



ROYAL CANADIAN MOUNTED POLICE

in the matter of
a conduct hearing pursuant to the
Royal Canadian Mounted Police Act, RSC, 1985, c R-10

BETWEEN:

Commanding Officer, "K" Division

(Conduct Authority)

and

Constable Kelly Brown
Regimental Number 53241

(Subject Member)

RCMP Conduct Board – Record of Decision

Christine Sakiris

September 20, 2019

Representative for the Conduct Authority:
Staff Sergeant Jon Hart

Representatives for Constable Brown:
Mr. Gordon Campbell and Staff Sergeant Peter Hearty

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SUMMARY

Constable Brown was alleged to have touched another member for a sexual purpose and without her consent. The *Notice of Conduct Hearing* contained one allegation under section 7.1 of the RCMP Code of Conduct, detailing four incidents of non-consensual touching for a sexual purpose over the course of a few hours. The incidents were alleged to have taken place off-duty, after a Watch party, as Constable Brown and a female member walked to their respective homes. Both members were intoxicated. Following a hearing, at which five witnesses presented evidence, including Constable Brown, the Conduct Board found the allegation to be established. The following conduct measures were imposed: a) a financial penalty of 40 days, to be deducted from Constable Brown’s pay; b) ineligibility for promotion for a period of 2 years, to start from the date of Constable Brown’s reinstatement; and c) a direction to work under close supervision for a period of 1 year, to start from the date of Constable Brown’s reinstatement.

INTRODUCTION

[1] On or about July 5, 2017, while off-duty, Constable Kelly Brown and another member, T.N., attended a Watch party where both consumed alcohol. In the early hours of July 6, 2017, Constable Brown and T.N. walked home to their respective residences. Constable Brown is alleged to have touched T.N., for a sexual purpose and without her consent, during that walk home.

[2] A Code of Conduct Investigation, under Part IV of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], was initiated on July 24, 2017. The matter was also referred to the Alberta Serious Incident Response Team (ASIRT). Criminal charges were not pursued.¹

[3] On March 10, 2018, the Commanding Officer and Conduct Authority for “K” Division (the Conduct Authority) signed a *Notice to the Designated Officer* which requested that a conduct hearing be initiated in relation to this matter. I was appointed as the Conduct Board on July 18, 2018, pursuant to subsection 43(1) of the *RCMP Act*.

[4] Constable Brown is facing one allegation under section 7.1 of the RCMP Code of Conduct. The particulars of the allegation describe four incidents of unwanted sexual touching. The *Notice of Conduct Hearing* was signed by the Conduct Authority on August 29, 2018. It was served on Constable Brown together with the investigation package on September 11, 2018.

[5] On October 31, 2018, Constable Brown provided his response to the *Notice of Conduct Hearing*, pursuant to subsection 15(3) of the *Commissioner’s Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*].

[6] As is required in this process, I reviewed a copy of the *Notice of Conduct Hearing* and of the investigation package, Constable Brown’s response pursuant to subsection 15(3) of the *CSO (Conduct)*, as well as additional documentation admitted over the course of pre-hearing conferences in this matter. These materials shall be referred to collectively as the Record.

[7] Prior to the hearing, the Member Representative (MR) presented a motion for additional disclosure of T.N.’s occupational health file, for the period of February 2017 until her deployment

¹ This fact is noted as background information only. No weight was ascribed to the Crown’s decision not to pursue charges in this matter.

out of Leduc Detachment. On March 22, 2019, I provided my written decision to the parties, in which I denied the motion.

[8] The hearing for this matter was held in Edmonton, Alberta, from June 5 to 7, 2019. Oral evidence was received from five witnesses, including Constable Brown. The hearing reconvened in person in Ottawa, Ontario, on June 11, 2019, at which time I delivered my oral decision on the allegation. Having found the allegation to be established, I heard submissions from the parties on conduct measures and I delivered my oral decision on conduct measures late that afternoon. This written decision incorporates and expands upon those oral decisions.

ALLEGATION

[9] The *Notice of Conduct Hearing* sets out the allegation and the particulars as follows:

Allegation 1

On or about July 6, 2017, at or near Leduc, in the province of Alberta, Constable Brown behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars

1. At all material times you were a member of the RCMP posted to “K” Division, Leduc detachment in Alberta. As a Leduc RCMP Detachment member you were assigned to “C” watch.
2. At all material times [T.N.] was a Leduc Detachment RCMP member and also assigned to “C” watch. Your personal residence and the personal residence of [T.N.] are in very close proximity to each other in the City of Leduc. It is accepted that both you and [T.N.], along with your respective spouses, frequently socialized together both as co-workers and neighbours.
3. Both you and [T.N.] were off-duty during the evening of July 5, 2017, casually socializing with work colleagues at the Original Joe’s restaurant/bar in Leduc. The evening of socializing then moved to the residence of Constable Morgan Kay as he was being transferred from “C” watch. It is accepted that both you and [T.N.] consumed alcoholic beverages while socializing. At approximately [2 a.m.] on July 6, 2017, [T.N.] recognized that it was time to go home and you accompanied [T.N.] on the walk back to her personal residence. It is further accepted that no one else was present while on the walk back to your respective personal residences.

