Protected A

ACMT File Number: 201733836

2018 RCAD 19

IN THE MATTER OF A CONDUCT PROCEEDING

PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer
"E" Division

("Conduct Authority")

and

Constable Andrew Scott Hedderson
Regimental Number 61436

("Subject Member")

Record of Decision

Conduct Board

Protected A

ACMT File Number: 201733836

Craig S. MacMillan

December 17, 2018

Ms. France Saint-Denis, Conduct Authority Representative ("CAR")

Ms. Nicole Jedlinski, Member Representative ("MR")

(collectively, the "Representatives")

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Summary

The Board found the Subject Member engaged in discreditable conduct by showing a revealing picture of himself and exchanging inappropriate sexual and personal text messages with Ms. W contrary to section 7.1 of the Code of Conduct and failed to diligently perform duties and take appropriate action to aid Ms. W contrary to section 4.2 of the Code of Conduct. The allegation that the Subject Member created actual, apparent or potential conflicts of interest between his professional responsibilities and private interests based on inappropriate sexual and personal communications with Ms. W contrary to section 6.1 to the Code of Conduct was not established, but elements of this allegation were relevant as aggravating factors in relation to the first contravention of discreditable conduct. The Board dismissed the Subject Member for the discreditable conduct contravention and imposed a forfeiture of 15 days' pay for the second contravention.

Record of Decision

1. Introduction[1]

[1] This decision arises from a conduct proceeding involving the Subject Member in which the Conduct Board ("Board") rendered a written-oral decision on merit without hearing any testimony (subject to final editing, formatting, corrections and transitional requirements to deal with measures and complete the final decision).

[2] The Representatives were subsequently given an opportunity to provide submissions on what measures should be imposed, and the Board rendered a decision on measures without finding it necessary to hear any testimony.

[1] Unless otherwise stated, page number citations or references relate to the enumeration found in the Code of Conduct Investigation Report (dated 2017-06-29) and Appendices ("Conduct Report"), or the pertinent submission, legal decision, authority, or document submitted by the Representatives and being referred to at that point in the decision.

2. Allegations

[3] Between approximately March 28 and June 7, 2017, while posted to the RCMP detachment in Surrey, British Columbia ("Detachment"), the Subject Member had certain interactions with a member of the public ("Ms. W"), and based on the circumstances of those interactions and subsequent events related thereto, the Subject Member faces three allegations, outlined in the Notice of Conduct Hearing and particulars (dated December 21, 2017) ("Notice") of contravening the Code of Conduct, which the Board summarizes as:

1. engaging in discreditable conduct by showing Ms. W a revealing picture of himself and exchanging inappropriate sexual and personal text messages contrary to section 7.1 ("Allegation 1);

2. creating actual, apparent or potential conflicts of interest between his professional responsibilities and private interests based on inappropriate sexual and personal communications with Ms. W contrary to section 6.1 ("Allegation 2"); and

3. failing to diligently perform duties and take appropriate action to aid Ms. W contrary to section 4.2 ("Allegation 3") (collectively, the "Allegations").

[4] For the reasons outlined below, the Board finds Allegation 1 and Allegation 3 established. The Board finds that Allegation 2 has not been established.

[5] In respective of Allegation 1, the Board directs that the Subject Member be dismissed, and in respective of Allegation 3, a forfeiture of 15 days' pay is imposed.

3. Background

[6] The Subject Member graduated from Depot in March, 2015, and was posted to the Detachment, giving him approximately two years of service at the time of the circumstances arising from Allegations. The Conduct Report does not address whether the Subject Member was still on probation at the time of the Allegations.

[7] On or about March 27, 2017, at approximately 13:13 hours, Ms. W was assaulted by her boyfriend ("Mr. P") in the Safeway parking lot on 152 Street in Surrey, British Columbia ("Assault"), which was reported to the Detachment, and resulted in the arrest of Mr. P (p. 50).

[8] As reported in the operational occurrence file relating to the Assault ("Assault File"), Ms. W advised the arresting members that she feared for her safety due to past unreported assaults by Mr. P, his drug activities and associates, and because she had reported him to the police (p. 40).

[9] Mr. P was transported to the Detachment and lodged in cells, and he was subsequently released the next day (March 28, 2017) at 16:11 hours on a Recognizance of Bail by a Provincial Court Judge, who imposed nine conditions ("Conditions") (p. 235), including that Mr. P not have contact or communication, directly or indirectly, with Ms. W ("No Contact Condition") (p. 159).

[10] Twenty three minutes later, at 16:34 hours, Mr. P violated the No Contact Condition of his release by sending a text to Ms. W (p. 159-160), which Ms. W. reported to the Detachment at 16:55 hours (p. 159).

