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2018 RCAD 11

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

a conduct hearing pursuant to the

ROYAL CANADIAN MOUNTED POLICE ACT

BETWEEN:

Commanding Officer, "K" Division

Conduct Authority

and

Corporal Mark Potts, Regimental Number 45452

Subject Member

Conduct Board Decision

John A. McKinlay

August 16, 2018

Staff Sergeant Jonathan Hart (CAR), for the Conduct Authority

Staff Sergeant Colin Miller (MR 2), for the Subject Member

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SUMMARY

[This Summary forms no part of the written decision]

The Subject Member escorted an intoxicated, handcuffed prisoner to the rear door of a police vehicle; while on the back seat, the prisoner kicked at and spat directly in the face of the Subject Member. The Subject Member entered the rear of the police vehicle and punched the prisoner a number of times, including about the head. Immediately after the prisoner spat on the Subject Member, another member pulled the prisoner further into the back seat through the other rear door, and punched the prisoner once on the head before quickly closing the door.

After the Subject Member exited the back seat, a scalp laceration on the prisoner that later required 4 stitches became apparent. The other member, in whose vehicle the prisoner was to be transported to cells, first drove the prisoner to a medical facility for treatment. The Subject Member spoke with the other member's supervisor, who was in attendance while the prisoner received medical attention. The Subject Member indicated that, after he was assaulted by the prisoner, he had retaliated. However, he did not provide the supervisor with a full account.

The Subject Member also completed a PROS Summary for the initial call that involved the intoxicated prisoner alarming a resident by seeking access to her dwelling mistakenly believing it was the location where he was permitted to stay. The PROS Summary made no mention of the use of force upon the prisoner.

The Subject Member made handwritten police notes that were incomplete concerning his interaction with the prisoner in the police vehicle, which left the impression that force was required to extricate himself from the prisoner's grasp.

The Subject Member admitted to both Code of Conduct contraventions for using more force than reasonably necessary and for failing to provide a complete and accurate account of the performance of his duties.

The Conduct Board could not determine the likely cause of the scalp laceration suffered by the prisoner. The Crown had earlier accepted a guilty plea for a common assault, resulting in a conditional discharge with probation and other conditions.

The Conduct Board determined that loss of employment was not a proportionate conduct measure, but it ordered the forfeiture of twenty-five days of pay for the prisoner assault, and twenty days of pay for the Subject Member's failure to provide a full account of his actions while interacting with the prisoner inside the police vehicle.

REASONS FOR DECISION

INTRODUCTION

[1] In the still dark early morning of April 15, 2016, the Subject Member entered the back seat of a police vehicle, and repeatedly struck with his fists a handcuffed, intoxicated individual, Mr. [W.], who had just spit in the Subject Member's face and kicked at him with both feet.

[2] Earlier that night, Mr. [W.] had been arrested by the Subject Member in Manning, Alberta, due to his level of intoxication and the disturbance he caused after seeking to gain entry into a private residence. Mr. [W.] claimed he was welcome to stay at this residence while doing out-of- town construction work in Manning. Before Mr. [W.]'s behaviour deteriorated and he was arrested, the Subject Member had spent considerable time with Mr. [W.] assisting him in trying to locate the correct private residence.

[3] The cells at the Manning Detachment lacked an on-duty guard that night; therefore, the Subject Member made arrangements to meet up at an appropriate location on the highway with another member, Constable (Cst.) B.G., so that Cst. B.G. could transport Mr. [W.] to the nearby Peace River Detachment. Mr. [W.] could be lodged there in a monitored cell until he was sober and released.

[4] It was after Mr. [W.] was seated in the rear of the Tahoe police vehicle operated by Cst. B.G. that the Subject Member struck Mr. [W.]. This event was recorded by an in-vehicle video camera, which was activated when Cst. B.G. parked the Tahoe on the shoulder of the roadway and, for safety reasons, activated the Tahoe's flashing roof lights to enhance its visibility.

[5] Both Cst. B.G. and the Subject Member struck Mr. [W.], although the single punch to the head delivered by Cst. B.G., described by him as a diversionary tactic, was applied while Cst. B.G. was pulling Mr. [W.] further into the Tahoe after Mr. [W.] spat on the Subject Member who was standing outside the opposite rear door. When the punches by the Subject Member ended, Mr. [W.] was clearly bleeding from a laceration on his scalp, above his forehead, which required four stitches.

[6] The Subject Member entered an account of the initial call for service received from the terrified homeowner at the residence first approached by Mr. [W.], but his PROS Summary entry made no mention of any force applied to Mr. [W.].

[7] The Subject Member also spoke briefly by telephone with Corporal (Cpl.) B.N., the supervisor who had joined Cst. B.G. at the medical facility where Mr. [W.] was immediately driven by Cst. B.G. to receive treatment for the scalp laceration. This conversation did cover the fact that the Subject Member had, in effect, retaliated after being spat on and, in so many words, the Subject Member indicated that he was not inclined to charge Mr. [W.] with assault. The Subject Member did create a PROS file for an assault on a police officer, listing himself as the victim, but no charge against Mr. [W.] was initiated.

[8] The Subject Member made fairly extensive handwritten notes of his interaction with Mr. [W.]. In the absence of the videotape of the event, his notes left the impression that the use of force was incidental to Mr. [W.] grabbing at the Subject Member while he was being placed in the police vehicle, and was required for the Subject Member to extricate himself.

[9] When the video recording was reviewed by the Subject Member's superiors, criminal and internal conduct investigations were initiated. The Subject Member remained on full operational duties until he was suspended with pay on October 18, 2016.

NOTICE OF CONDUCT HEARING

[10] On February 3, 2017, I was appointed the Conduct Board to adjudicate the Code of Conduct allegations against the Subject Member. On February 28, 2017, the Subject Member was served with the Notice of Conduct Hearing, and related investigative materials. On March 10, 2017, I received the Notice of Conduct Hearing and materials.

[11] The Notice of Conduct Hearing, dated February 15, 2017, identifies two allegations of misconduct by the Subject Member:

Allegation 1

On or about April 15th, 2016, at or near the Hamlet of Dixonville on Alberta Provincial Highway No. 35 in the Province of Alberta, [the Subject Member] used more force than was reasonably necessary in the circumstances, contrary to section 5.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") and working an overtime shift at the Manning RCMP Detachment in "K" Division in Alberta.

2. At all material times, you were on-duty and the arresting officer with respect to Police Reporting Occurrence System file 2016-440449. You lawfully arrested [Mr. W.] […] and secured him into your police vehicle. You later made arrangements to meet up with Peace River RCMP [Cst. B.G.] […] for a prisoner exchange, so that [Mr. W.] could be lodged overnight in Peace River RCMP Detachment cells.

3. While transferring [Mr. W.] from your police vehicle (5B18) to [Cst. B.G.]'s police vehicle (5A25) a struggle ensued between yourself and [Mr. W.]. The level of force you subsequently used to control [Mr. W.] - who was handcuffed in the front - was both excessive and unnecessary. The In-Car Video System installed in 5A25, a marked Chevy Tahoe, recorded your use of excessive and unnecessary force on [Mr. W.].

4. After [Mr. W.] was placed in the back seat of 5A25 he spat on you. You responded by physically assaulting [Mr. W.] with repeated blows to the head area of [Mr. W.]. You caused visible bodily injury to the head area of [Mr. W.] resulting in noticeable bleeding. You made no attempt to secure medical assistance for [Mr. W.]. [Mr. W.] was subsequently transported to the Peace River hospital by [Cst. B.G.] and received medical attention for his injuries.

5. You were subsequently charged criminally with Assault Causing Bodily Harm pursuant to section 267(b) of the *Criminal Code of Canada.*

Allegation 2

On or between April 15th, 2016, and April 20th, 2016, at or near Manning and Peace River in the Province of Alberta, [the Subject Member] failed to provide a complete and accurate account pertaining to the carrying out of his responsibilities, the performance of his duties and the conduct of his investigations, contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*

Particulars of the contravention:

> 1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") and working an overtime shift at the Manning RCMP Detachment in "K" Division in Alberta.
>
> 2. At all material times, you were on-duty and the arresting officer with respect to Police Reporting Occurrence System ("PROS") file 2016-440449. You lawfully arrested [Mr. W.] […] and secured him into your police vehicle. You later made arrangements to meet up with Peace River RCMP [Cst. B.G.] […] for a prisoner exchange, so that [Mr. W.] could be lodged overnight in Peace River RCMP Detachment cells.
>
> 3. While transferring [Mr. W.] from your police vehicle (5B18) to [Cst. B.G.]'s police vehicle (5A25) a struggle ensued between yourself and [Mr. W.]. After [Mr. W.] was placed in the back seat of 5A25 he spat on you and you responded by striking [Mr. W.] in the head area causing him injuries. You made no attempt to secure medical assistance for [Mr. W.]. The In-Car Video System installed in 5A25, a marked Chevy Tahoe, recorded your actions in the back seat of the police vehicle. [Mr. W.] was subsequently transported to the Peace River hospital by [Cst. B.G.] and received medical attention for his injuries.
>
> 4. You failed to provide a complete and accurate account pertaining to the circumstances surrounding what occurred between yourself and [Mr. W.] in the back seat of 5A25. Your police notes purposefully downplayed your own actions and improperly suggest that you were justified in your use of force as [Mr. W.] was grabbing onto you and refusing to let you go.
>
> 5. You concluded PROS file 2016-440449 with only the limited details contained in the occurrence summary. This is not a complete and accurate account of what occurred. Moreover, your description by phone of the incident to [Cpl. B.N.] was not a fulsome account of what had actually taken place.
>
> 6. While you did not criminally charge [Mr. W.] with assault on a police officer, an assault on police officer PROS file 2016-442671 was opened, listing yourself as the victim.
>
> 7. You failed to accurately report your actions and the conduct of your investigation to your supervisor.
>
> [*Sic throughout*]

[12] On March 22, 2017, the first Member Representative (MR 1) representing the Subject Member requested an extension to April 28, 2017, to file the responses identified under subsection 15(3) and section 18 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*] (the Written Responses). This extension was granted.

[13] On March 29, 2017, the Conduct Authority Representative (CAR) filed an extensive list of proposed witnesses. It was suggested that the Conduct Board hear testimony from Mr. [W.], Cst. B.G., Cpl. B.N., and other RCMP members.

[14] On April 24, 2017, the MR 1 filed a further extension request, seeking to file the Written Responses on May 29, 2017. This extension was granted, but with the Conduct Board noting, in part:

> Extensions are ordinarily given when unanticipated developments arise, a compelling issue of fairness has arisen, and/or any prejudice resulting from the extension to the parties or to the adjudicative system is outweighed by other interests. […] Any further extension in this matter is unlikely.

MR request for information production order

[15] On May 25, 2017, the MR 1 filed with the Conduct Board a "supplementary disclosure request" that she had provided to the CAR on May 23, 2017. The CAR was not prepared to provide any of the information and materials identified by the MR 1 of his own initiative, indicating in part:

> Under the new [*Royal Canadian Mounted Police Act, 1988*, SOR/88-361 [*RCMP Act*]] regime I have received instructions from our Director that "any" future disclosure request made by MR counsel […] will NOT be addressed by CAR counsel alone but rather must include the Conduct Board to assess matters such as relevancy of the additional disclosure request.

[16] The Conduct Board summarily ordered the CAR to provide the MR and the Conduct Board with a copy of the Subject Member's requested employee profile printout, a two-page document listing his postings and training history. Consideration of the MR's other requests for information would await the filing of the Subject Member's Written Responses under the *CSO (Conduct)*.

[17] On May 29, 2017, at 11:38 p.m., the MR 1 filed the Subject Member's Written Responses, including a list of proposed witnesses. The Subject Member admitted his contravention of the Code of Conduct provisions identified in the two allegations in the Notice of Conduct Hearing, but he took issue with the purported duplicitous and unclear wording that

appeared in some particulars. This filing was closely followed by a further email, in which the MR 1 stated in part:

> […]
>
> After reviewing the member's response, I suggest that you let me know the list of the disclosure that you are ready to order at this point without further submissions from the Member and that for the remaining items, that I be authorized to make a disclosure motion containing submissions to explain the relevancy.
>
> In every system that I was used to practise in before, defence's lawyer or member's representative will send a disclosure request to the prosecutor, the prosecutor will take position whether he will disclose or not the items and defence will make a motion for disclosure to the Judge or the Board only for the remaining elements if he still feels necessary with the grounds. In the present case, the Conduct Authority Representative takes the position that disclosure is controlled by the Board and that my disclosure request has to be sent directly to the Board.
>
> Having to submit detailed explanations for every items [*sic*] contained in a disclosure request even the ones that are obviously relevant is very onerous and time-consuming.
>
> […]

[18] On May 30, 2017, the CAR responded, questioning the weight to be given the "version of the facts" filed on May 29, 2018 (under only the MR 1's signature), in particular where the MR 1 purported to reserve her decision to call the Subject Member to testify until all evidence-in-chief was before the Conduct Board. On May 31, 2017, the MR 1 advised that she would be on medical leave until June 12, 2017, and would reply after her return.

[19] On June 21, 2017, the Conduct Board emailed both representatives and commented briefly on the issue of whether aspects of the MR 1's filing under subsection 15(3) of the *CSO (Conduct)* were "more submissions than evidence". The Conduct Board also noted that a conduct board is granted the authority to order production of documents and information; and so, this language would be used going forward, and not the term "disclosure" if possible.

[20] The MR 1 was directed to provide, by 12:00 noon in Ottawa, on June 29, 2017, her submissions of not more than five pages supporting the ordered production of the requested items. The CAR's response was then due at 12:00 noon, on July 4, 2017. To assist the parties,

the Conduct Board provided them with a copy of the recently updated *Conduct Board Guide*, received by the directors of their respective units on June 16, 2017, and quoted sections 17.4 and 17.5 regarding the ordered production of information that is "material and necessary to resolving an outstanding issue in the conduct proceeding".

[21] On the day that the MR 1's submission was due, June 29, 2017, she sought permission to file a twenty-page submission and a filing extension to June 30, 2017. The Conduct Board granted permission for a ten-page submission, still to be filed on June 29, 2017, but at 5:00 p.m. in Ottawa. Comparable terms were afforded the CAR for his submission, and a filing date of July 6 was set, given that the CAR was unexpectedly assigned to operational duties related to Canada Day.

[22] Four hours before her submission was due on June 29, 2017, the MR 1 filed the following communication with the Conduct Board:

> The delay that you granted me until 17:00 today being insufficient to allow the Member to produce meaningful submission and the CAR being deployed to active duty for Canada Day festivities effective tomorrow, I respectfully submit that it would not be problematic to allow me until tomorrow June 30, 2017 at 16:00 to produce our submissions. Given the situation, I am respectfully asking that you reconsider your position.

[23] The Conduct Board responded to the MR 1's request, as follows:

> You have had from June 21 to seek a filing extension, and permission to file a lengthier submission.
>
> You only sought them this morning.
>
> It may not be your view, but a period from June 21 until today is a reasonable period for preparation of your submissions which, after all, pertain to requests for materials that you identified to the CAR on May 23, 2017. I do not accept that a filing time of 5 pm Ottawa today has denied the Subject Member the opportunity to file meaningful submissions.
>
> Your reference to [the CAR's] unexpected operational deployment tomorrow, as a basis for reconsideration of your filing date, overlooks that even adjudicators organize their work according to events in a schedule. My receipt of your submissions at 5 pm Halifax tomorrow is not satisfactory.