4. At one point while walking, [T.N.] stumbled and fell onto a patch of grass where she lay motionless. [T.N.] informed you: "Just leave me here I'll sleep outside for the night." It is accepted that you were concerned for [T.N.]'s well being and would not leave her alone in an intoxicated state to sleep outside. You began to rub the back of [T.N.]. You touched the outside of the shirt of [T.N.] over her right breast in a sexual manner. You did not have the consent of [T.N.] to touch her breast in a sexual manner. You took advantage of [T.N.] in her intoxicated state. Eventually [T.N.] got up and together you continued your walk home.
5. [T.N.] again stumbled and made a comment to you as she lay on the front lawn of an unknown individual's residence: "There's a TV show, like I'm fine, just leave me here for the night. I'll watch TV til I fall asleep." It is accepted that you were once again concerned for [T.N.]'s well-being and would not leave her alone in an intoxicated state to sleep outside on the lawn. You placed your hands inside the shirt and bra of [T.N.] and physically grabbed onto her right breast in a sexual manner. You took advantage of [T.N.] in her intoxicated state. Eventually [T.N.] got up and together you continued your walk home.
6. Upon arrival at her personal residence [T.N.] did not have her keys and the door was locked. Together you knocked on the door and rang the doorbell causing the dogs inside of the residence to commence barking. [T.N.] informed you that as she was now home it was fine and she will just sit on the front porch/step until her husband, RCMP Constable [B.S.] awakes. You replied that you would stay with her and sat down beside her on the front porch/step. You then put your hand down the shirt of [T.N.] and began fondling her breast. [T.N.] said to you: "Kelly, stop." You did not have the consent of [T.N.] to touch her breast in a sexual manner and committed a sexual assault. You took advantage of [T.N.] in her intoxicated state.
7. Constable [B.S.] then appeared at the door way of the residence and turned on the light. Given the intoxicated state of [T.N.], Constable [B.S.] requested your assistance to physically carry her into the residence. Together you carried [T.N.] into the residence and placed her on the couch inside. Constable [B.S.] left the room and proceeded to go into the kitchen to get some water for [T.N.]. You leaned over the couch and proceeded to place one of your hands between the legs of [T.N.] in her vagina area and another hand under her shirt and bra touching her breast while fondling it. [T.N.] plainly stated to you: "Kelly stop." Your actions caused both the shirt and bra of [T.N.] to become disheveled exposing most of her right breast. You did not have the consent of [T.N.] to touch either her breast or between her legs in a sexual manner and committed a sexual assault. You took advantage of [T.N.] in her intoxicated state. Eventually Constable [B.S.] returned to the couch and you left the residence in a hurried manner.

8. On July 23, 2017, [T.N.] reported that she was sexually assaulted by you to her supervisor, Sergeant Shane Himmelman.

[*Sic throughout*]

[10] Pursuant to subsection 20(1) of the *CSO (Conduct)*, the aforementioned allegation and particulars were read to Constable Brown at the beginning of the hearing. Constable Brown denied the allegation.

Applicable legal principles and tests

[11] The burden is on the Conduct Authority Representative (CAR) to establish the allegation on a balance of probabilities. Practically speaking, this means that I must find that the CAR has established that it is more likely than not that Constable Brown has contravened section 7.1 of the Code of Conduct. The parties have properly referenced *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], for the principle that this burden can only be satisfied by sufficiently clear, convincing and cogent evidence.

[12] The Supreme Court of Canada also observed in *McDougall* that there is no objective test of sufficiency. A trier of fact must make a decision on the totality of the evidence before him or her. In the RCMP conduct hearing process, the totality of the evidence before me includes the Record as well as the oral evidence received during the hearing.

[13] The test for discreditable conduct under section 7.1 of the Code of Conduct is as follows. The CAR must prove, on a balance of probabilities, the acts that constitute the alleged behaviour, as well as the identity of the member who is alleged to have committed these acts. If he is successful in doing so, I must determine if a reasonable person in society, with knowledge of all of the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view Constable Brown's behaviour as likely to discredit the Force. Finally, I must determine whether the behaviour is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

[14] Throughout this decision, I have referenced the expression "sexual assault". This expression is used within the particulars, and by both the parties and the witnesses throughout the hearing. Any reference to sexual assault should be understood as a reference to allegations of

sexual assault within a civil context, as referenced in *McDougall*. The findings set out in this decision should not be interpreted as a determination as to whether a sexual assault, as set out in the *Criminal Code*, RSC, 1985, c C-46, has been established.

Evidence

[15] At the core of this case is whether Constable Brown touched T.N. for a sexual purpose without her consent. There are four instances of non-consensual sexual touching set out in the particulars of the allegation. All four involve non-consensual sexual touching of T.N.'s breast(s). Two instances may also involve unwanted sexual touching of T.N.'s vaginal area.

[16] I heard oral evidence from five witnesses: T.N., her then husband Constable B.S., Constable Pocock (a Watch mate of T.N. and Constable Brown who attended the Watch party), Constable Brown, and his spouse E.B.

Facts not in dispute

[17] There are a number of points on which the witnesses were in agreement. I find the following facts to be established:

1. T.N. and Constable Brown were both members at Leduc Detachment, assigned to "C" Watch.
2. T.N. and Constable Brown, together with their respective spouses, were good friends. They socialized outside of work and were close.
3. T.N. and Constable Brown had dinner with their spouses and other members of their Watch at Original Joe's restaurant on the evening of July 5, 2017.
4. After dinner, T.N., Constable B.S. and Constable Brown attended a party at Constable Kay's home. Constable Brown's spouse, E.B., did not attend.
5. When Constable B.S. left the party, sometime between 10 and 11 p.m., he asked Constable Brown to make sure T.N. got home safely. This was not out of the ordinary in the context of their friendship and the fact that their respective residences were only a few houses away from one another.
6. There was a considerable amount of alcohol consumed at the party. Constable B.S. had consumed approximately 5 drinks over the course of the evening. T.N. had the

equivalent of approximately 15 drinks, and Constable Brown reported consuming the equivalent of approximately 20 drinks. Regardless of the exact number of drinks, it is agreed that both T.N. and Constable Brown were quite intoxicated.

7. T.N. left Constable Kay's residence at approximately 2 a.m. on July 6, 2017. Constable Brown left at approximately the same time, but after T.N.. He caught up to T.N. as she was walking home.
8. T.N. and Constable Brown walked home together. They were alone on the walk home.
9. T.N. was locked out of her house. She and/or Constable Brown knocked and/or rang the doorbell. T.N.'s dog(s) started barking.
10. Constable Brown was on T.N.'s front porch when Constable B.S. opened the door to their home.
11. Constable Brown assisted Constable B.S. to carry T.N. into her residence. They placed her, lying down, on the sectional sofa.
12. Constable Brown left T.N.'s residence and went to his home. Constable Brown then spent the rest of the night in his bathroom, sick to his stomach.
13. T.N. reported the alleged incidents of non-consensual sexual touching to Sergeant Himmelman on or about July 22, 2017.

