joint submission on sanction.

[182] Joint submissions place a hearing in a unique context. First, the decision maker knows dismissal is not being sought, and this important fact changes the tenor of the discussion completely. Second, a decision maker who receives a joint submission knows he or she is not bound by it, but also knows that great deference must be paid. Unless there are very compelling reasons to do otherwise, the decision maker must accept the joint submission.

[183] Joint submissions are invariably the result of considerable negotiation and compromise, and involve factors (both tangible and intangible) known only to the negotiating parties and not to the decision maker. They are, in a very real sense, a leap of faith. For this reason, the Saskatchewan Court of Appeal observed in the case of *Rault v The Law Society of Saskatchewan*, 2009 SKCA 81 (CanLii), "if the parties cannot expect their efforts will be respected, there is little incentive to attempt to negotiate a resolution."

[184] Therefore, I find relatively little weight can be attached to the sanctions arising out of the cases cited as *The Appropriate Officer "E" Division and Civilian Member R.B.* (2009), 4 A.D.

(4th) 293, *The Appropriate Officer Division and Constable M* (2011), 6 A.D. (4th) 250, and *The Appropriate Officer "C" Division and Constable T-L.L.*, (2014), 14 A.D. (4th) 520.

[185] The recently decided case of *The Commanding Officer, "E" Division and Constable B.C.*, 2017 RCAD 8, is similar to the present matter in that it involved a number of attacks of a sexual nature. Although not occurring in the workplace, these acts were perpetrated upon co-workers at a private party. In that matter, a heavy forfeiture of pay was imposed rather than dismissal. I agree with the CAR, though, that the primary distinguishing feature of this particular case is that it involved the transgressions of a drunken party-goer, vis-à-vis a number of unfortunate recipients of his attentions, in the course of one wild evening. These facts are easily distinguished from the present situation, involving as it does a series of repeated incidents directed at the same person.

[186] Dismissal is a last resort in sanctioning professional misconduct, and must be reserved for the most egregious of cases. Professor Ferguson, in an RCMP ERC Discussion Paper, cited simply as "ERC Discussion Paper Number 8", had occasion to review the unique nature of dismissal as a form of sanction. At pages 48 and 49:

> The main purpose of police discipline is to assist a police force to achieve its organizational objective of delivering effective and efficient police services to the community, keeping in mind that any disciplinary sanction imposed must be fair and just in the circumstances. Disciplinary objective can be best achieved by reliance on a system of positive, progressive discipline aimed at correcting deviant behaviour and remedying organizational or administrative practices which may have contributed to the misconduct. Recognition that correction and remedy are the first purposes of discipline is also a recognition of the current managerial theory that employees are the most valuable resource of an organization. Punitive sanctions are neither in an employer's nor an employee's best interests. Dismissal normally represents a loss of a valuable, experienced employee and involves the cost of recruiting and training a new employee. Thus correction is to be preferred.

[187] Similarly, in the Ontario Court of Appeal case of *Trumbley v. Metropolitan Toronto Police* (1986), 55 O.R. (2d) 570; 29 D.L.R. (4th) 577, the Court held:

> The basic object in dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or, possibly to extract some form of modern retribution) but rather, to rid the employer of an employee who has shown that he or she is not fit to remain an employee.

[188] One of the most frequently cited cases in labour law, where dismissal is being considered, is *Ennis v. The Canadian Imperial Bank of Commerce*, [1986] BCJ 1742. In this case, it is stated:

> Real misconduct or incompetence must be demonstrated. The employee's conduct, and the character it reveals, must be such as to undermine or seriously impair the essential trust and confidence the employer is entitled to place in an employee in the circumstances of their particular relationship. The employee's behavio[u]r must show that he is repudiating the contract of employment or one of its essential ingredients.

[189] The core values of the Force are part of the contract of employment. These core values include professionalism, compassion and respect, all of which have all been violated in some way by the Subject Member's outrageous behaviour towards Mr. A on three separate occasions.

[190] Sexual harassment in the workplace has long been a plague upon the Force. The following was contained in a Commissioner's Broadcast, issued to all employees, dated July 4, 2003, 15 years ago and a full decade before the events which gave rise to the present Notice of Conduct Hearing:

> I am writing to you today about what I believe is one of the more important and challenging issues that we face inside the RCMP. I have observed a troubling gap between the policies and the commitments we have made to ensure that our workplace is free of harassment and the day-to-day experiences of some of our employees. I have been made aware of instances where harassment, including sexual misconduct, have occurred. Of greater concern have been the reports that I have received describing the response to some of these situations.
>
> As Commissioner, my commitment has been to make the RCMP an organization where employees can work in a safe, harassment-free environment.
>
> This means that harassment and sexual misconduct will not be tolerated in this organization. Every employee has a role to play in making sure that their behaviour is exemplary in this regard, and my expectation is that managers will act quickly, judiciously and decisively when allegations of harassment of any kind are brought to their attention.

> It is now time for us to give sober thought to the difficult and potentially destructive issue of harassment in our work environment. We have some serious questions to consider. How can we, publicly acknowledge as among the best that Canadian society has to offer, internally fall short of the goals and objectives that we meet every day as we respond to such scenarios in our policing capacity? How can an organization that expresses values of integrity, transparency, compassion, equity and excellence fail to assure each and every employee the utmost in respect and responsiveness?
>
> I know that no lecture from the Commissioner's office, no new policy, no threat of disciplinary repercussions, will ensure adherence to individual and organizational values. Values are lived on a day-to-day basis. They exist in each one of us. When we come together, the way we work and operate in a values-based environment results in the whole being greater than the sum of its parts. In engaging in constructive dialogue and discussion on an issue that is central to our fundamental values, we will find better ways to demonstrate our values, to live by them and to achieve the goals we have set for ourselves over the past three years. The end result will be an improvement to our internal systems, solidification of our organization as an employer of choice, improved management capacity and a greater collective ability to serve Canada.
>
> I think of the RCMP as a secure and solid house, the foundation of which is the people we serve and the employees who have collectively worked for more than 130 years to build it. Our work is a stellar example of the spirit of public service. We share an abiding love of our country, an unshak[e]able belief in the right of citizens and our employees to be secure and treated with dignity.
>
> If our employees cannot expect the same level of security, the same dignity and unequivocal protection from harm as those we serve, will we not shake the foundations of our house? In the end, will we fail to achieve our goals?
>
> No one associated with the RCMP can be excluded from this protection. No one can be relieved of the responsibility to contribute to the vision of our work as a sacred trust. I have made a personal commitment that the RCMP will continue this tradition of trust and security. I expect nothing less than the same level of commitment from each and every employee of this organization.

[191] This message has been reinforced by every Commissioner who has taken office since. It would do the reputation of the Force irreparable damage should an employee be retained under the present circumstances, as it would undermine every message that has ever been issued about the paramountcy of a safe and respectful workplace.

[192] There is no doubt that the Subject Member is a highly regarded and valued employee, a subject-matter expert in an area of vital importance to the organization and to the country. There is no indication that this misconduct would ever be repeated. These are compelling reasons to retain him as a member of the organization, but some hurdles are simply too high to clear. The gravity of the misconduct in this case, combined with the aggravating factors, outweighs the set of mitigating factors, as powerful as they are.

[193] On Friday, May 25, 2018, I expressed my regret that it was my solemn duty to dismiss the Subject Member from the Force, effective immediately, with written reasons to follow. This decision comprises my written reasons.

[194] This decision is subject to appeal, as per the provisions of the *RCMP Act*.

	July 12, 2018
James R. Knopp, Inspector	Ottawa, Ontario

Conduct Board