> I view [the CAR's] absence from CAR work tomorrow as unexpected and beyond his control (see the reasons of Justice Reed in *Chin v. Canada (Minister of Employment and Immigration)*, Federal Court of Canada, October 8, 1993, attached). Given this fact, and that he will now be responding to an MR submission of 10 pages, his extension to July 6 at 5 pm Ottawa was granted.
>
> I decline to reconsider my position.

[24] The representatives' submissions on the MR 1's request for the ordered production were then received on June 29, 2017, and July 6, 2017, respectively.

[25] On July 7, 2017, the Conduct Board permitted the MR 1 to file a rebuttal of five pages by July 11, 2017, given that the CAR had cited further authorities and raised new arguments. The MR 1 responded, identifying work obligations on other files, and seeking a rebuttal filing date of July 25, 2017. The Conduct Board received submissions from the CAR identifying his ongoing workload but taking no position on the MR 1's requested filing date, which was followed by a further email by the MR 1.

[26] The Conduct Board responded on the subject of the MR 1's rebuttal filing date as follows:

> I have considered each of your representations concerning workload and filing extensions.
>
> Earlier this morning, I set July 11 for receipt of [the MR 1's] rebuttal.
>
> In light of [the MR 1's] representations, I now set a new filing deadline: **5 pm Ottawa on Tuesday, July 18, 2017, 5 pages.**
>
> This falls in the week after [the MR 1's] hearing (July 12-14) and in the week before her "old Act" appeal response is due (July 24).
>
> Except for extraordinary, unexpected circumstances, I do not contemplate any further extension being granted.
>
> […]
>
> [Emphasis in original]

Decision on MR request for the production order

[27] The MR 1's rebuttal submission was transmitted on July 18, 2017. The Conduct Board issued its decision on the ordered production on July 19, 2017:

[…]

2. I have reviewed the law concerning procedural fairness and disclosure, as described in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817*, Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, *May v. Ferndale*, [2005] 3 S.C.R. 809, and *Sheriff v. Attorney General of Canada*, 2006 FCA 139. I confirm I am not legally bound by the *Khan* adjudication board decision, nor by any commentary in my [G.] ruling, nor by the terms of the recently revised Conduct Board Guidebook.

3. Except with respect to items under sub-headings 5 and 6 below, I do not order production of the information/documentation requested by the MR. Applying the standard of relevance, and of necessity and materiality, there is insufficient reason to order production of most of the materials identified by the MR.

4. Unlike a criminal court, or an RCMP adjudication board, or even the bankruptcy trustee disciplinary analyst in *Sheriff*, I have the ability to assess the utility of the requested information against the backdrop of the entire investigative report materials, and, importantly, the responses of the Subject Member made under section 15(3) of the *CSO (Conduct).*

1- Ms. [T.K.''s calls and [the Subject Member]'s exchanges with Dispatch

5. The MR seeks the audio-recordings for all of Ms. [T.K.]'s phone calls to the RCMP on April 15, 2016, regarding this matter, and all of [Subject Member]'s exchanges with Dispatch or the operator regarding this call.

6. Based on what I consider the formal confirmation provided in the CAR's submissions, the only misconduct alleged under Allegation #1 relates to the Subject Member's striking of the Mr. [W.] inside the Tahoe police vehicle. The Subject Member's interaction with Mr. [W.] at any time before Mr. [W.] is struck inside the Tahoe is not relevant and does not give rise to any allegation of misconduct. Therefore, the requested audio-recordings are not relevant, nor material and necessary, to the Subject Member's answer to the allegation. It is conceded by the Conduct Authority, and confirmed in the Particulars for Allegation #1, that Mr. [W.] spitting on the Subject Member precipitated the Subject Member's striking of Mr. [W.] inside the Tahoe. Mr. [W.'s] credibility concerning his interaction with the Subject Member before Mr. [W.] was placed in the Tahoe police vehicle is not in issue. Given that the Subject Member's striking of Mr. [W.] is captured on video, I do not anticipate it is necessary for Mr. [W.] to testify on any other aspect (such as the cause of his scalp laceration) given his degree of intoxication and unreliable recollection of events. Mr. [W.'s] uncooperative attitude, behavior and degree of intoxication are therefore not in issue in this matter and do not warrant production of the requested recordings.

2 - Calling Card

7. I will not spend a great deal of time on this item. The acts and omissions of the Subject Member once Mr. [W.] was placed in the Tahoe police vehicle begin the timeline of relevant events. The precise times of Ms. [T.K.]'s calls to RCMP on April 15, 2016, do not relate to the period under examination, and are simply not relevant to the Subject Member's ability to answer to the allegations.

3 - Cell block video

8. I decline to order production of any cells area video recording covering the time period that Mr. [W.] was booked in, lodged in cells, and released after his arrest of April 15, 2017. As I indicate above, there is no need to test Mr. [W.'s] credibility, and the Tahoe video captures the Subject Member's admitted use of excessive force upon Mr. [W.] in the Tahoe police vehicle, rendering irrelevant Mr. [W.'s] attitude, behaviour, and degree of intoxication. His behaviour while handcuffed inside the Tahoe is nevertheless captured in the video. No misconduct is alleged before Mr. [W.] is placed in the Tahoe police vehicle, and mention at pages 7 and 8 of [Cst. B.G.]'s statement of April 29, 2016, of Mr. [W.]'s "reluctance to be touched" is not relevant to the Subject Member's acts and omissions as captured in the video of the Tahoe Police vehicle. The cells video is equally irrelevant to the interaction mentioned by the Subject Member at pages 14 and 15 of his response, concerning Mr. [W.]'s reaction when the Subject Member took hold of his arm. There is well positioned colour photography taken of Mr. [W.], indicating the location of his scalp laceration, at the time he received medical treatment later on the night of April 15, 2016. Accordingly, there is no merit whatsoever in the argument that production of the cells video is justified because "it will allow us to see if Mr. [W.]'s bodily injury was still visible at that time." This argument appears to lack all common sense.

4 - PROS check

9. The MR requests an order for production of all queries conducted by the Subject Member on PROS concerning Mr. [W.] on April 15, 2016 and the results obtained. I decline to make such an order, as I do not consider Particular 6 of Allegation #2 to constitute an act or omission that is relied upon for a finding of misconduct. It is part of the narrative, not part of the allegation of misconduct to which the Subject Member must respond. I do not find that the requested information is relevant to any decision of the Subject Member that is alleged to be a decision that attracts a finding of misconduct. The Subject Member's awareness of matters concerning Mr.

> [W.], potentially gleaned from a PROS check conducted by the Subject Member on April 15, 2016, does not relate to what he subsequently verbally told, or did not tell, any supervisor concerning his use of excessive force upon Mr. [W.] in the Tahoe police vehicle. His failure to fully document his interaction with Mr. [W.] does not make any PROS entries for Mr. [W.] relevant or necessary.
>
> **5 – [Staff Sergeant (S/Sgt) M.]**
>
> 10. I confirm that Allegation #2, Particular 7 alleges the Subject Member failed to accurately report his actions and the conduct of his investigation to his supervisor. It is apparent from the materials contained in the internal investigation report that on the night of April 15, 2016, the Subject Member's supervisor was [Cpl. B.N.]. I would have expected the Subject Member's representative to first seek clarification from the CAR concerning the identity of the supervisor, before using any perceived lack of precision as a basis for broad requests for ordered production.

11. It is not in dispute that on April 29, 2016, after the period covered by Allegation #2, the Subject Member had a telephone conversation with his [Non-Commissioned Officer (NCO)], S/Sgt [M.], during which the Subject Member took responsibility regarding the excessive use of force on Mr. [W.]. For the purpose of any evidence to be relied upon by the Subject Member for any conduct measures phase, S/Sgt [M.]'s letter dated May 28, 2016 corroborates the Subject Member's version, stating: "[The Subject Member] was remorseful, contrite and apologetic. [The Subject Member] was travelling with [Cst. M.S.] and I asked that she take care of [the Subject Member]."

> **ORDER**: I direct the MR, […], to immediately contact S/Sgt [M.], and ask whether he possesses any documentation that provides a contemporary account or summary of his conversation with [the Subject Member] on or around April 29, 2016, where [the Subject Member] was remorseful, contrite and apologetic. If he does, I direct S/Sgt [M.] to file any such documentation with the Conduct Board [redacted email address], and provide copies to the MR [redacted email address] and CAR [redacted email address], within 14 days of being contacted by the MR. If S/Sgt [M.] has no such documentation, he shall advise of same within 14 days. The use of the RCMP Groupwise email system, and scanned documents, is satisfactory in order to comply with this Order.
>
> **6 – Cpl. [B.N.]**

12. The Subject Member is alleged to have failed to give a "fulsome account" of his interaction with Mr. [W.] in a telephone conversation with Cpl. [B.N.] on April 15, 2017.

ORDER: I direct the CAR, […] (noted to now be on leave until approx. August 14, 2017), to immediately contact Cpl. [B.N.], and ask whether he possesses any documentation that captures his telephone discussion with [the Subject Member] on April 15, 2016, concerning matters related to Mr. [W.]. If he does, I direct Cpl. [B.N.] to file any such documentation with the Conduct Board [redacted email address], and provide copies to the MR [redacted email address] and CAR [redacted email address], within 14 days of being contacted by the CAR. If Cpl. [B.N.] has no such documentation, he shall advise of same within 14 days. The use of the RCMP Groupwise email system, and scanned documents, is satisfactory in order to comply with this Order.

7 – Cst. [B.G.]

13. The MR confirms that Cst. [B.G.]'s notes for April 14 and 15, 2016, have been provided by the Conduct Authority. I see no other notes as relevant or necessary given the commission period for Allegation #1, and given Cst. [B.G.] himself suggests it is possible he may have caused the scalp laceration of Mr. [W.] when he struck him once on the top of the head, or when he closed the right rear door of the Tahoe police vehicle.

8 - Mr. [W.]'s criminal record

14. For the reasons provided above, I do not anticipate Mr. [W.] being approved as a necessary witness in this matter. The video capturing the Subject Member's application of force upon Mr. [W.] removes any need to question Mr. [W.]'s credibility, and this matter is not a contest between the Subject Member and Mr. [W.]'s competing versions of events. Therefore, even assuming I have the authority to order production of the requested adult and youth criminal records concerning Mr. [W.] rather than the records being ordered disclosed under a judicial order, I decline to do so.

9 - Reports regarding Mr. [W.] (PROS or other)

15. For the same reasons outlined above, Mr. [W.]'s credibility is not in issue in this matter, and I decline to order production of any PROS reports, other reports, or handwritten notes of the named RCMP members that relate to Mr. [W.].

10 - Briefing Notes and other documents

16. It is established that the Subject Member was not suspended from duty from April 15, 2016, until October 18, 2016. This fact is sufficient for the MR to argue it is a mitigating factor, and no other documentation from the Conduct Authority adds to this established point.

> **11- Other investigation and decision**
>
> 17. The only witnesses to how Cst. [B.G.]'s head punch, or the Tahoe police vehicle's right rear door, may have caused Mr. [W.]'s scalp laceration are Cst. [B.G.], Mr. [W.] and the Subject Member. It is apparent that due to his level of intoxication at the time, Mr [W.]'s recollection of events in the Tahoe is not reliable. I consider Cst. [B.G.] a potentially necessary witness on the issue of the causation of the scalp laceration. I will entertain submissions on the need for cross-examination of Cst. [B.G.], a witness who has offered a possible explanation for the scalp laceration that does not involve the Subject Member. I decline to order production of any of the materials the MR posits may exist for Cst. [B.G.], as (without prejudging any objection that might be raised) relevant information concerning Cst. [B.G.]'s actions at the Tahoe police vehicle that night may be pursued during his testimony under oath. What Cst. [B.G.] did or didn't do during his interaction with Mr. [W.] does not change the fact that the Tahoe video captures the Subject Member's subsequent use of force upon Mr. [W.], at the end of which blood appears (coming from above the hairline onto the forehead and face of Mr. [W.]) that was not visible before the Subject Member's use of force.
>
> **13 - Criminal and internal investigation files**
>
> 18. For the reasons provided above, I decline to order production of the requested files.
>
> [*Sic throughout*]

[28] The MR 1 filed the response of S/Sgt. M. on July 26, 2017, and the CAR filed the response of Cpl. B.N. on August 18, 2017.

[29] On August 24, 2017, the CAR advised of the outcome of the Subject Member's parallel criminal matter, attaching his Probation Order. The Crown accepted the Subject Member's guilty plea to a charge of simple assault, with Crown counsel stating the videotape and other evidence did not establish the cause of Mr. [W.]'s scalp laceration with certainty. On August 22, 2017, the Subject Member was convicted of assault, and placed on 18 months' probation with conditions.

[30] On October 3, 2017, the Conduct Board proposed a pre-hearing conference (PHC) on November 3, 2017, by which time any expert report was to be filed. The Conduct Board set a hearing date of December 11 and 12, 2017, subject to any submissions opposing the date. The Conduct Board indicated that testimony from Cst. B.G. on the cause of the scalp laceration appeared necessary, and submissions were invited concerning the necessity of testimony by Cpl.

B.N. The MR 1 responded, advising that she was not available on November 3, but offering numerous other dates in late October and early November 2017.

[31] The MR 1 advised that the Subject Member "will have two experts witnesses during the allegation phase of the hearing and one during the sanction phase", but took the position that the expert's report on the proportionate sanction should only be disclosed to the Board, if necessary, after the Board's determinations on the establishment of the allegations. The MR 1 objected to the disclosure of the Subject Member's expert report "on sanction" to the Board "before the hearing on sanction". She also identified clarification that she had sought from the CAR on September 21, 2017, concerning certain particulars for Allegation 2, and indicated that she had started to draft a "motion for particulars".

[32] On October 4, 2017, the Conduct Board addressed the filing of expert reports, and expert qualifications, as follows:

> My direction that any expert reports (with CVs) be submitted by November 3, 2017 stands.

Under CSO (Conduct), section 19(1): "Any party who intends to use an expert report must, at least 30 days before the hearing, submit it to the conduct board and serve it on the other party". Accordingly, reports shall be submitted to not only the opposite party but to me as Conduct Board. Section 19(1) does not differentiate between reports related to the allegation phase, and the conduct measures phase. The MR's objection is denied.

> It is only with my receipt of expert reports that I can determine if testimony from the writers is necessary, and the scope of that testimony. These determinations may then impact the ultimate mode, duration and site of any "live" hearing. The information and opinions contained in an expert report related to the conduct measures phase is excluded from consideration until that phase.
>
> [*Sic throughout*]

[33] With respect to any motion by the MR 1 for better particulars, the Conduct Board set the MR 1 a filing date of October 11, a CAR response date of October 18, and a limit of five pages for each submission. A PHC on November 6, 2017, was also set. The Conduct Board sought confirmation of the proposed hearing date of December 11 and 12, 2017. The CAR responded

that he was involved in an unrelated hearing the week of October 16, 2017; therefore, he sought until October 25, 2017, to respond to the motion for better particulars. He also advised that the Conduct Authority anticipated receiving a "use of force" expert report from the MR 1 and, subject to the content of such a report, the CAR might seek to adduce a contrary report.