[18] The parties do not agree on what transpired on the walk home, on the porch, or on the sectional sofa in T.N.'s residence. Nor do they agree on many aspects of what transpired between the the alleged incidents, on July 6, 2017, and when T.N. reported the alleged non-consensual sexual touching to Sergeant Himmelman on or about July 22, 2017.

[19] The MR was clear that consent is not at issue in this case. At no time has Constable Brown indicated that the alleged acts of sexual touching were consensual. Rather, Constable Brown denied that the incidents took place. Alternatively, he indicated that he had no recollection of the events in question.

[20] There are four alleged incidents of unwanted sexual touching. The first two are alleged to have taken place on the walk home, when T.N. fell to the ground. These will be referred to as the first and second falls. The third is alleged to have occurred while T.N. and Constable Brown were

on the front porch of T.N.'s home. The fourth is alleged to have occurred when T.N. was lying on the sectional sofa inside her residence.

[21] The primary question in this matter is whether the evidence available is sufficiently clear, convincing and cogent to establish that Constable Brown committed the alleged acts of unwanted sexual touching. In order to make that determination, I must carefully assess the credibility and reliability of each witness's evidence and, in particular, that of Constable Brown and T.N.

Applicable legal principles

[22] In assessing a witness's evidence, I must consider whether he or she is being truthful as well as whether his or her evidence is reliable (i.e., whether the witness is in a position to accurately perceive and recollect what he or she observed). I may find a witness's evidence to be truthful, but unreliable.² It is also open to me to accept some, none or all of a witness's evidence on a given point.

[23] The parties referred to a number of cases,³ which set out some of the fundamental principles to be applied by a trier of fact when assessing a witness's evidence. The MR submitted that T.N.'s evidence was so fraught with inconsistencies that her evidence was not credible and/or reliable. I note the following from *McDougall*, at paragraph 58, which reinforces that I must assess a witness's evidence in the context of all of the evidence before me:

[58] [...] where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[24] In the context of allegations of sexual assault (in the criminal context), the CAR provided a number of cases which clearly state that a trier of fact cannot draw a negative inference from: a

² *Smith v The Rover's Nest*, 2013 HRT0 700 (CanLII), at paragraph 61.

³ I have not cited every decision provided by the parties. A comprehensive list of jurisprudence provided by the parties is included at Appendix A of this decision. I reviewed all of these decisions prior to rendering my decision in this matter.

delay in reporting (the debunked doctrine of recent complaint);⁴ lack of avoidance behaviour;⁵ and/or post-incident conduct including stereotypes and assumptions about how a victim of sexual assault should behave.⁶ These principles are equally applicable within the administrative law context, where allegations of non-consensual sexual touching are at issue.⁷

[25] I also note that while corroboration is not a legal requirement in civil cases in which sexual assault is alleged, its use is permissible. As noted by the Supreme Court of Canada in *McDougall*, while not required, if available “it is always helpful and does strengthen the evidence of the party relying on it”.⁸

[26] Finally, the fact that Constable Brown asserted having no recollection of the events does not, in and of itself, enhance the credibility or reliability of T.N.’s account. However, where there is conflicting testimony on a particular point, finding one party to be credible may decide the issue.⁹

Evidence of Constable Pocock

[27] Constable Pocock was a Watch mate of T.N. and Constable Brown. He was at the Watch party on the night of July 5, 2017, and interacted with Constable Brown and T.N. after the alleged incidents. I find the evidence of Constable Pocock to be credible, on the whole. However, I do not find it to be reliable. His memory failed him on several aspects of the narrow scope of evidence to which he testified.

Evidence of E.B.

[28] I find the evidence of E.B. to be credible. She appeared to be very balanced in her evidence and did not seek to cast T.N. in a negative light. She expressed a sense of loss for the dissolution of her friendship with T.N. She recalled the nature of her conversation with T.N. on July 6, 2017,

⁴ *R. v D.(D.)*, 2000 SCC 43, [2000] 2 SCR 275, starting at paragraph 58; *R. v ADG*, 2015 ABCA 149, at paragraph 30

⁵ *R. v A.R.D.*, 2017 ABCA 237, at paragraphs 39 and 43

⁶ *R. v T.B.*, 2018 PEI SC; *R. v Ururyar*, 2017 ONSC 4428; *R. v Nyznik*, 2017 ONSC 4392

⁷ See for example, *Commanding Officer, “E” Division v Constable Jordan Irvine*, 2019 RCAD 03 [Irvine].

⁸ *McDougall*, at paragraph 80

⁹ *McDougall*, at paragraph 86

and subsequent interactions with considerable detail. Her accounts of events are consistent, on the whole, with that of other witnesses.

Evidence of Constable B.S.

[29] Both parties submitted that Constable B.S.'s evidence was the most credible and reliable of all of the witnesses. I agree with this assessment. Constable B.S. is no longer married to T.N., and while he may have harboured some resentment towards T.N. with respect to the dissolution of their marriage, it did not appear to impact his evidence. He did not seek to embellish any aspect of his testimony. He was firm where his memory was clear, and acknowledged where he was unsure. His evidence was internally consistent and externally consistent with that of other witnesses, particularly the evidence of T.N.

[30] There were some inconsistencies between his evidence and that of other witnesses, notably Constable Brown, which I shall address in my factual findings and analysis. However, I will address here Constable B.S.'s January 25, 2019, statement to Sergeant Bellamy of the RCMP Professional Responsibility Unit (PRU), in Edmonton, Alberta. This statement was provided when Constable B.S. disclosed two text messages that he had sent to Constable Brown on August 29, 2018. Constable Brown did not reply to these text messages.

[31] In these text messages, Constable B.S. wrote in part:

[...] [T.N.] was nothing but drama and I really hate that she ruined our friendship and at that time, and at that time, I wanted to believe what she said about what happened, but thinking about it, I really don't believe anything she says. [...]

[32] In his statement to the PRU, Constable B.S. clarified that at the time he wrote the text messages, he was only questioning the "vagina touch". He stood by all other elements of his statement. Constable B.S. further clarified, in his oral evidence, that it was an emotional time for him, as it was approximately a year since the incident and his subsequent separation from T.N. He reiterated that he did not have any doubts about any other element of his statement. It is also worth noting that Constable B.S. expressed, in his original statement to ASIRT, some uncertainty about how/when the "vagina touch" took place. He noted that T.N. herself seemed uncertain about the details. In short, he has remained consistent throughout on this point. I do not find that the text

messages, or Constable B.S.'s statement to PRU, identify any significant inconsistencies in his evidence.

Evidence of T.N.

[33] I have concerns about the credibility and reliability of both T.N.'s and Constable Brown's evidence. My concerns fall into the same general categories for both members: a) variations in their evidence; b) propensity to embellish; c) lack of responsiveness, editorializing, or deflection when answering questions; and d) unfounded assertions. In exploring these concerns, I have cited some examples of my observations. These are examples and should not be interpreted as exhaustive.

a) Variations in evidence

[34] T.N. significantly varied her evidence on an element of the allegation. T.N. indicated that while she maintained that Constable Brown's hand had, on two occasions, been placed near her vagina, she no longer believed it was for a sexual purpose. Therefore, any physical contact with her vaginal area was no longer at issue. The CAR argued that T.N. was clarifying, rather than recanting, her prior evidence. I note that T.N.'s account of any touching of her vaginal area was not as definitive as with the touching of her breast(s). Her account on this point was inconsistent and hesitant throughout.

b) Propensity to embellish

[35] T.N. embellished her evidence, namely with respect to her certainty in her recollection of events which occurred after the alleged incidents.

c) Lack of responsiveness

[36] T.N. was on occasion "editorializing", unresponsive or defensive. For example, T.N. made comments to the effect of "it's still sexual assault".

d) Unfounded assertions

[37] T.N. made assertions which were unsupported by the evidence. T.N. asserted that she had been directed to delete her text messages by a superior officer. This was a surprising assertion and not found elsewhere in the Record. The evidence does not support her assertion that a clear direction to delete the text messages had been given.

[38] Finally, I have concerns about the reliability of T.N.'s evidence, specifically with her ability to recall events. She consumed large quantities of alcohol. It is inconceivable to me that her ability to recall events was not impacted.

[39] However, I note that T.N. was consistent throughout the Record and in her oral evidence about the substance of the allegation with respect to non-consensual sexual touching of her breast(s). Moreover, Constable B.S.'s account of T.N.'s initial disclosure to him in the early hours of July 6, 2017, and again later that day, are equally consistent.

[40] The MR argued that there were many inconsistencies in T.N.'s evidence. While some may be, as the CAR argued, on peripheral matters, when taken as a whole, the MR argued that they called her overall credibility and/or reliability into question. On this point, he referred to *McDougall*, at paragraph 57, in which the Federal Court cites Rowles J.A. in *R. v R.W.B.* (1993), 24 BCAC 1:

In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have reasonable doubt about the reliability of the witness'[s] evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness'[s] evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

[41] Over the course of his submissions, the MR identified approximately 12 inconsistencies. A number of these are not, on my review of the Record, actual inconsistencies. Rather, they are an interpretation of what was or was not said. Others, such as the issue of the colour of the bra worn

by T.N., are peripheral in nature. I note that, in this case, there was considerable “supporting evidence on the central issue”. On the totality of the evidence, I do not find that the inconsistencies that do exist are, as a whole, sufficient to render T.N.’s evidence unreliable in its entirety.

Evidence of Constable Brown

a) Variations in evidence

[42] Constable Brown’s recollection varied significantly between his October 11, 2017, written statement to ASIRT, his section 15 response, and his oral evidence. His recollection varied as to whether T.N. fell once or twice, and whether he also fell. In his written statement, he had no recollection of being on T.N.’s porch. In his section 15 response, he recalled certain details (T.N. being locked out and her dog(s) barking). In his oral evidence, he was adamant about his position vis-à-vis T.N. while on the porch, and where he was standing when Constable B.S. opened the door. It strikes me as implausible that Constable Brown can, at the same time, have no recollection of being on the porch, and yet recall his position vis-à-vis T.N.

[43] Constable Brown sought to explain the discrepancies between his initial statement to ASIRT and subsequent evidence as being the result of his confounding his own memories with what he read in the investigation package. However, he did not have the investigation package when he provided his October 11, 2017, statement to ASIRT. His recollection and/or lack thereof appears to be selective.

b) Propensity to embellish

[44] Constable Brown seemed to exaggerate his inability to recall, and in particular his lack of recollection of the walk home.

c) Lack of responsiveness

[45] Constable Brown’s responses were often vague and/or designed to cast himself in a positive light. He answered most questions with “I don’t believe I could have”, “I don’t believe I am the type of person who would” or words to that effect.

d) Unfounded assertions

[46] Constable Brown asserted that T.N. had a history of regularly/heavily consuming alcohol prior to the incident. While T.N. acknowledged her drinking was problematic after the incident, she denied it was an issue prior to it. The evidence of Constable B.S. and E.B. support T.N.'s account on this point.