[34] On October 4, 2017, the MR 1 advised that she was not available on December 11 and 12, 2017, but she would offer earlier alternative dates once she had confirmed the availability of her experts. She also advised that she would file her motion on October 5, 2017 (earlier than the October 11, 2017, date set by the Conduct Board), allowing the CAR to file his response earlier. She also sought permission to file submissions that were not five but nine pages in length. The CAR responded: "I am prepared to work this weekend to respond to a Motion but it is my position that the parties be held to the five pages […] as also stated in the Conduct Board Guidebook."

[35] The Conduct Board replied on October 4, 2017, as follows:

1. Provided it is filed tomorrow, the MR's motion may be not more than 10 pages in length.

2. Any response to the motion filed by the CAR may be not more than 10 pages in length.

3. After I read the MR's motion, I will consider an appropriate filing date for the CAR's response.

4. I direct MR and CAR to identify a suitable hearing date given your own availability and that of contemplated experts, as [the MR 1] has now indicated she is not available on Dec. 11-12, 2017.

5. I have noted the CAR's suggestion that Edmonton is preferable to Peace River. The selection of a hearing site will no doubt be affected by a number of the items now being mentioned in email correspondence below. Site selection still to be determined.

6. PHC #1 is now set for Nov. 6, 2017, at 9 am Ottawa time.

7. MR to file all expert reports by Nov. 3, 2017, or sooner if they are now received by the MR. The necessity of any CAR "counter-expert" report on use of force can be assessed once the MR-side report is reviewed.

MR motion for particulars

[36] The MR 1 filed her formal "Notice of Motion for Particulars" with appendices on October 5, 2017. The CAR replied, indicating that he could provide his response in a "rather short reply" and seeking the Conduct Board's agreement that a less formal email submission could be filed. The Conduct Board indicated an email not exceeding ten pages was satisfactory, and requested the CAR provide answers to specific questions formulated by the Conduct Board after review of the motion.

[37] The CAR's response on the motion, including his answers to the Conduct Board's questions, was made on October 5, 2017. The most salient aspects of the response may be summarized as follows:

- CAR is unable to properly respond to this Motion until such time as these issues are fully addressed in front of the Conduct Board or until a Determination of Established Facts is first made by the Conduct Board.

- As the Subject Member has not admitted all particulars in the Notice, a significant portion of what is contained within the particulars remains a live contested issue.

- The Motion is seeking to have the CAR prematurely speculate as to the Conduct Board's findings. The CAR submits that it is unable to properly respond to the Motion at this time.

- Particular 7 [of Allegation 2] is meant as an overall summary not to be seen as distinct misconduct.

- [The Subject Member] failed to provide a complete and accurate account (omission) as to what occurred in his police notes. However, the CAR also submits that this decision to

not include certain details and to add other details amounts to deliberate concealment behaviours. This matter should be properly dealt with at the hearing proper following direct and cross- examination to see if the evidence supports this position.

- [The Subject Member] failed to provide a complete and accurate account (omission) in the occurrence summary. The PROS summary is simply not a complete and accurate account of everything that took place. However, the CAR also submits that this decision by [Subject Member] to not include certain details of what is alleged to have occurred was in fact deliberate as a means of covering up actions. It is necessary to cross examine [Subject Member] at the hearing proper to glean evidence to address these matters or in the alternative the Conduct Board must make a Determination of Facts. To answer this question now properly is premature.

[38] The MR 1 then requested the opportunity to reply to the CAR's response.

[39] On October 6, 2017, the Conduct Board provided an initial reaction to primarily the CAR's submissions on the motion, stating:

> First things first. It is now clear that Allegation 2, Particular 7, is a summary, and does not identify any distinct act/omission beyond those identified in other particulars. To my mind this was fairly obvious but the MR now has the confirmation requested.
>
> The response by the CAR, to my mind, confuses two distinct aspects.
>
> One aspect is the Subject Member understanding what are the acts/omissions he is alleged to have committed. If, for whatever reason, the MR does not understand the specific acts/omissions, then gaining that understanding can only assist her client in making admissions that will expedite the process.
>
> The second aspect, which seems to be the one that dominates the CAR's response, is whether there is sufficient evidence in the record for me to make certain preliminary factual findings after review of the materials filed to date, including those filed by the MR.
>
> The CAR providing clarity on what is being alleged is one thing, whether there is sufficient evidence to find that alleged misconduct established is a separate consideration.

> With the exception of the clarity achieved on Allegation 2, Particular 7, I see little achieved in the written exchanges to date. I view further written submissions as unlikely to achieve much more. No email reply from the MR is expected.
>
> PHC #1 is now set for Nov 6, 2017, at 9 am Ottawa time
>
> Our first PHC shall be conducted by me in the same room as both reps, or by video-conference to both reps in the same room, and, if possible, all outstanding issues shall be addressed then and there.
>
> To be able to resolve any outstanding issues, if the MR is in receipt of expert reports for this matter, I direct that they now be filed with me.
>
> [*Sic throughout*]

[40] In keeping with the Conduct Board's direction, the MR 1 immediately filed reports and *curriculum vitae* for her proposed expert witnesses. These reports may be generally characterized as involving the use of force as identified in the Tahoe in-vehicle video recording (Mr. S.S.), physiological aspects of scalp lacerations (Dr. L.B.) and a psychological assessment containing opinions on factors potentially mitigating the Subject Member's misconduct (Dr. M.P.). In addition, numerous other materials were filed pertaining to the outcome of the Subject Member's criminal matter, along with court documentation concerning convictions for assault and resisting arrest entered against Mr. W. that were handled by other members. In addition to filing reports and material, the MR 1 also made the following submission:

> I understand from your e-mail […] regarding the pre-hearing conference that all outstanding issues shall be addressed then and there. This include among other things our motion for particulars. Please confirm that we will not have to provide written submissions on the requirements to hear witnesses as all outstanding issues shall be addressed then and there. We respectfully believe that this will make sense and be more productive as it is indeed important that the Member understands allegation 2 in order to take position regarding the witnesses required to testify before the hearing. I trust/hope that the pre-hearing conference will provide us with the information needed. As much as this is important for the member to get a better understanding of allegation 2, it is also in the advantage of the process as this could result in more admissions.
>
> Given that important decisions will likely be taken by the Board during the pre- hearing conference, we are respectfully asking that the pre-hearing conference be recorded. We are aware that you refused similar requests in the past in other files, however, considering that this is the practise in other

> venues, that it is in the advantage of transparency and accuracy as well as compatible with the fact that hearing before the Board should be public, we are respectfully making this request in [the Subject Member's] case.
>
> Finally, we would like to point out that the Member is not renouncing to any cross-examination of the Conduct Authority's witnesses before the Board and is not renouncing to calling his witnesses, including himself on the allegations. This position may change after the pre-hearing conference and the obtaining of my client's instructions in light of the pre-hearing conference's results, but this is the current position of the Member that we would like to express to preserve his rights.
>
> Indeed, the opportunity to answer and defend against the allegations of contraventions to the Code of Conduct lies at the core of the principles of procedural fairness and natural justice. It has also been established by the Supreme Court of Canada that the right to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. The Member should also be allowed to make his evidence and if not, there is a breach to the audi alteram partem rule and the natural justice principles. As in the present case, dismissal is the sanction sought by the Conduct Authority, the Board's decision can have important consequences on the Member's right to gain a living and pursuant to the case-law a generous interpretation must be given to the right to be heard.
>
> Furthermore, the Member is not renouncing to the reading of the allegations during the hearing and it is the Member's position that no decision should be rendered by the Conduct Board on the allegations without the Member having the opportunity to make submissions.
>
> If those become living issues, we will be providing detailed submissions with case-law in support. At this point, we just want that the record reflects that the Member is not renouncing to the above-mentioned rights.
>
> [*Sic throughout*]

[41] On October 16, 2017, a joint proposal by the representatives was filed concerning a hearing date, with the caveat that the availability of Dr. L.B. had yet to be confirmed. A hearing in the week of February 19 or February 26, 2018, was proposed.

[42] On October 23, 2017, the CAR filed an expert report prepared by S/Sgt. L.M., which was subject to a written peer review report by S/Sgt. L.L. The *curriculum vitae* for each officer was also filed. The nature of these reports can be generally characterized as related to the unreasonableness of the use of force captured in the Tahoe in-vehicle video recording.

[43] As a result of unexpected air travel delays on November 6, 2017, involving the Conduct Board, the PHC for that date was cancelled, and ultimately rescheduled to November 21, 2017, by teleconference.

[44] In the interim, the MR 1 sought the ordered production of a copy of the Form 1004 – *Performance Log* issued to Cpl. B.N. on November 22, 2016, related to his failure to report the Subject Member's behaviour after speaking with him on April 15, 2016. In addition, the MR 1 sought "any document emanating from [Cpl. B.N.] (e-mail, submissions, etc.) regarding his phone conversation with [the Subject Member] on April 15, 2016 as well as Sergeant [N.]'s notes regarding the 1004."

First pre-hearing conference (November 21, 2017)

[45] As captured in the minutes issued for the PHC of November 21, 2017, the Conduct Board ordered the production of the Form 1004 issued to Cpl. B.N., but declined to order the production of any further notes. The Conduct Board would not accept, nor further consider, the content of the three reports filed concerning the use of force. It noted that the Subject Member had pleaded guilty to assaulting Mr. [W.], and there was a videotape that captured the interaction of Mr. [W.], Cst. B.G., and the Subject Member in the back of the Tahoe police vehicle. The Conduct Board was able to personally assess the video in order to determine whether the particulars of Allegation 1 were established, and for any purpose that might arise at any conduct measures phase. Certain opinions expressed in the reports did not require any special expertise and did no more than state possibilities apparent from the review of the videotape. The Conduct Board was not convinced of the necessity of the opinions expressed in these three reports. Accordingly, a number of items pertaining to the CAR's proposed use of force experts were no longer relevant or material; therefore, their ordered production was denied.

[46] The expert report of Dr. L.B. was accepted and made part of the record. While the medical documentation (including photographs) identified the extent of Mr. [W.]'s scalp injury, the Conduct Board was nevertheless prepared to consider the report as the author was a medical

doctor with sufficient expertise to present the fairly limited opinions contained in the report. The CAR had no issue with this report and he did not seek cross-examination of Dr. L.B.

[47] The Conduct Board indicated that Dr. M.P., registered psychologist, could be subject to a concise direct-examination by the MR 1 at a preliminary phase in order to qualify her as an expert witness, and the CAR could also cross-examine on the nature of Dr. M.P.'s expertise and qualification as an expert witness permitted to offer opinion evidence as contained in her report. Upon Dr. M.P.'s qualification as an expert, the MR 1 could conduct concise direct examination touching on the most important aspects of her report, and the CAR could then conduct his cross-examination. It was confirmed that the evidence of Dr. M.P. only related to any conduct measures phase of the hearing.

[48] Subject to any Summary of Facts presented for consideration, the Conduct Board was prepared to approve testimony from the Subject Member, Cst. B.N., and Cpl. B.N. in the allegation phase of the hearing. It remained the Conduct Board's view that testimony from Mr. [W.] was not necessary, as his limited recollection of events was apparent in his comments to an investigator, reflecting his degree of intoxication at the time of the events under examination. The Conduct Board indicated that there was no reason to wait for a formal determination of whether Allegation 1 was established before the CAR sought a victim impact statement from Mr. [W.].

[49] The Conduct Board confirmed that the issue of the cause of Mr. [W.]'s scalp laceration remained contested. The Conduct Board offered informal guidance to the parties that the issue of who precisely caused the scalp laceration, while included in the particulars, would not, in and of itself, constitute a highly aggravating feature for the Subject Member. The parties were to file recently taken digital photos of the interior of the Tahoe police vehicle related to the design and surfaces of the door closed by Cst. B.G. immediately after he struck Mr. [W.].

[50] The Conduct Board issued a direction to the CAR as a result of the MR 1's motion for better particulars. The MR 1 considered the direction to sufficiently address the requests for clarification in her motion. The direction stated:

> With respect to the Subject Member's 1) handwritten police notes, 2) PROS summary, and 3) telephone communication with [Cpl. B.N.], the CAR is directed to identify by what specific acts or omissions the CAR alleges the Subject Member failed to provide a complete and accurate account. CAR agrees to comply with this DIRECTION by Wednesday, November 29, 2017.

[51] Importantly, as a result of the discussions at the PHC on November 21, 2017, it was understood that the necessity of testimony from approved witnesses could be affected by further admissions from the Subject Member.

[52] The last noted item arising from the PHC was the MR's agreement to file the audio recording of the criminal court process that resulted in the Subject Member's conditional discharge for his conviction for assault under section 266 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], and the resulting probation order dated August 22, 2017 (documentation that was previously made part of the record for this matter).

[53] The hearing was set to commence in the week of February 19, 2018, in Peace River. A second PHC was set for December 5, 2017.

[54] On November 27, 2017, the CAR filed the Form 1004 received by Cpl. B.N. and provided the CAR's response to the Conduct Board's direction for better particulars. He provided detailed comments relating to the Subject Member's handwritten police notes, PROS summary, and telephone communication with Cpl. B.N., but these comments remained subject to something akin to a caveat, which stated:

> I submit that my response is still in large part dependent upon the actual findings of the Conduct Board and is therefore somewhat premature. That in order to respond to the Direction I must make several conclusions drawn from the evidence that may or may not be supported by the Conduct Board in its analysis of the evidence to be heard during the week of February 19, 2017. In particular the testimony and cross-examination of [the Subject Member], Cst. [B.G.] and Cpl. [B.N.].

[55] On December 4, 2017, the MR 1 copied the Conduct Board with her email to the CAR, advising that she would provide the CAR with a copy of the audio recording for the Subject Member's criminal matter, adding: "However, it is not the Member's responsibility to file the

Conduct Authority's evidence in front of the Board." The MR 1 also filed four photographs of the interior door surface of the Tahoe taken on November 7, 2017.

[56] On the morning of December 5, 2017, the Conduct Board responded to the MR 1's email to the CAR pertaining to the audio recording from the criminal proceeding, stating in part:

> The CSO (Conduct), subsection 13(1) states: "Proceedings before a conduct board must be dealt with by the board as informally and expeditiously as the principles of procedural fairness permit."
>
> No effort was made to correct item 12 of the Minutes, which recorded the agreement of the [MR 1] to file the audio-recording with both the CAR and the [Conduct Board].
>
> **I am directing [the MR 1] to immediately honour her agreement, and herself file the audio-recording with me or the Registrar.** I am copying the Registrar so she is aware.
>
> Obliging the CAR to file the recording is unnecessarily formal and lacking in expedience.
>
> [Emphasis in original; *sic throughout*]

Second pre-hearing conference (December 5, 2017)

[57] A PHC took place on December 5, 2017, with minutes issued by the Conduct Board as follows:

> 1. I approve as witnesses Cpl. [B.N.], Cst. [B.G.], Dr. [M.P.], and the Subject Member. (Any restrictions on the parametres of their testimony can be finalized after receipt of the documentation referenced below). Based on my review of the record to date, including submissions by the representatives, I continue not to view testimony from Mr. [W.] as necessary.
>
> […]
>
> 4. Any "summary of facts" document prepared by the parties shall be filed with the [Conduct Board] by January 5, 2018. (In addition to identifying joint agreement on certain facts, it would be appreciated if the specific points still in dispute between the parties were also set out.)
>
> 5. The MR may file a submission, not exceeding 5 pages, by January 5, 2018, in response to the CAR's response of November 27, 2017 respecting the Subject Member's 1) handwritten police notes, 2) PROS summary, and 3) telephone communication with Cpl. [B.N.], and the specific acts or

> omissions by which the CAR alleges the Subject Member failed to provide a complete and accurate account.
>
> […]
>
> 7. CAR advising he intends to seek a victim impact statement from Mr. [W.].