[47] More troubling is Constable Brown's assertion that he did not know any of the details of the alleged incidents, and that the allegation seemed to escalate as time went on. T.N. acknowledged in her evidence that she did not give many details about the incidents when she first spoke with Constable Brown, but that she provided him with the details over the course of the text messages and conversations that followed. Constable Brown's assertions that T.N. did not provide him with any details of the alleged incidents and that he only learned of them when he received the investigation package were successfully challenged on cross-examination. Constable Brown acknowledged in cross-examination that T.N. had shared details prior to reporting the incidents to Sergeant Himmelman. Moreover, Constable Brown's own timeline, as set out in his written statement, makes it clear that T.N. had made him aware of the details of the allegation as early as July 7, 2017.

[48] There are other aspects of Constable Brown's evidence that I did not find credible. These include his explanations for selectively deleting text messages with T.N. after the incident, as well as his theory that T.N. made up the allegation in order to seek a romantic relationship with him.

[49] As is the case with the evidence of T.N., I have concerns about the reliability of Constable Brown's evidence. He consumed large quantities of alcohol and reported that he had never been as intoxicated as he was that evening. His ability to recall events was unquestionably impacted.

[50] It is open to me to find all, some or none of a witness's evidence to be credible. On the totality of the evidence, I find T.N.'s evidence with respect to the events leading up to and in the early hours of July 6, 2017, to be more credible than that of Constable Brown. I find her evidence with respect to her post-incident conduct to be less credible, on certain narrow issues.

[51] There are some points on which I have preferred the evidence of Constable B.S. to that of T.N. and/or Constable Brown. These are set out in my decision on the allegation.

Decision on the allegation

[52] As previously noted, consent is not at issue. Constable Brown either denied that the acts of sexual touching took place, or that he had no recollection of having touched T.N. for a sexual purpose. The central issue in this case, then, is whether the alleged acts took place: Did Constable Brown touch T.N.'s breast(s) and, if so, was it for a sexual purpose?

[53] Here are my findings and analysis with respect to each of the alleged incidents.

The first fall

[54] As previously noted, T.N. left Constable Kay's house at approximately 2 a.m. and began walking home. Constable Brown caught up to T.N. as she was walking. T.N. was walking unassisted immediately prior to falling down on the grass. Constable Brown asserted in his oral evidence that he did not recall this fall. Noting my assessment of the witnesses' credibility and Constable Brown's section 15 response, in which he acknowledged the fall, I prefer the evidence of T.N. and find that the fall did take place.

[55] Constable Brown is alleged to have touched T.N.'s breast over her clothing while she lay on the grass. I find that physical contact with her breast, over her shirt, did occur. However, I do not find that T.N.'s memory of the event is reliable enough to allow me to find on a balance of probabilities that the physical contact was for a sexual purpose. In particular, T.N. testified that she was, at least initially, of the view that the contact may have been a clumsy attempt to rouse her from apparent sleep.

The second fall

[56] I find that T.N. and Constable Brown continued on their walk and that Constable Brown assisted T.N. by placing her left arm over his shoulder and his right arm around her back.

[57] I prefer T.N.'s account of the fall itself, as it is consistent with her recorded statement to ASIRT, her oral evidence, Constable Brown's written statement to ASIRT, his section 15 response, and his oral evidence, in which he described a fall while assisting T.N.. Based on the totality of the evidence, I find that the fall occurred as described by T.N..

[58] T.N. asserted that Constable Brown put his hand under her shirt and bra, and that he touched her breast while she was lying on the grass. I am mindful that Constable Brown denied, or alternatively stated that he had no recollection of any further physical contact. As previously noted, I find T.N.'s account of the alleged incidents to be more credible when assessed in the totality of the evidence. In terms of reliability, T.N. acknowledged that her memory was not perfect with respect to every detail of that walk home. However, I accept her explanation that there were certain elements of that night, most notably the unwanted sexual touching, which stood out in her mind.

[59] I am cognizant of the slight variations in the description of that touching, in particular whether Constable Brown rubbed her breast with his full hand or with his thumb. In either case, it does not change the fact that Constable Brown's hand was on her breast. Unlike the first incident, in which his hand was above her clothing, the purpose of this contact is unambiguous. In the circumstances, there is no plausible explanation for touching someone's breast, underneath their clothing, for anything other than a sexual purpose.

On the porch

[60] I find that, after the second fall, T.N. and Constable Brown continued on their walk home. I find that the statements and oral evidence of T.N., Constable B.S., and Constable Brown establish that Constable Brown was with T.N. when she arrived home and that T.N. was locked out of her house. After knocking on the door and/or ringing the bell, Constable Brown waited with T.N. for Constable B.S. to let her in.

[61] I find that it is implausible that T.N. and Constable Brown remained in a static position for the 5-7 minutes they were on the porch. There was some debate as to their exact position when Constable Brown is alleged to have put his hand down T.N.'s shirt and bra.

[62] T.N. described sitting down on the porch and leaning up against the railing. This is consistent throughout the Record and her oral evidence. T.N.'s recollection was that she was in this position when Constable Brown put his hand down her shirt and bra and fondled her breast. She recalled saying "stop", or "Kelly, stop".

[63] T.N. did not clearly recollect Constable Brown's position, in relation to her own, in her statement to ASIRT. In her oral evidence, she reported that Constable Brown was sitting to her side, but not fully behind her. I find her account on this point to be credible, but somewhat unreliable.

[64] I do not find Constable Brown's account on this point to be credible or reliable. In his written statement to ASIRT, Constable Brown had no recollection of being on the porch. In his section 15 response, he remembered some elements of the time on the porch, but he did not recall sitting down beside her. In his oral evidence, he reported standing with T.N. off to the side or behind him. In cross-examination, Constable Brown acknowledged that he was behind T.N. when Constable B.S. came to the door.

[65] I find that the most reliable evidence on this point comes from Constable B.S. who observed T.N. and Constable Brown from the front window, before opening the door. He clearly described Constable Brown crouching by T.N., with his arms around her, "like a backpack strap".¹⁰ He described seeing Constable Brown's hand in T.N.'s chest area and that, when he opened the door, he heard T.N. say "stop" twice before T.N. and Constable Brown became aware of his presence. Constable B.S. recalled that, when Constable Brown became aware of his presence, his hand "shot back" and he had the expression of someone who had been caught doing something he shouldn't.

[66] Constable Brown denied touching T.N.. The MR argued that the word "stop" could have been a request for Constable Brown to stop trying to help her stand. It was not contested that T.N. did tell Constable Brown to leave her to her own devices and to go home several times on their walk home. Nor was it contested that Constable Brown would not leave her intoxicated and alone. However, when I examine the circumstances, and in particular the observations of Constable B.S., which placed Constable Brown's hand in T.N.'s chest area when she said "stop", I find it more plausible that the word "stop" was a clear indication of a lack of consent to unwanted sexual touching.

¹⁰ Transcript, June 5, 2019, at page 35, line 16.

[67] On the totality of the evidence, I find that Constable Brown touched T.N.'s breast, under her shirt and bra, without her consent and for a sexual purpose.

On the sofa

[68] While Constable Brown's evidence in the Record is inconsistent, he acknowledged in his oral evidence that he assisted Constable B.S. to carry T.N. into the house. He also acknowledged that he and Constable B.S. placed T.N. lying down on the sectional sofa. The evidence establishes that T.N. was lying down with her head towards the kitchen counter and her feet towards the front door.

[69] T.N. recalled Constable B.S. leaving her and Constable Brown at the sofa to go get her a glass of water in the kitchen. She stated that Constable Brown was standing at the back of the sofa, leaning over her. She recalled Constable Brown sliding his hand under her shirt and bra, touching her breast. She recalled telling him to stop.

[70] Constable Brown asserted that he had no recollection of his time in T.N.'s house. All three agreed on the layout of the house, of T.N.'s position on the sofa, and that Constable B.S. would have an unobstructed view from the kitchen to the sofa.

[71] Constable B.S.'s evidence is, on the whole, consistent with that of T.N.. He was clear that, while he was getting water from the fridge, his back was to the sofa. Constable B.S. recalled hearing T.N. say "stop". This caused him to look over to the sofa, where he observed Constable Brown quickly pulling his hand away from T.N.'s chest area. Constable B.S. described Constable Brown's expression as one of someone who had been caught doing something he shouldn't. Constable Brown left the house immediately thereafter.

[72] T.N. recalled Constable Brown's hand under her shirt and bra, pushing it to the side. She recalled him fondling her breast. Constable B.S.'s and T.N.'s evidence is consistent that her shirt and bra were not displaced when Constable Brown and Constable B.S. placed her on the sofa. Constable B.S. was emphatic on this point. Her clothes were displaced when Constable Brown stepped away from the sofa and left the residence. I do not place any weight on the discrepancy between T.N.'s and Constable B.S.'s recollection of the colour of her bra. It is a peripheral issue. Moreover, I note that T.N. did not contradict herself on this point in her evidence.

[73] I am cognizant of the discrepancy between T.N.'s and Constable B.S.'s recollection of Constable Brown's position when the alleged sexual touching took place. T.N. placed Constable Brown behind the couch, while Constable B.S. placed him at the front of the couch. On this point, I find the evidence of Constable B.S. to be more reliable. He was relatively sober and had an unobstructed view of both T.N. and Constable Brown. This discrepancy does not significantly affect the overall reliability of T.N.'s account of the nature of the non-consensual sexual touching that took place. Constable B.S.'s evidence is consistent with T.N.'s overall recollection. He heard her say "stop". He saw Constable Brown's hand at her chest and then quickly pulling it away. He observed T.N.'s breast exposed and confirmed that T.N. began crying and told him that Constable Brown had been touching her breast.

[74] I find that the word "stop", as heard by Constable B.S., enhances the reliability of T.N.'s recollection of the alleged non-consensual sexual touching. Once again, I do not agree with the MR's suggestion that "stop" could have been in reference to Constable Brown's efforts to move her. This is simply not likely when one considers that T.N. was, at this time, in her own house. There was no cause for Constable Brown to be assisting her once she was in her own house with her spouse.

[75] I am also cognizant that T.N. and Constable B.S. differ in their recollection as to whether T.N.'s left or right breast was exposed, and whether it was fully or two thirds exposed. T.N. reported that it was her right breast, while Constable B.S. reported that it was the left one. I do not place significant weight on this discrepancy when assessing the overall reliability of T.N.'s and Constable B.S.'s account. Looking at the totality of the evidence, it is more likely than not that Constable Brown touched T.N.'s breast for a sexual purpose, without her consent, and that her breast was exposed as a result of this sexual contact.

Interactions following the incident

[76] At various points in the hearing, evidence was adduced which falls under the heading of "rape myths" or other stereotypes of sexual assault. Woven within certain witnesses' evidence were suggestions that negative inferences should be drawn from perceived delays in reporting; questioning a lack of avoidance behaviour; and/or stereotypes and assumptions about how a victim

of sexual assault should behave. As noted at paragraph 24, a trier of fact cannot draw any adverse inference from such evidence. As a result, I have not ascribed any weight to evidence of this nature.

Finding on the allegation

[77] Throughout these proceedings, T.N., Constable Brown, Constable B.S. and E.B. expressed their sense of loss, following the dissolution of their friendship. There was no evidence of any “nefarious purpose” or motive for T.N. to falsify the allegation. When initially confronted with T.N.’s allegation, Constable Brown indicated that, even though he had no recollection of the events, he apologized because he had no reason to disbelieve T.N..

[78] Constable Brown could not point to any plausible motive for T.N. to fabricate the allegation in question. He offered two possible “motives”. First, he suggested that the allegations “escalated” as her relationship with Constable B.S. deteriorated. As noted in paragraph 47, Constable Brown’s assertion that he was not aware of the details of the allegation was disproven. Second, Constable Brown “speculated” that T.N. may have been motivated by a desire to seek a relationship with him. I find it implausible that anyone would seek to initiate a relationship by accusing their romantic interest of sexual misconduct.