[58] On December 27, 2017, the MR 1 emailed the Conduct Board and the CAR "to clear up any misunderstanding regarding the audio recording". The MR 1 understood that the CAR had yet to obtain the audio recording; therefore, she informed the CAR and the Conduct Board that she already had a copy of the audio recording and could copy it. Her offer was made out of courtesy, in order to save the CAR's time and money to the RCMP. The MR 1 stated that she and the Subject Member "never intended to rely on the audio-recording of the criminal matter as evidence that the member would introduce or rely on at the hearing pursuant to s.15 (3)(c) of the CSO (Conduct)". The MR 1 asked the Conduct Board to confirm that the audio recording would be considered one of the Conduct Authority's exhibits and not the Member's. The MR 1 concluded her email as follows:

> I respectfully believe that having the CAR filing the audio-recording is the Member's right and it is not unnecessarily formal and lacking in expedience. It is not the Member's responsibility to file/produce the Conduct Authority's evidence in front of the Board and it takes only a few minutes or seconds to copy the electronic file to the Board's folder. I was more than willing to help by making copies for everyone, but not that the Member be considered to be the one producing it into evidence an exhibit and this why I proceeded the way I did on December 4, 2017.
>
> I wrote my e-mail of December 4, 2017 very quickly as I was busy and in hindsight, it may have been a good idea to formally make some comments regarding the minutes of the pre-hearing conference as my understanding during the PHC was that I would share a copy with both my friend and the registrar to save time and effort out of courtesy, not that it will be produced by the Member.

[59] The Conduct Board did not address this item any further. Further email correspondence then took place concerning the specifics of the hearing date and site; the preparation and service of summonses; an extension to January 10, 2018, for the parties to continue preparation of a Summary of Facts; possible travel using RCMP air services; and acceptance by the MR 1 of service of the Notice of Date, Place and Time.

[60] On January 5, 2018, the MR 1 filed her rebuttal concerning her motion for better particulars. Uninvited, the CAR then filed a further response on January 8, 2018.

[61] Unable to file a joint Summary of Facts on January 10, 2018, the MR 1 filed a "Partial Summary of Facts" that was unsigned, but clearly drafted as only "agreed to in form and content" by the MR 1. The CAR emphasized in a follow-up email that the document filed by the MR 1 contained multiple paragraphs that he did not agree with. The MR 1 confirmed that it was not a joint summary of facts, but that she would be in contact with the CAR to still pursue a joint summary.

Third pre-hearing conference (January 19, 2018)

[62] A further PHC took place on January 19, 2018. The CAR was directed to submit a copy of the Partial Summary of Facts filed by the MR 1 on January 10, 2018, with those portions the CAR did not agree with "crossed out". This hand-edited document was to be filed by Monday, January 22, 2018 (and was filed on that date). The MR 1 was directed to file by February 2, 2018, all documentary materials that the Subject Member would rely upon at any conduct measures phase.

[63] On January 22, 2018, the MR 1 responded to the MR-side direction, reduced to writing after the PHC of January 19, 2018, as follows:

> My understanding is that [the Subject Member] is directed to file all documentary materials that he would rely upon at any conduct measures phase to the Conduct Board with a copy to CAR by Friday, Feb. 2, 2018.
>
> I would like to add for the record that I mentioned during the pre-hearing conference that my position was that the evidence on sanction should not be disclosed to the Board before a decision is rendered by the Board that an allegation is established. The allegations and conduct measures being two different phasis of the hearing. This being said, I obviously respect the Board's decision and will act accordingly.
>
> The Member will testify during the hearing on the allegations and during the conduct measures' hearing. Dr [M.P.] will be called to testify on sanction as well.

> I understand that the CAR will review the Member's evidence on sanction and will let the Board and the Member know if he consents to the production of the documents. The Member reserves his right to call other witnesses to testify on sanction and will require the Board's permission.
>
> […] [*Sic throughout*]

[64] On February 1, 2018, the MR 1 advised by email: "Please be informed that as a result of my transfer, I am no longer representing [the Subject Member]. His file will be reassigned by the Member Representative Directorate to [the MR 2]."

[65] The Conduct Board adjourned the hearing, scheduled to begin on February 20, 2018, and instead scheduled a further PHC involving the MR 2 on February 21, 2018, by teleconference. Relocating the site for the hearing from Peace River to Ottawa was also contemplated, with necessary witnesses potentially testifying by either videoconference (Cst. B.G., Cpl. B.N.) or speakerphone (Dr. M.P.).

Fourth pre-hearing conference (February 21, 2018)

[66] At the PHC on February 21, 2018, the CAR provided information concerning Mr. [W.]'s attitude and the conduct proceeding, captured in the minutes as follows:

> […] CAR advising that an RCMP member has been in communication with Mr. [W.], and Mr. [W.] does not wish to be further involved in this conduct matter, and expressed somewhat antagonistic sentiments concerning the police. I consider the CAR to have fulfilled any obligation to seek an impact statement from Mr. [W.] concerning the Subject Member's misconduct. No further inquiries of Mr. [W.] are required.

[67] The hearing was rescheduled to the period from April 24 to 26, 2018, with witness availability and logistics to be confirmed and considered further by the representatives. A further PHC was set for March 9, 2018, but the Conduct Board made a scheduling mistake and it took place instead on March 16, 2018.

Fifth pre-hearing conference (March 16, 2018)

[68] While a member may certainly be bound by the positions and litigation decisions articulated by their initial legal representative, the minutes for the PHC of March 16, 2018,

capture a number of matters that were revisited as a result of the MR 2 becoming counsel for the Subject Member:

> 1. Given change of [the MR], [the Conduct Board] directing [the MR 2] to provide any submissions concerning the necessity of hearing testimony from witnesses [B.G.] and [B.N.] […].
>
> 2. In addition, [the MR 2] directed to file by that time any statement from the [Subject Member] concerning facts for which there is no evidence/information before the [Conduct Board]. These facts must relate to matters referenced in the Summary of Facts filed by the previous [MR 1].
>
> 3. [The MR 2] to advise [the Conduct Board] and [the CAR] by that same time of the specific area(s) of expertise in which he proposes that witness [M.P.] be deemed by the [Conduct Board] to be qualified to provide expert opinion evidence by admission of her report, and testimony.
>
> 4. [The CAR] to provide any further submissions on the necessity of witnesses [B.G.] and [B.N.], and on the necessity of cross-examination of [M.P.] […]. […]
>
> 6. It is noted that the [CAR] requests and is prepared to facilitate witness [M.P.]'s travel from Peace River to [Edmonton] in order to testify via videoconference at an RCMP facility. [The Conduct Board] confirms that he has determined that any examination of witness [M.P.] shall take place via teleconference with [M.P.] still located in Peace River.

[69] On March 22, 2018, the MR 2 addressed the necessity of testimony from Cst. B.G. and Cpl. B.N., providing a preliminary response as his review of the file was not complete. He advised that Cst. B.G.'s testimony might be dispensed with if his statement and his identification of the interior of the Tahoe could be relied upon. With respect to Cpl. B.N., he might need to be called to verify the recollection that he provided in his statement, but if the CAR had no issues with accepting his account of his phone call with the Subject Member, his testimony might not be needed. He also filed a signed statement by the Subject Member that incorporated much of the information that formed the Partial Summary of Facts filed by the MR 1, and offered a brief submission on the specific areas in which Dr. M.P. should be qualified as an expert.

[70] On March 22, 2018, the CAR replied, seeking a further PHC to address certain information contained in the Subject Member's statement (not corroborated or otherwise provided by any other source within the investigative materials and, in some cases, contrary to

information in other statements to investigators). The CAR also raised his wish to comment on the expert qualifications of Dr. M.P.

Sixth pre-hearing conference (March 29, 2018)

[71] A further PHC took place on March 29, 2018. Having obtained his client's instructions, the MR 2 advised that if the Board accepted the Subject Member's Written Responses and signed statement in lieu of his testimony, the Subject Member "waive[d] his right to testify". The MR 2 sought permission to file a corrected statement by the Subject Member that addressed certain grammatical problems (for which the Conduct Board granted permission).

[72] The Conduct Board provided clarification on the treatment of the documentary record, and the necessity of testimony by witnesses, as follows:

> […] I am guided by the overall intention that the conduct system operate informally and expeditiously, but feel I should clarify how I intend to treat the corrected signed statement of [the Subject Member], and his initial submissions filed under subsection 15(3) of the *CSO (Conduct).* To some extent it may come down to grammatical subtleties. Nothing I am about to say is viewed by me as being particularly contentious.
>
> I will accept the written admissions of misconduct contained in the submissions, and also the admission of specified particulars in the submissions.
>
> I will consider the information contained in the signed statement of [the Subject Member] just as I will consider the information contained in other unsworn statements filed as part of the investigative materials, and briefer statements received by me in email form as a result of the efforts of counsel since the investigation was completed.
>
> […] Your email below, in effect, takes the position that testimony from [the Subject Member] is not necessary given that the information received by me in documentary (and video, audio and digital photo) form is all the information necessary for [the Subject Member] to respond to the allegations, given his admissions of misconduct. On the basis that [the Subject Member] will not testify, [the CAR] has taken the position that testimony is not necessary from [Cst. B.G.], nor from [Cpl. B.N.].
>
> The "net effect" of these positions, as I see it, is that I am no longer being asked to approve testimony from [the Subject Member], [Cst. B.G.], and [Cpl. B.N.]. Accordingly, for the purposes of the allegation phase of the

> hearing, and for me to comply with subsection 18(4) of the *CSO (Conduct)*, I confirm they are not approved to testify.
>
> […]

[73] The basis for the CAR's opposition to certain opinions expressed by Dr. M.P. in her report are captured in the minutes of the PHC on March 29, 2018, as follows:

> […] With respect to Dr. [M.P.]'s expert report, CAR indicates that nothing in her c.v. and report indicate sufficient expertise in "use of force" and therefore she has overstepped her expertise in stating a link between [the Subject Member]'s stress-related status and his use of excessive force. CAR indicating his concern is that Dr. [M.P.]'s use of "direct link" language can go to the allegation phase. [The Conduct Board] stating that given the [Subject Member] admitted guilt to an assault criminally, and has admitted to Allegation #1, the [Conduct Board] finds the opinions of Dr. [M.P.] are not relevant in the allegation phase, and only apply in any conduct measures phase. CAR observing that expert report does not state that "cumulative stress" is a recognized disorder under the DSM-V manual. CAR stating report should not have been filed in advance of allegation phase adjudication. CAR has not adduced any counter-expertise, but seeks to cross-examine Dr. [M.P.]. [The Conduct Board] observing the opinion appears only to provide a mitigating factor. Report, cv and MR proposed areas of expertise articulated by MR. Given financial cost to be borne by CAR, CAR asking that Dr. [M.P.] appear in person for testimony concerning qualified expertise and for cross-examination. [The Conduct Board] observing very little to be gained observing her demeanour given the expert evidence contained in her report and "live" testimony not required. CAR does not want to get into questions to be posed in cross-examination. CAR does not oppose areas of expert qualification proposed by MR. [The Conduct Board] must consider his obligation to approve testimony of Dr. [M.P.] in light of CAR reluctance to identify questions to be put to the witness. CAR citing [Commissioner's] decision in *Cormier* to the effect that CAR must cross-examine or live with what is written in the report. Paragraph 6, page 4, of the expert report cited as problematic by the CAR.
>
> […] [the Conduct Board] prepared to approve telephone cross-examination of Dr. [M.P.] on "direct link" items CAR has noted in the report, but preliminary issue appears to be that MR has proposed areas of qualification for Dr. [M.P.], and CAR takes position that the "direct link" items exceed the areas of expertise. CAR takes position that "use of force" aspect is not, for example, backed up by professional experience of Dr. [M.P.], for example from military- based treatment of patients. MR takes the position that opinions of Dr. [M.P.] are within the proposed areas of expertise as they address contributors to [Subject Member]'s behaviour, not propriety of his

> use of force. The CAR questions whether I should accept those opinions because he submits they are outside Dr. [M.P.]'s area of expertise. At the hearing, the onus will rest on the MR to establish her expertise at the qualification stage.

[74] By email transmitted on April 6, 2018, the MR 2 accepted service of the Notice of Date, Place and Time for the rescheduled hearing period of April 24 to 26, 2018, in Ottawa. It was determined that cross-examination of Dr. M.P. would take place by telephone on April 25, 2018. On April 9, 2018, the signed statement of the Subject Member (with previous errors corrected) was filed by the MR 2.

[75] On April 22, 2018, the CAR filed RCMP policies in effect in April 2016 together with authorities on the criminal legal test for assault causing bodily harm, the definition of bodily harm, and issues related to expert witness evidence. The policies, drawn from the RCMP *Operational Manual*, concerned "assessing responsiveness and medical assistance" and "mentally ill persons/prisoners". On April 23, 2018, the MR 2 filed a copy of the decision in *F.H. v McDougall*, [2008] 3 SCR 41, [*McDougall*], concerning the balance of probabilities standard of proof.

[76] On Tuesday, April 24, 2018, the CAR and the MR 2, accompanied by the Subject Member, attended a "live" hearing conducted within the RCMP national headquarters building in Ottawa. To formally observe subsection 20(1) of the *CSO (Conduct)*, each allegation (without the supporting particulars) was read to the Subject Member and he entered his admission to each allegation. The representatives then provided their respective oral submissions concerning the establishment of the two allegations contained in the Notice of Conduct Hearing.

[77] On the morning of April 25, 2018, the Conduct Board delivered an oral decision on the allegations. This oral decision was subject to the caveat that the Conduct Board reserved the right to provide and expand upon, clarify and explain its reasons and findings in greater detail in this final written decision.

ALLEGATIONS

[78] As prescribed by subsection 44(1) of the *RCMP Act*, my role as Conduct Board is to decide whether or not each allegation of a contravention of a provision of the Code of Conduct is established.

[79] I confirm that, as the Conduct Board, I am responsible for determining whether or not allegations of misconduct are proven on a "balance of probabilities", as required by subsection 45(1) of the *RCMP Act*.

[80] As both parties' submissions acknowledged, primary guidance on the "balance of probabilities" standard of proof can be found in the Supreme Court of Canada's decision in *McDougall*. In particular, I am guided by paragraphs 44 to 46, where the Court states:

> [44] […] In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.
>
> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. […]

[81] I carefully examined the submission by the CAR that, by assessing all of the possible causes of the scalp laceration, I would be engaging in a "subjective analysis that […] is taking the balance of probabilities too far". I decline to accept what I understand to be the CAR's argument: any cause I consider most possible necessarily must be considered proven on a balance of probabilities. *McDougall* places the onus on the CAR to establish that it is more likely than not that the Subject Member caused the "visible bodily injury to the head area of [Mr. W.]" by adducing evidence that is sufficiently "clear, cogent and convincing".

[82] As well, I confirm the application in this matter of subsection 23(2) of the *CSO (Conduct)*, which provides:

> (2) The conduct board may rely on a finding by a court in Canada that a member is guilty of an offence under an Act of Parliament or of the legislature of a province to decide that the member has contravened the Code of Conduct.

[83] Given the Subject Member's admissions and the facts to be found established for each allegation, I do not consider the interpretation of section 5.1 of the Code of Conduct, "Members use only as much force as is reasonably necessary in the circumstances", to require close examination of precedent cases. Nevertheless, I have considered the cases at page 19 of the RCMP *Annotated Code of Conduct*.

[84] The application to be given section 8.1 of the Code of Conduct to the facts of the present matter also appears relatively straightforward, given its reference to members providing complete, accurate and timely accounts.

Established facts

[85] On April 15, 2016, the Subject Member was a corporal with the General Investigative Section of the RCMP, in Peace River, Alberta.

[86] However, on April 14 and 15, 2016, as a result of a lack of resources, the Subject Member was working at the Manning RCMP Detachment, in Alberta. The Manning Detachment is one hour's drive from Peace River. He was seconded to cover Manning's jurisdiction alone. No other members, including the NCO, were on duty or on call. The Subject Member was scheduled to work day shifts and be on call for the remainder of the time.

[87] The day of April 14, 2016, he worked a regular day shift beginning at 9:00 a.m. Following his day shift, the Subject Member worked an overtime shift being on call in the evening and night for the Manning Detachment.

[88] Shortly after 1:30 a.m. on April 15, 2016, the Subject Member responded to a call of an unwanted male attempting to gain access to a woman's residence in Manning.

[89] The Subject Member located Mr. [W.] intoxicated in the complainant's yard. Mr. [W.] had been banging on doors and windows at the residence, mistakenly believing that it was where he was staying.

[90] Mr. [W.], who usually resided in Grimshaw, Alberta, was temporarily residing in Manning while working for a construction company. The Subject Member explained to Mr. [W.] that he was not at his correct temporary residence.

[91] Mr. [W.] indicated that he was cold and asked to sit in the Subject Member's vehicle. Mr. [W.] was searched and placed in the vehicle.

[92] Mr. [W.] asked to be driven back to the pub where he had been drinking. The Subject Member agreed. With Mr. [W.]'s direction, the Subject Member then attempted to backtrack Mr. [W.]'s path from the pub to where he was residing. The Subject Member noted a vehicle with the name of the construction company written on it parked in a driveway.

[93] The Subject Member left the vehicle and knocked at the door of the residence to confirm if Mr. [W]. was staying there. While the Subject Member was trying to see if anyone was home at the residence, Mr. [W.] began yelling and kicking in the back of the police car. When the Subject Member went to speak to Mr. [W.], Mr. [W.] indicated that he was upset that the Subject Member did not allow him to go and knock at the door. The Subject Member left Mr. [W.] in the vehicle and again knocked at the door. No one answered. As the Subject Member returned to his vehicle, he heard Mr. [W.] swearing loudly in the back of the vehicle.

[94] The Subject Member arrested Mr. [W.] for causing a disturbance. Mr. [W.] was handcuffed at the front and advised that he would be lodged at the RCMP Peace River Detachment because he was too intoxicated to care for himself.

[95] The Subject Member decided to transport Mr. [W.] to Peace River because of the unavailability of cell guards in Manning. The Subject Member notified dispatch that Mr. [W.] was being transported to Peace River. The Subject Member requested that a Peace River RCMP

officer meet him halfway to take custody of Mr. [W.] and complete the transport. Cst. B.G. agreed to meet the Subject Member at an exchange point.

[96] As the Subject Member was transporting Mr. [W.] to the exchange point, intermittent swearing and name-calling occurred between the two. Mr. [W.] appeared to experience mood swings during that transport.

[97] The Subject Member's in-car video system was not engaged at any time in his dealings with Mr. [W.].

[98] At approximately 2:42 a.m., Cst. B.G. and the Subject Member met up on the side of Highway 35, about 20 kilometres south of Dixonville and approximately 35 kilometres from Manning and Peace River. Cst. B.G. parked his vehicle directly behind that of the Subject Member. The highway at this location is narrow with no shoulder; therefore, to increase their visibility, Cst. B.G. activated his emergency lights, which caused his in-car video system to begin recording.

[99] Cst. B.G. walked over to the Subject Member's vehicle and the two had a brief conversation. The Subject Member indicated that Mr. [W.] was intoxicated and belligerent. The Subject Member removed his handcuffs from Mr. [W.] and Cst. B.G. placed his handcuffs on Mr. [W.]. Cst. B.G. walked back to his car, a Chevy Tahoe, with the Subject Member and Mr. [W.] walking behind him.

[100] On the walk between the two police vehicles, Cst. B.G. overheard Mr. [W.] making offensive comments to the Subject Member.

[101] At this time, they were nearing Cst. B.G.'s vehicle. The Subject Member admits to grabbing Mr. [W.] more firmly by the arm. Mr. [W.] then started tugging his arm. The Subject Member spun Mr. [W.] and got him against the side of the hood of Cst. B.G.'s police vehicle and pinned Mr. [W.] briefly. The sound of this physical interaction can be heard on video 2. None of the interaction between Mr. [W.] and the Subject Member to this point constitutes misconduct on

the Subject Member's part. Mr. [W.] then continued walking to the police vehicle door that Cst. B.G. had opened.

[102] At Cst. B.G.'s vehicle the Subject Member said "Get in there" twice and Mr. [W.] complied, backing into the seat with his feet hanging out the door.

[103] Mr. [W.] moved backwards in the seat and the Subject Member attempted to close the back door. Mr. [W.] kicked out, striking either the inside of the back door of the vehicle with both of his feet, or the Subject Member's stomach directly. The Subject Member then stated to Mr. [W.]: "Whoah, whoah".

[104] Mr. [W.] then lifted his head and intentionally spat at the Subject Member, with spit striking the Subject Member's face and, in particular, his right eye.

[105] Cst. B.G. observed the spitting, immediately opened the opposite back door and grabbed Mr. [W.] by the sweatshirt and pulled him into the vehicle away from the Subject Member's door. As a distraction or diversion technique, Cst. B.G. struck Mr. [W.] with considerable force with his closed right fist covered in a black glove, hitting Mr. [W.] somewhere on the top of the head. Cst. B.G. then quickly closed his door, the inside lower panel of which appeared to also contact the top of Mr. [W.]'s head.

[106] As for the Subject Member, he immediately responded by entering the back seat on top of Mr. [W.] and physically assaulting Mr. [W.] with repeated blows to the head area. The Subject Member punched Mr. [W.] some seven times about the head area with his bare fists, and four times to his body or torso area. During the course of the altercation, the Subject Member is heard stating: "Holy fuck huh. What the fuck do you think this is? Fucking stupid little shit. You fucking stupid little cunt." Mr. [W.] responds: "Tough (inaudible) from you." Cst. B.G. yells: "Hey [Subject Member]." Mr. [W.] taunts the Subject Member, saying: "Fucking touch me, hit me fucking harder." The Subject Member responds: "Fuck off, let go of me, Jesus Christ you're fucking stupid."

[107] The Subject Member then removed himself from the back seat of the police vehicle.

[108] At some point during the events in the rear of Cst. B.G.'s vehicle, Mr. [W.] sustained a laceration to his scalp, on the top of his head, which required four stitches to close. The site of the wound is captured in photographs that are part of the record.

[109] The Subject Member made no attempt to secure medical assistance for Mr. [W.], who was subsequently transported to the Peace River hospital by Cst. B.G. and received appropriate medical attention for his injuries.

[110] After consideration of all submissions and a careful review of the record, including the two police vehicle video recordings, the photographs depicting the rear door of the relevant police vehicle, relevant transcribed and signed statements, police notes, medical records including hospital photographs of Mr. W,'s scalp wound area, medical records for the Subject Member, and the expert medical report of Dr. L.D., I find that there is insufficient evidence to establish, on a balance of probabilities, whether the laceration occurred when Cst. B.G. struck Mr. [W.] with the distraction/diversion blow, when Cst. B.G. closed the door on Mr. [W.]'s head, or in the course of the Subject Member assaulting Mr. [W.] as captured on the in-vehicle video recording.

[111] It is not sufficiently clear that either of the Subject Member's fists directly contacted the spot on Mr. [W.]'s scalp pictured at the medical clinic, nor that a fist caused the metal handcuffs to strike this scalp location, nor that the Subject Member's actions caused this scalp location to contact the surface of the door recently closed by Cst. B.G.

[112] I acknowledge that, in his statement, Mr. [W.] appears to believe that the handcuffs caused his scalp laceration, indicating "the cuffs were punched into the right above my forehead and my hairline". But other elements of Mr. W.'s statement (such as his inability to recall the Subject Member even being in the back seat of the Tahoe) reduce the reliability of the statement as a means to determine causation of the scalp laceration.

[113] I am unable to conclude that the scalp laceration likely occurred as a result of the Subject Member's fist strikes simply on the basis that the profuse bleeding is only apparent when the strikes have ended, and not immediately after the single fist blow and door closing by Cst. B.G.

It is quite possible that it took a few seconds for the blood from the laceration to accumulate and run down Mr. [W.]'s forehead after it emerged from above his hairline.

[114] Given that no single fist strike by the Subject Member can be seen on the video contacting the site of the scalp laceration, nor contacting the handcuffs while they are above the site of the scalp laceration, the sheer number of times that the Subject Member struck Mr. [W.] about the head does not, in my view, establish one of his punches as the likely cause of the scalp injury.

[115] In light of the proximity of blood vessels to the surface of the human scalp, as described by Dr. L.B. in his report, I view the direct punch delivered by Cst. G.B. as just as likely to have caused the scalp laceration, particularly when he admitted that his punch may have caused the cut.

[116] While it is less clear how much force was involved when the door closed by Cst. B.G. came in contact with the top of Mr. [W].'s head, his head is abruptly moved when the door closes against it. I consider Cst. B.G.'s closing of the door to be a purely accidental, but nevertheless plausible, cause of the scalp laceration.

[117] While I am unable to find that the Subject Member's actions inside the Tahoe back seat (primarily the blows to the head area of Mr. [W.]) caused the scalp laceration, it is clear that this laceration constituted a visible bodily injury resulting in noticeable bleeding. This is the only injury identified in the Notice of Conduct Hearing, and the only injury attributed by the Notice of Conduct Hearing to the Subject Member.

[118] The Subject Member made the following entry on the PROS file for the initial disturbance call that caused the Subject Member to be called out:

> 911 call from [Ms. K.] advising unwanted male outside her residence trying to get in. He is knocking on doors and windows and won't leave. [Subject Member] attended and while looking for the residence, the suspect male walked up to him stating his boss won't let him in the house. The male, identified as [Mr. W.], was intoxicated and wasn't catching on he was at the wrong address. [Mr. W.] was eventually able to find the correct place, which

> was 2 houses down, but no one would answer the door. With [Mr. W.'s] level of intoxication and no where to stay, along with his increased aggression, it was decided to lodge [Mr. W.] until sober. No charges, subject honestly had no idea he was at the wrong residence. CH

[119] The Subject Member made a further entry regarding a separate "assault peace officer" matter:

> [Mr. W.] was arrested in Manning by [the Subject Member] for causing a disturbance.
>
> [Mr. W.] was being transported to Peace River where a meet was made half way. During transfer from PC to PC, [Mr. W.] became aggressive and kicked and spit on [the Subject Member]. [Mr. W.] was under the influence of alcohol and drugs. [Mr. W.] seemed to have mental issues as well. Due to conversations between [the Subject Member] and [Mr. W.] on the trip, [the Subject Member] felt he was instigating the matter, so decided not to pursue charges. The incident could have been avoided if [the Subject Member] let [Cst. B.G.] take control of [Mr. W.] at the meet since [Mr. W.] was very upset with [the Subject Member].

[120] The Subject Member makes handwritten police notes that state in part:

> I start striking him which didn't stop him from pulling at me. He makes some comment about taking on bigger guys. I continued to strike him to get him to let go of me & then I noticed a large amount of blood coming down his forehead. I would guess that he cut it on the door somehow with the blood & yelled at him to "let me go, what the hell is wrong with you" I was able to pull my arms free & jumped out before he could kick me or spit at me again. [*Sic throughout*]

[121] Later in the evening, while Mr. [W.] was being treated at the hospital, Cpl. B.N. asked the Subject Member during their brief telephone conversation if he wanted to charge Mr. [W.] with anything. The Subject Member replied no charges were necessary, because although there was an assault against a peace officer, the Subject Member had hit him back.

[122] Cpl. B.N.'s statement of April 29, 2016, contains the following two relevant quotations:

- [Subject Member] says to me "ya so [Cst. B.G.] asked me you know if we were charging this kid" he says "oh you know I don't think so, you know, we'll just leave it as is like you know he hit me, I hit him kind of thing and you know we'll just leave it be".

- Basically the jist that I got from him was the kid spit in his face and [the Subject Member] just went in and in heat of the moment kind of retaliated and hit him back.

Decision on Allegation 1

[123] There is no issue with respect to sufficient proof of Particulars 1, 2 and 3 of Allegation 1, and I find them established.

[124] Notwithstanding my finding concerning insufficient evidence that Mr. [W.]'s head wound was caused by the Subject Member, I do find that the Subject Member's use of force inside the Tahoe vehicle was both excessive and unnecessary. I emphasize that it was unnecessary. In my view, the Tahoe's door could have been closed by the Subject Member after he was spat on, and the Subject Member's involvement with Mr. [W.] could have ended there.

[125] I did entertain the thought that the Subject Member felt some legitimate need to go into the vehicle to assist Cst. B.G., but that is not a reasonable view. The Subject Member should have simply closed the rear door on his side of the Tahoe.

[126] Clearly, the application of force is what constitutes the assault to which the Subject Member pleaded guilty. Accordingly, the terms of Particular 3 have been established.

[127] With respect to Particular 3, no matter the wording, it is understood that the Subject Member's use of force, while he and Mr. [W.] were outside the Tahoe, was not in any way inappropriate or excessive. We are dealing only with the Subject Member's conduct inside the Tahoe.

[128] My analysis now moves on to Particular 4. It is established on a balance of probabilities that, after being placed in the back seat of the Tahoe, Mr. [W.] spat on the Subject Member. It is clearly captured in the video and admitted by the Subject Member that he responded by physically assaulting Mr. W. with repeated blows to the head area.

[129] It is not established on a balance of probabilities that the Subject Member caused visible bodily injury to the head area of Mr. [W.] resulting in noticeable bleeding.

[130] It is established that the Subject Member made no attempt to secure medical assistance for Mr. [W.]. But I must note that that Particular or that fact appears to me to be irrelevant in terms of supporting an allegation of using more force than reasonably necessary under section 5.1 of the Code of Conduct. In this instance, I do not find that failing to attempt to secure medical assistance is probative of an excessive use of force.

[131] It is established that Mr. [W.] was transported to the Peace River hospital by Cst. B.G. and received medical attention for his injuries. Again, that Particular is established but the visible bodily injury to the head area has not been found attributable to the Subject Member's repeated blows.