[79] On the totality of the evidence, I find that particular 4 is not established on a balance of probabilities. However, I find that particulars 1, 2, 3, 5, 6 and 7 are established on a balance of probabilities and that, in the early hours of July 6, 2017, Constable Brown touched T.N.’s breast(s), for a sexual purpose and without her consent, three times. The CAR has accordingly established on a balance of probabilities the acts that constitute the alleged behaviour, as well as the identity of the member who is alleged to have committed these acts.

[80] Members of the RCMP are held to a higher standard of behaviour than the general public. They must adhere to the RCMP Code of Conduct, both on- and off-duty. I find that a reasonable person in society, with knowledge of all of the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view Constable Brown’s actions as likely to bring discredit to the Force.

[81] Noting that the Force has issued several communications, both internally and externally, that sexual misconduct, if founded, has serious consequences, I find that Constable Brown’s

actions are sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him. Therefore, the allegation is established on a balance of probabilities.

CONDUCT MEASURES

Position of the parties

[82] The Conduct Authority requested that Constable Brown be ordered to resign within 14 days. The CAR submitted that Constable Brown's performance evaluations and letters of reference should be given little weight as the nature of the allegation is unrelated to the adequacy of the performance of his duties. He argued that Constable Brown's actions were, essentially, criminal in nature and that they should be viewed in the most serious light.

[83] The CAR argued that the Federal Court and other conduct boards have recognized the public interest in matters of sexual misconduct,¹¹ particularly in the context of the organizational imperative to address sexual misconduct and harassment. The public, he argued, has an interest in ensuring that the RCMP is addressing cases of sexual misconduct in a manner which reflects the very serious nature of the contravention. He emphasized the very pressing need for general deterrence in the case of sexual misconduct, if the RCMP has any hopes of eradicating this behaviour from its workplace.

[84] Constable Brown asked for a financial penalty of between 30 and 45 days, and any additional sanction that the Conduct Board feels is appropriate, short of dismissal. The MR argued that the impugned behaviours in *Cooke, The Appropriate Officer "K" Division v Constable Pernell Cardinal*, 17 AD (4th) 111 [*Cardinal*], and *Calandrini – RCAD* were more egregious than that in the present case. He acknowledged the very real need to address sexual misconduct and harassment within the RCMP. However, he argued that an appropriate distinction should be made between cases of long-term, systemic harassment within the workplace, and cases of off-duty conduct involving excessive alcohol consumption, where the incident(s) occur(s) within a very short time

¹¹ *Calandrini v Canada (Attorney General)*, 2018 FC 52; *"National Headquarters" Division v Civilian Member Marco Calandrini*, 2018 RCAD 10 [*Calandrini – RCAD*]; *The Appropriate Officer "K" Division v Constable Tyler Cooke*, 15 AD (4th) 475 [*Cooke*]

frame. The MR argued that, in the latter category of cases, dismissal had not been ordered by a conduct board.

[85] While Constable Brown's actions may be viewed as sexual assault under the criminal law, the MR conceded that no charges were laid in this matter. The MR agreed with the CAR's arguments with respect to public interest, but he noted that there were additional considerations that fall into that analysis. These included whether Constable Brown can continue to serve the RCMP his community; whether other members, and in particular female members, will be comfortable working with him; and, ultimately, whether the safety of female members or female members of the public will be compromised. He argued that the letters of support, including from his immediate supervisor, spoke to his professionalism with his colleagues and the public. All describe the impugned behaviour as out of character.

[86] The MR suggested that, when one considered all of these factors, the public interest in denouncing Constable Brown's behaviour did not completely outweigh the public interest in retaining him. He argued that this analysis was consistent with the conduct board's rationale in *Commanding Officer, "E" Division v Constable Benjamin Caram*, 2017 RCAD 8 Corrected; *Commanding Officer, "H" Division v Constable Devin Pulsifer*, 2019 RCAD 09, and *Commanding Officer, "H" Division v Constable Troy Allen*, 2019 RCAD 10: an order of dismissal would not respect the principle of proportionality.

[87] In his rebuttal, the CAR cited *Irvine* for the principle that a conduct board should not give any weight to the presence or absence of criminal charges. He also noted that the MR's statement that a conduct board had never dismissed a member for sexual misconduct, where that sexual misconduct was isolated/short-lived, occurred off-duty and involved alcohol, was not entirely accurate. There are cases in which members facing such allegations have resigned prior to appearing before a conduct board. Therefore, the precedents were not fully representative of the actual outcomes.

Decision on conduct measures

[88] In arriving at my decision on measures, I am guided by section 36.2 of the *RCMP Act*, which sets out the purpose of the conduct process. These include at paragraph e):

[...] to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive.

[89] In determining the appropriate sanction, I must first determine the possible range of conduct measures. Then, I must consider the aggravating and mitigating factors. I must apply the appropriate legal principles, including the principle of proportionality, which necessarily requires me to consider the public interest as well as parity. While I may be guided by prior conduct board decisions, I am not bound by these decisions. I must make my own determination on the facts of this case.

[90] With respect to the principle of denunciation, or of both general and specific deterrence, the Force's position has been clear. Established allegations of sexual misconduct will entail serious consequences. The range of sanction for sexual misconduct includes dismissal.

[91] I do not prescribe to the view that there is a hierarchy of behaviours that constitute sexual misconduct. I do not agree that one can simply look at the mechanics of non-consensual sexual touching, place it along a scale, and assign an appropriate conduct measure. Nor do I agree that dismissal is the only sanction that can meet the objectives of specific and general deterrence as well as respect the public interest. A conduct board must not act in an arbitrary fashion. The totality of the circumstances must be considered in each case.

[92] Since I have already determined that the range of sanction for sexual misconduct includes dismissal, I will now examine the aggravating and mitigating factors in this case.