[132] With respect to Particular 5, it references the Subject Member being charged criminally with assault causing bodily harm. As I indicated earlier, by operation of subsection 23(2) of the *CSO (Conduct),* the finding of guilt for a common assault which resulted in the Subject Member's conditional discharge may be relied upon and is relied upon by me to establish Allegation 1.

[133] Accordingly, I find the Subject Member to have contravened section 5.1 of the Code of Conduct and Allegation 1 to be established.

Decision on Allegation 2

[134] During the MR 2's oral submissions concerning the establishment of the allegations, he advised that, through his communications with the CAR, the nature of the omissions encompassed by Allegation 2 had been clarified to the MR 2's satisfaction. Through questions posed by the Conduct Board, further clarity concerning the specific deficiencies in the Subject Member's accounts was provided. The CAR confirmed the misconduct concerning the Subject Member's PROS entries and police notes pertained to their incompleteness, not false or untruthful contents. The MR 2 admitted that the Subject Member was "not fulsome" in his reporting, within his notes, his brief conversation with Cpl. B.N. and his PROS reporting. The Conduct Board was satisfied that no further consideration of the MR 1's "Motion for Particulars" was required.

[135] For Allegation 2, Particulars 1 and 2 are clearly established. Particular 3 again references the fact that a struggle ensued between the Subject Member and Mr. [W.], while Mr. [W.] was being transferred to the Tahoe. It is understood that this interaction outside the Tahoe is not part of any alleged misconduct.

[136] It is established that, after being placed in the back seat of the Tahoe, Mr. [W.] spat on the Subject Member and the Subject Member responded by striking Mr. [W.] in the head area. However, it is not my finding that this caused Mr. [W.]'s injuries.

[137] As it is the only injury referenced ("visible bodily injury to his head"), any reference in the plural to "injuries" I consider to describe nothing more than the cut to the scalp suffered by Mr. [W.]. I acknowledge that Mr. [W]. references in his recorded statement wrist and neck soreness and his losing wages due to an inability to perform manual labour, but this may well have been the result of his being held against the hood of the Tahoe by the Subject Member when he offered resistance while being walked to its rear door.

[138] Again, it is established that the Subject Member made no attempt to secure medical assistance for Mr. [W.]. In this case, I do not find that fact relevant or probative to proving incomplete or inaccurate accounting by the Subject Member. The in-vehicle camera system recorded the Subject Member's actions in the back of the vehicle. It is established that Mr. [W.] was transported to the Peace River hospital by Cst. B.G. and received medical attention for his injuries. (I wish to add that, in my view, once Mr. [W.] was an occupant of Cst. B.G.'s police vehicle, responsibility for him as a prisoner rested with Cst. B.G. It is my further view that Mr. [W.] was clearly afforded appropriate medical attention once he was under the control of Cst. B.G.)

[139] With respect to Particular 4, I have the Subject Member's admission. I have reviewed the police notes and I have made specific reference above to at least a portion of those notes which I believe establishes Particular 4. I find that the Subject Member's police notes purposefully downplayed his actions. Perhaps it is playing with words whether there was an "improper suggestion" in the handwritten entries, but the combined effect of the incomplete nature of the

handwritten notes and the actual wording of the handwritten notes was to leave the reader with the impression that the Subject Member was justified in his use of force as Mr. [W.] was grabbing on to him and refusing to let him go.

[140] As I have previously indicated, with respect to Particular 5 and the entry on that specific PROS file, I find it established that only limited details were contained in the occurrence summary. There may be nothing inaccurate and there may be nothing expressly misleading, but I do find that the entry is not complete; therefore, it is not an accurate account of what occurred.

[141] My understanding from the MR 2's representations is that the Subject Member admits that the description of the incident he provided by telephone to Cpl. B.N. was not a fulsome account of what had actually taken place. Above, I have recounted those portions of Cpl. B.N.'s statement in which he provided the understanding he gained of the incident from that brief telephone conversation with the Subject Member. It is for providing an incomplete account that I find Particular 5 established. I do not find that any false or untrue information was communicated in the telephone call involving the Subject Member and Cpl. B.N. I find that there was an incomplete account provided. The totality of what had taken place was not communicated by the Subject Member to Cpl. B.N. I appreciate that it was perhaps not intended to be an extensive telephone briefing, but nevertheless, there was a duty on the Subject Member to explain in greater detail what had transpired, beyond the circumstances that Cpl. B.N. was able to recall being told.

[142] While the Subject Member's account may have been incomplete, it clearly communicated that he had applied force to Mr. [W.] in order to retaliate, and not simply to gain appropriate control over a resistant prisoner. I interpret the Subject Member's decision not to charge Mr. [W.] over the spitting and kicking elements of Mr. [W].'s behaviour, and to communicate this decision to Cpl. B.N. in their brief telephone conversation, as an informal admission on the Subject Member's part that his striking of Mr. [W.] was not a reasonable and necessary use of force.

[143] For Particular 6, I am bound by the decision in *Gill v Canada (Attorney General)*, 2006 FC 1106 (affirmed, 2007 FCA 305) [*Gill*], to assess the particulars provided in order to determine if the acts or omissions describe a contravention of section 8.1 of the Code of Conduct.

[144] Particular 6 reads: "While you did not criminally charge Mr. [W.] with assault on a police officer, an assault on a police officer PROS file […] was opened listing yourself as the victim." There is nothing in this Particular that suggests an incomplete or inaccurate account, it simply states that a PROS file was opened, listing the Subject Member as the victim. I find the facts of Particular 6 established, but I do not find that Particular 6 describes a failure to provide a complete and accurate account. The Subject Member was in fact the victim of an assault by Mr. [W.]. In the age of serious, highly communicable infections, spitting in any peace officer's face can constitute not only an assault, but an upsetting, disrespectful and provocative act.

[145] With respect to Particular 7 ("you failed to accurately report your actions and the conduct of your investigation to your supervisor"), I confirm that in a pre-hearing motion for particulars, brought by the MR 1, the CAR formally confirmed that Particular 7 was a summary of more specific items appearing in preceding particulars, and that Particular 7 did not allege any freestanding act or omission.

[146] Accordingly, I find the Subject Member to have contravened section 8.1 of the Code of Conduct and Allegation 2 to be established.

CONDUCT MEASURES

[147] On the morning of April 25, 2016, the subjects of the qualifications of Dr. M.P., registered clinical psychologist, and the Conduct Board's consideration of certain opinions expressed in her report were again addressed by the representatives. Later in the day, the CAR was permitted 40 minutes in which to cross-examine Dr. M.P., who testified from Peace River by speakerphone. Finally, the Subject Member testified very briefly. Accordingly, all testimony and material to be considered by the Conduct Board to determine conduct measures were completed by the end of the day on April 25, 2018.

[148] On the morning of April 26, 2018, the representatives provided their respective oral submissions. After a brief adjournment, the Conduct Board returned to provide a "profoundly expedited" decision on conduct measures, reserving the right to provide and expand upon, clarify and explain its reasons and findings in greater detail in this final written decision.

[149] The oral decision stated, in part:

> It is my decision that [the Subject Member]'s loss of employment is not a proportionate conduct measure in light of the circumstances of this case, including aggravating and mitigating factors that can be extracted and the circumstances and nature of the contraventions. I can state at this time that my final written decision will identify [any] non-dismissal conduct measures I do find proportionate.
>
> [Subject Member], you can expect not only a reprimand but significant forfeitures of pay to be identified as conduct measures in my final written decision. It remains in the discretion of the Conduct Authority whether to reinstate [the Subject Member] in light of my abbreviated oral decision indicating that my final written decision will not impose a direction to be dismissed or to resign.

Range of conduct measures

[150] The Conduct Board had the benefit of reviewing the cases that were submitted by the parties, including the materials filed in advance and referenced by both MRs which pertained to the Subject Member's circumstances. In addition, the Conduct Board had the opportunity to determine not only which Particulars were established or not established, but to consider the severity of the misconduct that was found to be established.

[151] The MR 2 filed a number of disciplinary decisions involving excessive force and assault committed by RCMP members involving prisoners and persons subject to arrest. These decisions assisted when assessing the range of sanctions imposed for misconduct comparable to the misconduct established under Allegation 1, and when assessing any parity of sanction considerations.

[152] However, I agree with the CAR that the precedential value of many of these decisions is clearly reduced where the member's retention was supported by the Appropriate Officer (a

significant mitigating factor), the matter did not involve a serious or severe assault, a joint sanction proposal demanding adjudicative deference was accepted, and a statutory limit of ten days' loss of pay operated for matters decided under the previous internal disciplinary system involving an RCMP adjudication board.

[153] For Allegation 1, factoring in the range of conduct measures considerations now identified in the RCMP *Conduct Measures Guide*, the range of measures for prisoner assaults appears to span from relatively modest forfeitures of pay for minor or technical assaults to loss of employment for severe cases that lack sufficient mitigation.

[154] With respect to Allegation 2, the range appears to encompass relatively modest forfeitures of pay for incomplete investigative entries (see 2018 RCAD 8 Corrected) to loss of employment for significant false entries where strong mitigating factors are absent (see *Conduct Authority for "J" Division and Constable* [*JC*], 2016-33572 (C-017), level II appeal decision rendered November 20, 2017).

[155] While the principle of parity of sanction is relevant, I understand that this principle does not fetter the discretion bestowed on a conduct board to determine proportionate conduct measures (see *Elhatton v Canada (A.G.)*, 2014 FC 67, at paragraph 70). Moreover, as stated by the Federal Court of Appeal in *Gill*, at paragraph 14, "findings on the sanctions to be imposed are primarily fact-driven and discretionary determinations".

Considerations when determining conduct measures

[156] I am guided by subsection 24(2) of the *CSO (Conduct)*, which states: "A Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct."

[157] In addition, I acknowledge the direction contained in section 11.15 of Chapter XII.I of the RCMP *Administration Manual*: "Aggravating and mitigating circumstances must be considered in determining the appropriate conduct measures in relation to the subject member." Therefore, in coming to my conduct measures decision, I have turned my mind to any

aggravating and mitigating factors, even where they were not identified as such in the submissions made by the representatives.

[158] The *Administration Manual* provides a fairly exhaustive list of potential aggravating and mitigating factors or circumstances.

Aggravating circumstances

[159] Appendix XII-1-20 of the *Administration Manual* describes aggravating circumstances or factors as follows:

> Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself (*Black's Law Dictionary, 6th ed.*).

Accepted aggravating circumstances

[160] After consideration of the information, materials and testimony available to determine appropriate conduct measures, and the submissions of the representatives, I accept the following as aggravating circumstances in this matter for Allegation 1:

- The seriousness of the misconduct, constituting a criminal act of assault. It is understood that the Subject Member momentarily lost his self-control, but during this episode he delivered numerous punches to Mr. [W.]'s head and body, many of which were forceful enough to place Mr. [W.] at risk of bodily injury, and to potentially cause Mr. [W.] emotional upset and fear given his confinement during the assault. While only a few seconds in length, it is aggravating that the assault involved numerous forceful blows. These findings put in context my earlier comment of November 21, 2017, to the parties that a finding of injury causation by the Subject Member "would not, in and of itself, constitute a highly aggravating feature for the Subject Member". The amount of force delivered by the Subject Member's punches, even if some were "glancing" or torso-aimed, made the assault serious, not merely technical, even if *no laceration* occurred.

- Notwithstanding the extreme provocation by Mr. [W.], the Subject Member's misconduct clearly involved a lack of compassion and respect for an intoxicated prisoner. The handcuffs remained on Mr. [W.]'s wrists in front of his torso, somewhat restricting his ability to react to the punches of the Subject Member. However, I do acknowledge that neither the handcuffs nor Mr. [W.]'s degree of intoxication seemed to reduce his ability to kick out violently at the Subject Member, both before and after the assault.

- The misconduct was perpetrated by a member with seniority, rank and an important supervisory role in the policing District. A much higher level of deportment was expected from the Subject Member as a role model. Included in this consideration is the fact that the mistreatment of a prisoner took place before a more junior member.

- The Subject Member's misconduct, at the time of his initial charge for assault causing bodily harm, received some media attention.

- However it may have been caused, there was a more than transient physical injury sustained by Mr. [W.]. I do note, however, that [Cst. B.G.]'s actions in pulling Mr. [W.] further into the back seat, striking him with his fist, and shutting the rear door opposite the Subject Member, did not take place as a result of the Subject Member's misconduct. Accordingly, it cannot be said that any scalp laceration that may have been caused by [Cst. B.G.]'s actions was the result of the Subject Member's misconduct.

[161] After due consideration, I accept the following as an aggravating circumstance in this matter for Allegation 2:

- The deliberate nature of a discrete aspect of the Allegation 2 misconduct, involving the preparation of handwritten police notes that did not provide a full account and would leave the reader with a misleading understanding of what really occurred when the Subject Member applied physical force to Mr. [W.] in the back seat of the Tahoe. While the Subject Member did exclaim that Mr. [W.] should "let go" of him, and the video recording captures Mr. [W.] seeking to still control the Subject Member's arms at the

point where the blows have ended, an objective reader would not form an accurate picture of the overall event from the Subject Member's handwritten account.

Mitigating circumstances

[162] Appendix XII-1-20 of the *Administration Manual* describes mitigating circumstances as follows:

> A fact or situation that does not bear on the question of a defendant's guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence" (*Black's Law Dictionary, 8th ed.*). Mitigating circumstances do not constitute a justification or an excuse for the offence, but in fairness, these factors may be taken into consideration to reduce the severity of the sanction to be imposed, in order to appropriately deal with the misconduct.

Letters of reference

[163] Without objection from the CAR, the MRs filed a number of supportive letters for my consideration in the conduct measures phase of the hearing.

[164] Sergeant J.O., Operations NCO, Peace River Detachment, states that the Subject Member was "tired, frustrated and burnt out", his mental health "was no doubt in a state of decline", his reaction was "out of character" and he had "never acted in this fashion towards anyone in the past". Having supervised the Subject Member for nine years, Sergeant J.O. has only observed the Subject Member police with "compassion, humanity and a strong dedication to his duty". Sergeant J.O. would not hesitate to work with the Subject Member again, and confirmed his support of the Subject Member even after having reviewed of the videotape of the assault upon Mr. [W].

[165] S/Sgt. B.M., Detachment Commander, Peace River Detachment, states that he has known the Subject Member since September 2014. (It was S/Sgt B.M., identified earlier in these reasons as "S/Sgt [M]", to whom the Subject Member was "remorseful, contrite and apologetic" on April 29, 2016.) He indicates that the Subject Member is not a man of many words, and would not want to appear weak or wear his troubles on his sleeve. S/Sgt. B.M. believes that the Subject

Member has provided valuable work within the communities served by the RCMP, and he would not have an issue working with him in the future. He supports the Subject Member with full knowledge of both the criminal charge outcome, and the contraventions made under the Code of Conduct.

[166] Retired in 2012 after 38 years of service, S/Sgt. G.M. met the Subject Member soon after his arrival in "K" Division, after the Subject Member completed training at Depot. He supervised the Subject Member from 1996 to 2001. He considers the contraventions to be out of character; he specifically recalls the Subject Member's enduring willingness to see the good in citizens who were acting in an extremely antagonistic manner toward the police. He states that, in considering this incident, he wants to believe it was a "terrible moment of very bad judgment not consistent with the person who is [the Subject Member]".

[167] S/Sgt. P.S., retired, former Commander of the Spirit River Detachment, "K" Division, worked with the Subject Member from 2002 to 2004, and neither heard of nor observed any inappropriate behaviour by the Subject Member involving prisoners. To the contrary, he exhibited maturity, respect and compassion, performing arrests in a firm but fair manner.

[168] In April 2017, S/Sgt. C.G. was on the eve of his RCMP retirement after 31 years of service, including eight years of frontline policing in Northern Alberta. In 18 months of direct supervision of the Subject Member, beginning in 2004, S/Sgt. C.G. noted the Subject Member's ability to maintain his composure in the most stressful of situations, and considers the impugned conduct clearly out of character. He describes the Subject Member as a very capable investigator of frequently time pressured, complex investigations, who has exhibited professionalism and compassion, including when questioning the family of a highly publicized multiple murderer of RCMP members. He has never observed the Subject Member "lose his cool". To the contrary, the Subject Member has always presented as a conscientious and sensitive individual. The contraventions are inconsistent with S/Sgt. C.G.'s experience with the Subject Member.

[169] Cpl. D.B., General Investigation Section (GIS), Peace River Detachment, has served over 12 years in that community, initially as a subordinate supervised by the Subject Member, and,

from 2012 to 2014, as a peer working on GIS cases. Cpl. D.B. provided detailed observations concerning the Subject Member's humility, approachable nature, investigative knowledge and skills, and consistent and notable ability to de-escalate situations involving irate, aggressive individuals, on occasion displaying an extraordinary degree of self-control. The Subject Member's misconduct is not representative of his typical behaviour or manner of conducting himself. The Subject Member's adherence to the core values of the RCMP, over a long period of service, has meant that he has repeatedly earned the trust of co-workers and citizens alike, and this trust remains notwithstanding the contraventions.

[170] Cst. N.Q., Red Deer Detachment, "K" Division, was posted to Peace River Detachment in 2009, where she was supervised by the Subject Member until March 2010, when a serious on-duty injury, resulting from a criminal assault, necessitated Cst. N.Q.'s transfer. The Subject Member investigated the assault. The Subject Member was supportive of Cst. N.Q. until a conviction was entered and a satisfactory sentence imposed. Cst. N.Q. described the contraventions as out of character. Her reaction when she first heard about them was not only surprise, but the thought that the Subject Member "must have been pushed to [sic] unreasonably far for him to act this way". She never observed the Subject Member act in an unprofessional manner.

[171] Cst. J.P. has seven years of RCMP service. His first posting was to Peace River Detachment in 2010, where the Subject Member was the supervisor on his Watch. Despite Cst. J.P.'s transfer in 2015, he has had periodic communication with the Subject Member through investigations and personal contact. He offered sincere and wide-ranging compliments concerning the Subject Member. He noted the Subject Member's effective mentorship, investigation and interviewing skills, and ability to effectively communicate and de-escalate situations. Aware of the Code of Conduct allegations, Cst. J.P. stated: "I truly believe that this is completely out of character for [the Subject Member] […] [and] not at all a representation of what I have personally observed of him over the [seven] years I have known him."

[172] Ms. B.W. was the Victims Services Coordinator, at Spirit River Detachment, where she worked with the Subject Member from 2001 to 2005. She described acts of compassion he

performed when assisting grieving family members, and dealing with site workers in the emotional period immediately following a fatal workplace tragedy. She was sorry to see the Subject Member transferred from Spirit River because he was such a "willing, reliable and compassionate officer".

[173] Mr. R.M., a lawyer practising in Peace River since 1998, has known the Subject Member since 2004, in both professional and personal settings. He has encountered the Subject Member while prosecuting and defending in criminal- and drug-related cases. I draw from Mr. R.M.'s many opportunities to observe the Subject Member that he has always been an impressive, candid witness and investigator, never exaggerating evidence to implicate an accused, nor misrepresenting his own actions. Throughout Mr. R.M.'s representation of criminal defence clients, who often do not view the police in a positive light, no client has ever indicated any inappropriate treatment by the Subject Member. Mr. R.M. stated that any excessive force used by the Subject Member "would be the exception and out of character".

[174] Retired Vice-Principal/Counselor and coach at a local school, Mr. R.P. knew the Subject Member for nine years in a professional capacity, and also in a personal capacity having coached one of the Subject Member's children. He offered the following pertinent comment:

> When I learned of the allegations of contraventions to the Code of Conduct, I was astonished. In my opinion, it seemed very much out of character. This did not reflect the person whom I have had the opportunity to know and work with as a parent. I have always known [the Subject Member] to be quite the opposite. I believe [the Subject Member] […] to be an individual who shows a great deal of respect for himself, his family, his job and his community.

[175] Ms. S.S. is the General Manager of a local newspaper, and has served as an elected official with the local Chamber of Commerce and with a local philanthropic organization. She first met the Subject Member approximately 13 years ago when he was transferred to Peace River. When news of the incident was released, Ms. S.S. was extremely shocked, writing: "This is definitely not the [the Subject Member] that I knew." After much consideration and reflection, she decided not to run any story in her paper concerning the Subject Member, something she has only done a few times in her 25-year career in the news media. She struggled to reconcile the

allegations with the individual she knew, but she decided not to report on the Subject Member's case "or in any way blemish his good reputation". Ms. S.S. did not make this decision lightly and, despite encountering some "resistance", she has maintained her decision, stating: "That is how uncharacteristic of [the Subject Member] I believe this to be […]."

[176] A letter dated April 17, 2018, from the Alberta Community Corrections and Release Program confirms that, on August 22, 2017, the Subject Member's conviction for assault resulted in his being placed on 18 months of probation, during which he was required to report to a probation officer, complete 220 hours of community service, and undergo such assessment, counselling or treatment as his probation officer directed. Not surprisingly, there are no issues identified concerning the Subject Member's compliance. A letter dated April 16, 2018, from the sports centre in Manning confirms that not only did the Subject Member thoroughly perform repairs and painting tasks at the arena as a condition of his probation, but he was "exceptionally courteous" and helpful when interacting with parents and young hockey players. In all, the Subject Member performed 253 hours of community service, detailed on a time sheet filed by the MR 2. The Subject Member also served as a volunteer bus driver for a weekend trip by a high school basketball team to Grande Prairie.

Performance assessments

[177] The Subject Member's employment as a member of the RCMP began in 1996; all of his service has taken place in "K" Division. His first posting was to Bonnyville Detachment (1996 – 2001), next a limited duration northern posting to Spirit River Detachment (2001 – 2005), a plainclothes posting to Peace River GIS (2005 – 2006), followed by promotion to the rank of corporal at the Municipal Detachment, in Peace River, in 2016. It is apparent from the performance evaluations and Form 1004 logs filed by the MRs that the Subject Member has consistently performed his duties as a peace officer and investigator at a very high level. He has also consistently provided exceptional leadership and effective supervision in his roles as a Watch Supervisor, NCO in charge of specialized units, or even as an Acting Detachment Commander or Operations NCO. As far back as 2008, he has been identified as a suitable candidate to compete for further promotion. His strong operational experience, investigative

skills, and effective interpersonal style and personal standards brought him the role of NCO in Charge of the newly created Peace River Regional GIS unit. This unit achieved notable investigative successes, with the Subject Member's dedication and effectiveness on a number of complex projects being noted. In the last written evaluation presented to me (2015 – 2016), the Subject Member's line officer summarized his importance by stating: "[The Subject Member] is one of the corner stones at Peace Regional."

Psychological report of Dr. M.P.

[178] The Subject Member's involvement with Dr. M.P., registered psychologist, began before his criminal conditional discharge was imposed, and gave rise to a report prepared by Dr. M.P. The MR 2 was prepared to let the report stand in for any direct examination testimony from Dr. M.P. Aspects of Dr. M.P.'s *curriculum vitae* were clarified and updated, and her opinions in specific portions of her report were explored, when Dr. M.P.'s was cross-examined by speakerphone.

[179] The MR 2 sought to qualify Dr. M.P. as an expert in psychology in relation to assessment, diagnosis, treatment and prognosis on the basis of her professional, academic and clinical qualifications and experience as described in her *curriculum vitae*. Moreover, it was the MR 2's view that the opinions expressed by Dr. M.P. in her report were opinions she was qualified to express.

[180] The CAR did not seek to have Dr. M.P.'s entire report "expunged" or otherwise excluded from consideration by the Conduct Board. He acknowledged that, while it was not a specific DSM-V recognized disorder, Dr. M.P.'s opinion that the Subject Member was serving on the early morning of April 15, 2016, while subject to the effects of "cumulative stress" was one she was qualified to form, and this finding could be afforded whatever weight the Conduct Board considered appropriate. What the CAR took issue with was the link made by Dr. M.P. between the Subject Member's cumulative stress condition and his assault upon Mr. [W.].

[181] The CAR referenced three specific entries in Dr. M.P.'s report. The first, appearing at page 3, subparagraph 4, states:

> There would be a direct link between [the Subject Member]'s psychological condition in April of 2016 and his alleged behavior. His level of irritability as well as his sleeping problems and chronic feelings of exhaustion would have made him more reactive to a problematic event.

[182] The second report entry referenced by the CAR appears at page 4, subparagraph 6:

> Despite his actions, [the Subject Member] takes responsibility for his behaviour. His account of the incident in his interviews with myself was consistent with the official documentation and videotape recording. He regrets his actions, loss of control of his anger and any harm to the victim.

[183] The third specific entry appears at page 3, paragraph 5:

> [The Subject Member] presented as suffering from cumulative stress, although not a diagnostic label.

[184] The CAR referred to the authors of the three use of force reports, and their apparent qualifications to offer opinions concerning the force applied to Mr. [W.], qualifications that were not possessed by Dr. M.P. The CAR asserted that, because Dr. M.P. did not possess expert qualifications in "police training, police tactics, use of force, [and] circumstances surrounding arrest", her opinion linking the Subject Member's psychological condition and his loss of control should not be accepted by the Conduct Board. This argument is not persuasive as, in my view, no special knowledge of use of force, police tactics or elements related to arrest was required in order for Dr. M.P. to determine the Subject Member's condition, and to offer her expert opinion on how that condition may have contributed to his loss of self-control when he assaulted Mr. [W.].

[185] I also do not accept that this opinion by Dr. M.P. of a link between psychological condition and loss of self-control must be excluded because it is not necessary. It is true that inherent in the Conduct Board's finding that the Subject Member assaulted Mr. W. is the finding that a loss of self- control took place, but that does not shunt the distinct contributory factor identified by Dr. M.P. into the category of an unnecessary opinion.

[186] With respect to necessity, the CAR argues that "stress causes you to do certain things […] you don't need an expert to put forward that position to you". Put slightly differently, the CAR asks: "[D]oes the judge need to hear from an expert to decide whether or not stress […]

would have had an impact?" It may be only common sense that some sort of cumulative fatigue or stress might cause irritability, or less obviously that this fatigue might contribute to an over-reaction to a negative event. But I find that the opinions of Dr. M.P., derived from not only the relevant materials but also clinical examination of the Subject Member, are specific to the Subject Member's condition and reaction. Accordingly, I consider Dr M.P.'s opinions to be expert's opinion that are necessary in the sense that they provide psychological information specific to the Subject Member that is "likely to be outside the experience and knowledge" of lay persons such as adjudicators, judges and jurors. Importantly, I do not consider the opinions provided by Dr. M.P. to usurp any aspect of my Conduct Board function, or to decide any ultimate issue that I must determine.

[187] I make this determination to accept the opinions of Dr. M.P. having reviewed the CAR's authorities. These authorities are relied upon to challenge Dr. M.P.'s status as an expert with sufficient qualifications to form the impugned opinions, and to argue that the MR 2 has failed to meet any legal onus concerning her qualifications.

[188] In *R. v McPherson*, 2011 ONSC 7717 (Superior Court of Justice) [*McPherson*], a criminal jury trial, the presiding judge refused to qualify a university professor, characterized as a "dedicated lobbyist", as an expert. He was not permitted to testify concerning "patterns of interaction between traffickers and their prey, and methods of recruitment, retention and control used by traffickers against their victims." The professor's testimony was not found necessary. The motivations of victims to enter the world of prostitution and human trafficking were not considered to be rare or hard to understand, and they involved common human experiences. Dr. M.P.'s situation differs markedly from that of the professor in *McPherson*. However, in accepting receipt of Dr. M.P.'s opinions, I do adopt the cautious approach to a behavioural (or "soft") science, as recommended by the Ontario Court of Appeal in *R. v McIntosh*, [1997] OJ No 3172, at paragraph 14.

[189] In *R. v D. (D.),* [2000] 2 SCR 275, the Supreme Court of Canada confirmed that the trial judge erred in permitting a Crown rebuttal expert to testify that many factors can affect the timing of a child's complaint of sexual abuse, and that delayed disclosure is not a diagnostic of

whether the alleged assaults actually occurred. The Supreme Court found that the jury could have sufficiently grasped these concepts by an adequate instruction from the trial judge; therefore, the Crown's evidence was not necessary. Paragraph 57 of *R. v D. (D.)* provides a succinct commentary on the general approach to be taken to the issue of necessity. Applying this approach, I consider the opinions of Dr. M.P. to be sufficiently necessary, as this legal requirement has been defined.

[190] Again, in my view, no concern arises respecting any prejudicial effect outweighing the probative value of Dr. M.P.'s opinions. I repeat this finding having considered the CAR's argument that, as I understand it, I could independently conclude that stress is a mitigating factor but then also indicate that I am "bolstered by the opinion of Dr. [M.P.]". This bolstering effect would, as I understand the CAR, constitute a prejudicial effect that would outweigh the probative value of Dr. M.P.'s opinion. I am not persuaded by this submission.

[191] In *R. v Pompeo*, 2014 BCCA 317 [*Pompeo*], the trial judge was found to have erred in excluding evidence of a defence expert, who viewed the accused's use of lethal force as in accordance with police protocols and training, and necessary. In the present case, the Subject Member has pleaded guilty to assaulting Mr. W., and there is no issue (based on the in-vehicle video recording) that the Subject Member's application of force was neither necessary nor reasonable. There is no need for consideration of any expert's opinions concerning how his application of force did not accord with applicable RCMP policy. Neither the MR 2 nor the CAR was prevented from highlighting specific physical elements pictured in the in-vehicle video recording, elements mentioned in any excluded use of force report. The Subject Member, unlike the accused in *Pompeo*, has never argued that his use of force upon Mr. [W.] was justified under paragraph 25(1)(b) of the *Criminal Code*. My finding a lack of necessity in the three use of force expert reports filed by the representatives does not, in my view, support the exclusion of the impugned opinions of Dr. M.P.

[192] I am not persuaded that Dr. M.P. was required to find a mental disorder, as categorized under the DSM-V manual, in order for the Subject Member's mental state to be found a potential contributing factor affecting his loss of control. I take this position after having carefully

considered the CAR's submission that I would have the ability to apply my own personal experiences with respect to "stress", but if Dr. M.P. provided a "true diagnosis" under the DSM-V, her opinions would be admissible as they would fall "outside of the expertise of the Board".