[93] I find the following to be aggravating factors in this case:

1. Constable Brown has 12 years of service, and is one of the senior members on his Watch. As noted by Constable Pocock, junior members look up to him. He has demonstrated poor judgment, which falls below what one would expect from a member with his years of service.
2. I find that Constable Brown, by his actions, breached a trust with T.N. However, I do not find that the circumstances of this case warrant the classification of T.N. as a "vulnerable person". That designation is more reflective of someone whose personal

security, or emotional well-being, is significantly compromised, and/or where there is a power imbalance. While T.N. was quite intoxicated, I do not find that she was “vulnerable” in this sense.

3. Constable Brown’s actions had a negative impact on T.N., both in her personal and work life. She and Constable B.S. reported that she struggled in dealing with her feelings after the incidents. This negatively impacted her personal health and added further stress to her already strained marriage. She also described feeling ostracized at work after the incidents were reported. She has since transferred to another detachment.

[94] I find the following to be mitigating factors in this case:

1. Constable Brown has approximately 12 years of productive service with the RCMP. He has no prior record of misconduct. His performance assessments are positive.
2. Constable Brown has the ongoing support of his colleagues and immediate supervisor.
3. Based on all of the evidence before me, Constable Brown’s level of intoxication was an isolated incident and out of character. E.B. reported that she had never seen him so intoxicated, nor since that date. I note here that E.B. and Constable Brown have been in a relationship for over five years. T.N. also noted that she had never seen Constable Brown so intoxicated.
4. Constable Brown’s actions towards T.N. were an isolated incident and out of character. Here I refer to the evidence of all of the witnesses, who confirmed no prior issues of this nature. His behaviour was, based on the Record and the letters of support that I received as the Conduct Board, out of character and a divergence from what is described as his usual respectful, kind and professional manner.
5. When T.N. confronted Constable Brown about his behaviour, his spontaneous reaction demonstrated remorse, and a desire to try to mitigate the negative impact of his actions. T.N. acknowledged that Constable Brown did try to respect her wishes, when they discussed how to address the situation.

[95] Sexual misconduct by a member of the RCMP is a behaviour which cannot be tolerated. However, not tolerating the behaviour does not translate into automatic dismissal in each and every

case of sexual misconduct. The circumstances of each case must be carefully assessed in order to determine whether the employment relationship has been irrevocably damaged.

[96] I note that several of the cases referenced by the CAR are from the “old system” prior to the implementation of the new *RCMP Act* in 2014. Under the “old system”, conduct boards were limited in the sanctions that could be imposed. A contravention that warranted more than 10 days of financial penalty necessarily resulted in dismissal. The current legislation allows for much greater flexibility and it enables a conduct board to be more nuanced in the imposition of conduct measures. Therefore, the older cases cited are of limited value in assessing proportionality.

[97] The behaviour in question arose off-duty and constituted an isolated incident. This is in contrast to repeated and prolonged behaviours described in several of the cases cited.¹² In this case, I find that the mitigating factors are sufficient to support the imposition of serious conduct measures, short of dismissal. Collectively, these mitigating factors suggest that there is a minimal risk of recidivism.

[98] Taking the totality of the circumstances into account, I find that a loss of employment would be a disproportionate response to Constable Brown’s misconduct. However, I find that significant conduct measures are required not only to address specific and general deterrence, but also to provide some reassurance of ongoing oversight in order to ensure that this behaviour is not repeated. In addition, in light of the poor judgment demonstrated by Constable Brown, I find that a period of reintegration is required before he may be eligible for any promotion.

[99] Having found the allegation to be established and in accordance with paragraph 45(4)(c) of the *RCMP Act*, I impose the following conduct measures:

- a) A financial penalty of 40 days’ pay, to be deducted from Constable Brown’s pay;
- b) Ineligibility for promotion for a period of 2 years, to start from the date of Constable Brown’s reinstatement; and
- c) A direction to work under close supervision for a period of 1 year, to start from the date of Constable Brown’s reinstatement.

¹² e.g. *Calandrini* – RCAD; *Cardinal*

[100] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the limitation period set out in subsection 45.11 of the *RCMP Act*, and in accordance with the rules contained in the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289.

Christine Sakiris
RCMP Conduct Board

September 20, 2019
Date

APPENDIX “A” – JURISPRUDENCE SUBMITTED BY THE PARTIES

Allegation

MacLeod v Canada (Attorney General), 2013 FC 770

R. v D. (D.) 2000 SCC 43, [2000] 2 SCR 275

R. v Ewanchuk, [1999] SCR 330

R. v Nyznik, 2017 ONSC 4392, [2017] OJ No 4138

R. v T.B., 2018 PESC 3

R. v Ururyar, 2017 ONSC 4428

R. v A.R.D., 2017 ABCA 237

R. v ADG, 2015 ABCA 149

F.H. v McDougall, 2008 SCC 53

Wallace v Davis, [1926] OJ No 212 (OSC – HCD)

Faryna v Chorny, [1951] BCJ No 152 (CA)

Ahmed v College of Registered Nurses, 2017 MBCA 121

Conduct Authority for “F” Division and Constable Jonathan Tremblay, 2018 RCAD 15

Conduct measures

The Appropriate Officer “K” Division v Constable Tyler Cooke, 15 AD (4th) 475

The Appropriate Officer “K” Division v Constable Pernell Cardinal, 17 AD (4th) 111

Commanding Officer, “National Headquarters” Division v Civilian Member Marco Calandrini, 2018 RCAD 10

Calandrini v Canada (Attorney General), 2018 FC 52

Commanding Officer, “E” Division v Constable Benjamin Caram, 2017 RCAD 8 Corrected

Commanding Officer, “E” Division v Constable Jordan Irvine, 2019 RCAD 03

Commanding Officer, “H” Division v Constable Devin Pulsifer, 2019 RCAD 09

Commanding Officer, “H” Division v Constable Troy Allen, 2019 RCAD 10