[193] I do not consider the purpose of the impugned opinions of Dr. M.P. to be the bolstering of the Subject Member's credibility, even his credibility concerning his reaction when he was spat upon by Mr. [W.]. He testified concerning his mindset when he was spat upon. His signed statement addresses his mindset too. I consider the opinions to provide expert psychological analysis whether the cumulative stress being experienced by the Subject Member constituted a contributing factor in his loss of self-control and assault upon Mr. [W.]. Given the observations and lay opinions provided in the reference letter of Sergeant J.O. concerning the Subject Member's burnout, the existence of some type of stressor does not rise or fall solely on the information received by Dr. M.P. from the Subject Member.

[194] In preliminary conversation with the Conduct Board, Dr. M.P. agreed that it was appropriate that she be qualified as an expert in psychology, including assessment, diagnosis, treatment and prognosis. In the forty minutes of cross-examination permitted the CAR, I find that the following points were established or confirmed:

- The report does not relate to the misconduct contained in Allegation 2
- Dr. [M.P.] was made aware in her testimony, for the first time, of the Conduct Board's finding that the Subject Member used excessive force.
- Previously, she had been qualified as an expert in psychological assessment and psychological treatment. She did not recall being qualified previously regarding prognosis.
- Dr. [M.P.] updated her most recent expert witness qualification as being in 2016 before the Alberta Court of Queen's Bench, concerning a parenting assessment. She added that in this type of assessment there is risk assessment concerning use of violence against children or a spouse. This risk assessment concerns the probability of re-offending in

terms of assault. These assessments would only involve family members, not external players.

- Regarding Dr. [M.P.]'s qualification in a dangerous offender matter involving a serial killer, it involved a statement of risk of offending and an assessment of effectiveness of treatment.

- Dr. [M.P.] confirmed she has never provided expert evidence with respect to the use of force, nor training of police officers in the use of force, nor police tactics in the use of force, nor the practical application of police use of force training, tactics, and protocols. She does not consider herself an expert in the use of force. In her work at the Peace River Correctional Centre, her work experiences never involved correctional officers' or police officers' use of force. No critical incident debriefing for the RCMP involved use of force.

- With respect to her report, and the sentence respecting the link between the Subject Member's psychological condition and his misconduct, this concerns the contributing factors she felt went into his loss of temper.

- With respect to the further sentence concerning his level of irritability as well as sleeping problems, chronic feelings of exhaustion, and being reactive to a problematic event, these were the factors correlated with loss of temper. "Loss of temper" is not a medical diagnosis, it is a description of a behaviour. A lay person probably could make an observation that a person had reacted in an aggressive manner. In writing this sentence, Dr. [M.P.] would have been writing as a psychologist about the correlation between the Subject Member's previous symptomatology and an act of aggression, in laymens' terms "a loss of temper".

- "Cumulative stress" is not a disorder identified under the DSM-V manual, but it is a psychological term recognized among psychologists. "[…] [I]t's fair to call it a condition that is recognized by other psychologists as a condition."

- With respect to a link being made between cumulative stress and a police officer using excessive force, Dr. [M.P.] testified there have been studies completed. The research falls under PTSD literature, although the diagnosis may not be PTSD. They studied stress and its impact on behaviour.

- In saying there was a direct link between cumulative stress and the Subject Member's behaviour, saying a link exists also serves as an "exclusion" in the sense that, for example, the behaviour was not attributable to a personality disorder or "anger problems"

- Dr. [M.P.] could not provide a qualified answer whether all eleven of the punches by the Subject Member were directly linked to cumulative stress, cumulative stress was related to his level of aggression. Based on the literature, there is a relief of tension, of frustration or anger, and then a person stops the aggressive behaviour.

- Dr. [M.P.] has not had other patients who were police officers involved in use of force situations, but she feels confident in drawing a direct link between his condition and the behaviour

- She apologized for using "direct link" and indicated she should have used "contributing factor" or "correlation", as "direct link […] implies causality", and it was a mistake to use those words.

- It was a significant factor, but not as significant as provocation, which her report did not address

[*Sic throughout*]

[195] I find Dr. M.P. duly qualified to provide the opinions contained in her report, specifically her opinions on the Subject Member's psychological status, including his psychological status at the time of the misconduct, any relationship between his condition and his misconduct, his diagnosis and treatment, and his prognosis and the likelihood of reoccurrence. I accept that, whether or not it is identified as a mental disorder by the DSM-V manual, Dr. M.P. can offer

expert opinion evidence on the effects that cumulative stress can have on a person, and more specifically and importantly, any contributory influence it had on the Subject Member's behaviour at the time of the assault.

[196] With respect to the second impugned passage from Dr. M.P.'s report (reproduced above from page 4, subparagraph 6, of the report), the CAR raised whether Dr. M.P.'s mention of the Subject Member's regrets made her an advocate and no longer an expert. The exact sentence in question states: "He regrets his actions, loss of control of his anger and any harm to the victim." The MR 2 acknowledged that Dr. M.P. cannot be formally viewed as an independent expert. However, based on the method of presentation of information and opinions throughout the entire report prepared by Dr. M.P., and what I found to be her cooperative, balanced and utterly professional responses when testifying, I harbour no concern that she has become an advocate. The opinions Dr. M.P. has expressed are admissible, and, in my view, have not been undermined or improperly influenced by her parallel role as the Subject Member's treating psychologist such that they must be excluded.

[197] I agree with the MR 2 that Dr. M.P. is qualified to present the opinions the CAR seeks to have excluded, together with the remainder of her expert report. Dr. M.P. has studied and practised in the field of psychology for over 40 years, possesses a Master's degree and Doctorate in Psychology, and has been certified as a registered psychologist since 1976. I note that Dr. M.P. has been qualified as an expert witness in various Alberta courts on approximately 34 occasions, and worked some 18 years at the Peace River Correctional Centre as a Clinical Psychologist. Relevant to her qualifications to express the opinions challenged by the CAR, her duties included the assessment and treatment of individuals with behavioural, emotional and social problems.

[198] In summary, I am satisfied that the requirements for the admission of Dr. M.P.'s opinions, as identified in *R. v Mohan*, [1994] 2 SCR 9, have been met. I find that the opinions are clearly relevant to a potential mitigating factor, are necessary, are not excluded by the operation of any exclusionary rule, and are presented by a properly qualified expert. I can see no issue

arising whether there is any prejudicial effect created that outweighs the probative value of the information.

Accepted mitigating circumstances

[199] After consideration of the information, materials and testimony available to determine the appropriate conduct measures, and the submissions of the representatives, I accept the following as mitigating factors for Allegation 1, and as applicable, for Allegation 2:

- The Subject Member almost immediately took responsibility when, in an admittedly less than fulsome manner, he admitted an assault in his telephone conversation with [Cpl. B.N.]; he fully acknowledged his actions in the later telephone call he received from [S/Sgt. M.] on April 29, 2016; while the assault was clearly established by the in-vehicle video footage, he acknowledged both of his contraventions of the Code of Conduct, and he pleaded guilty to a criminal charge of common assault.

- As detailed earlier in this written decision, the Subject Member's Written Response communicated his admission of misconduct with respect to both allegations. However, deficiencies in particulars in the Notice, unsuccessful requests for ordered production of information, and other issues and developments, then created delays in the resolution of this matter. Nevertheless, upon the retainer of the MR 2, the Subject Member's desire to resolve the matter expeditously was given almost immediate effect.

- Under oath, the Subject Member provided a sincere apology, and the Conduct Board finds he is deeply remorseful for his actions.

- The Subject Member has over twenty years of unblemished employment as a member of the RCMP. As stated in my decision in 2017 RCAD 4, at paragraph 68: "In the parlance of many RCMP adjudication boards, service without prior discipline may serve as mitigating, in the sense that this period of service may serve as a "bank account" upon which a member can sometimes draw when misconduct occurs."

- The Subject Member has, throughout his career, performed his duties in a clearly above-average manner, demonstrating an exceptional work ethic and a particular expertise and effectiveness as an investigator. The Subject Member has maintained his exemplary level of performance notwithstanding the challenges associated with policing in northern communities.

- While the Conduct Authority does not support the Subject Member's continued employment as a member of the RCMP, a wide range of members, a number of whom have supervised, worked alongside, or been supervised by the Subject Member over varied and significant periods of time, have confirmed their unreserved support for the Subject Member being retained in the Force.

- The Subject Member clearly enjoys very strong community support, as articulated by a number of civilians in their reference letters.

- After very careful scrutiny of all performance-related RCMP documentation, it is apparent that the Subject Member's policing style has never, while conducting extensive frontline operational duties, given rise to any issue of unreasonable or excessive force. I am fully satisfied that the Subject Member's misconduct when dealing with Mr. [W.], and the Subject Member's subsequent inadequate oral and written accounts, constitute an isolated incident.

- Moreover, from both the performance and reference letter materials, I am satisfied that the contraventions were completely out of character for the Subject Member. The observations shared by Mr. [R.M.], from the unique perspective of a lawyer practising in criminal law, confirm the out of character nature of the Subject Member's misconduct.

- I am satisfied that at the time of the Subject Member's misconduct respecting Allegation 1, he was suffering from some degree of burn out, as identified in the letter of Sergeant [J.O.]. Clearly, Sergeant [J.O.] has no documented clinical expertise or qualifications, but can nevertheless provide observations from the vantage point of a senior NCO familiar with the extraordinary stressors being experienced by the Subject Member. Generally, a

degree of mental or physical fatigue cannot serve as an absolute excuse or legal defence for acts of police misconduct, but when combined with the time of night that the Subject Member was called out, the burnout identified by Sergeant [J.O.] deserves some weight as a mitigating factor. The observations of Sergeant [J.O.] appear to overlap with the clinical findings of Dr. [M.P.] and I have decided to consider them as aspects of the same mitigating circumstance. The CAR does not dispute Dr. [M.P.]'s opinion that at the time of Mr. [W.]'s assault, the Subject Member was operating under the effects of cumulative stress. I accept not only this opinion, but Dr. [M.P.]'s further finding that the Subject Member's psychological condition was a contributing factor in his loss of control at the time he struck Mr. [W.]. In cross-examination, Dr. [M.P.] clarified her use of language, indicating that the existence of cumulative stress should be viewed as a "contributing factor" in the Subject Member's loss of control. While she indicated that she regretted using the term "direct link" because it "implies causality", I accept her opinion using the less weighted term "contributing factor".

- While the Subject Member's psychological state is viewed as a background influence upon his behaviour with Mr. [W.], the central and strongest mitigating factor is the clear, severe provocation that was committed by Mr [W.] when he spat in the Subject Member's face, in particular his eye. A member with the Subject Member's length of service and frontline experience is expected to demonstrate sufficient self-restraint that they do not respond inappropriately, even to Mr. [W.]'s disgusting act of provocation. But members are human, and while self-restraint is expected of all members, lapses or losses of self-control occur in response to extraordinary provocation.

- The Subject Member, aware that his assault of Mr. [W.] was under investigation, nevertheless continued to perform his regular duties until his suspension.

- On the basis of the conduct measures materials before me, and the testimony of the Subject Member, I find there is a minimal likelihood of recidivism by the Subject Member, both with respect to his appropriate interaction with prisoners and his appropriate completion of accounts and reports. To the extent that cumulative stress

influenced his misconduct, I am satisfied that the Subject Member has received sufficient psychological treatment from Dr. [M.P.] to be considered fully rehabilitated.

- While no evidence was received on this point, it is conceivable that the misconduct encompassed by Allegation 2 might give rise to *McNeil* considerations, which might come to affect the Subject Member's suitability for certain policing functions.

Proportionate conduct measures

[200] Having considered the nature of the established contraventions, as well as the aggravating and mitigating circumstances, it is my view that the loss of the Subject Member's employment (whether by order to resign or be dismissed, or by order for outright dismissal) is not the proportionate conduct measure. I gave careful consideration to the suitability of an order for demotion, especially in light of the less than fulsome accounts comprising the misconduct under Allegation 2. However, with the possible exception of a small portion of his handwritten police notes, the Subject Member's accounts may have been incomplete but they did not contain deliberately misleading entries.

[201] If I even suspected that the Subject Member had engaged in mistreatment of any prisoner in the past, then the misconduct established under Allegation 1 (even where there was severe provocation) would have called for demotion if not outright dismissal, as it falls to senior, supervisory RCMP personnel to ensure appropriate standards of treatment are consistently applied when handling even non-compliant or provocative prisoners and detained persons.

[202] However, in light of the mitigating circumstances, I do not believe that the Subject Member's misconduct reveals a deeper violent nature or corrupted character, personality disorder, or any incorrigible attitude concerning complete and accurate reporting. If these sorts of features had been revealed, then the Subject Member's outright dismissal would have demanded very serious consideration in order to adequately protect the public interest, public confidence in the RCMP, and the legitimate employer interests of the RCMP as a law enforcement institution.

[203] I have determined that the proportionate conduct measures here do not include an order for dismissal, demotion, nor for transfer or reassignment.

[204] In addition, I am satisfied that the Subject Member is now fully aware of his obligations concerning maintenance of his own health, and no order for further psychological assessment or monitoring is ordered. Nevertheless, I wish to emphasize to the Subject Member that he must act to protect his health not only for his own sake, but to protect the health and safety of his co-workers and those members of the public with whom he must interact, sometimes under demanding operational conditions. While it may have been considered a sign of dedication or loyalty to continue to work despite health issues, the Subject Member must never again allow his behaviour to be compromised by any health factor for which the RCMP plainly supports suitable treatment.

[205] Overall, the Subject Member's contraventions each fall on the aggravated end of the spectrum identified in the RCMP *Conduct Measures Guide*. I find each contravention is deserving of conduct measures involving a formal reprimand (which is imposed by service upon the Subject Member of this final written decision) and an order for the loss of a significant amount of pay.

[206] For Allegation 1, I order the loss of 25 days of pay (200 hours of pay). Given the importance of complete and accurate accounting in the circumstances present in this case, I order the further loss of 20 days of pay (160 hours of pay) for Allegation 2.

[207] Under the previous disciplinary system, where all formal allegations were adjudicated by an RCMP adjudication board, the maximum forfeiture possible under a single notice of hearing was ten days of pay, even with multiple allegations established. There is no such restriction on the total amount of forfeiture that may be imposed under a notice of conduct hearing considered by a conduct board.

[208] Therefore, as detailed above, I have imposed a total loss of 45 days of pay, or 360 hours. When compared with the sanctions imposed by RCMP adjudication boards in the cases submitted, this represents a very significant increase in loss of pay. However, it is apparent that

the new conduct regime grants conduct boards the authority and flexibility to impose much greater financial consequences for misconduct in order to impose proportionate measures short of ordered resignation, dismissal or demotion. This broader authority is reflected in the pay forfeiture considerations outlined in the RCMP *Conduct Measures Guide*.

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

[210] The forfeiture of pay measures are both corrective and punitive, and are intended to deter misconduct. Specifically, these measures should be understood by the Subject Member to be a sharp condemnation of his serious misconduct. Generally, these measures should tell all RCMP members that misconduct of this nature risks severe employment consequences, and could well result in dismissal where significant mitigating factors are absent.

CONCLUSION

[211] This written decision issued on today's date, August 16, 2018, constitutes the written decision required to be served on each party under subsection 25(3) of the *CSO (Conduct).* It may be appealed to the Commissioner by filing a statement of appeal within 14 days of the service of this decision on the Subject Member (section 45.11 of the *RCMP Act*; section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-293).

August 16, 2018

John A. McKinlay — Date

Conduct Board