[11] There is some discrepancy in the Conduct Report whether the Subject Member was attending the residence of Ms. W to advise her of the release of Mr. P and the Conditions (p. 5), or whether he was assigned the breach of the No Contact Condition file ("Breach File"), which prompted his attendance to her residence (p. 273), but in the end, nothing appears to turn on this discrepancy.

[12] Both the Subject Member and Ms. W provided statements[2] about what transpired when the Subject Member attended her residence relative to the Breach File and thereafter, many aspects of which are supported by text messages between them.

[2] The interview and statement of the Subject Member taken on June 27, 2017, found at pp. 272 of the Conduct Report, will be referred to as the "Interview", where applicable, in the final decision.

[13] The Subject Member reported that at approximately 16:50 hours, he attended the residence of Ms. W, but she was not home and he contacted her by cellular phone and learned she would be at her residence in a minute or so, as she was returning from the store (p. 273).

[14] Apparently the Subject Member used his personal phone to contact Ms. W because his assigned operational phone was not charging (p. 273).

[15] While waiting, the Subject Member reviewed the occurrence report relating to the Assault (i.e., Assault File) from the day before and queried Mr. P, who he found had a history of trafficking and violence (p. 173).

[16] Ms. W reports that the Subject Member contacted her by phone and during their conversation he saw her walking down the street and he came and picked her up with the police car and they returned to her residence (p. 209), but nothing appears to turn on the different descriptions.

[17] The Subject Member met with Ms. P and entered her residence, and noting her reluctance to trust the police, given Mr. P had already contacted her, he reports spending some time trying to build a rapport, during which he learned she had kids, had struggled with an addiction, and that she was "genuinely afraid" of Mr. P (pp. 274-5).

[18] Noting that "…I'm a fairly charming dude…", and wanting to get a statement from Ms. W in order to charge Mr. P, the Subject Member continued to build a rapport, and he felt she was "kinda flirting" so he used it to his advantage to make her feel more comfortable in order to get a statement for the Breach File (p. 275).

[19] Given there was little furniture in the apartment, the Subject Member was sitting next to Ms. W on the edge of her bed mattress, which, consistent with his training from Depot, was also part of trying to put Ms. W at ease rather than standing and looming over her (p. 276).

[20] Recalling that the initial Assault File did not have any pictures of Ms. W's injuries from the Assault, the Subject Member asked if she had any pictures of her injuries, and while he

expected to see photographs of bruises, instead states she showed him naked photos of herself, which he reports caused him to turn "crimson" (p. 276).

[21] Ms. W confirms that, once inside her residence, the Subject Member asked her if she had pictures of her injuries from the Assault, and she showed him a picture taken before she had a shower, but she did not realize it showed her breasts, and the Subject Member commented about her "boobies" (pp. 209-10).

[22] Ms. W said she was embarrassed, and the Subject Member said not to worry about it, but that he now felt he had to show her something in return, and he pulled out his phone and showed her "a picture of his penis in full uniform" (pp. 210 and 213).

[23] Ms. W reports that she then went into the bathroom to change, and when she came out the Subject Member showed another picture of himself fully nude with his genitals exposed (pp. 210 and 213).

[24] Ms. W reported that the Subject Member was "flirting" with her (p. 210) and she was "shocked" by his presentation of the photographs (p. 214).

[25] According to the Subject Member, they continued talking and Ms. W continued "flirting", saying it was not fair that he had seen her but she had not seen him, which he did not "shut down", as he did not mind the flirting, given he had just broken up with his girlfriend, and was going home to an empty apartment (p. 276).

[26] It is at this point that, to use the Subject Member's own words, things "went completely pear shaped", as he obtained a brief recorded statement from Ms. W regarding the breach of the No Contact Condition by Mr. P and discussed arrangements for to be safe, as well as a safety plan (pp. 276-77), and as he was getting ready to depart he turned and Ms. W had started to change, and when the Subject Member asked if he should step out, Ms. W went into the bathroom to finish changing (p. 277).

[27] The Subject Member states that after discussing the safety plan, Ms. W made another comment about seeing a picture, and he then showed her a photograph, which was from Depot, and being "buff", he was in front of a mirror (pp. 278):

> …wearing very, very tight boxers that were..if it wasn't for the fabric, it's essentially a dick pic, you could pretty much see a whole lot of everything…it was not a modest picture… I didn't send it to her, I showed it to her, I'm like here and she made a comment like ooh you're…you know you've got something down there. …. So I ah I showed her the picture…that was my big mistake… that was when things really.. were.. I just completely..went off the rails. [double dot ellipsis original]

[28] During the Interview, the Subject Member indicated he no longer had the original photograph that he showed Ms. W on his phone, and categorically denied he was naked, that there was a picture of his exposed penis, or of him being in uniform with his penis exposed (p. 282). The Subject Member stated he does not keep "dirty" or nude photos on his phone (p. 282).

[29] Ms. W recalls that after she provided her recorded statement and got changed in the bathroom the Subject Member continued to press about wanting to show her a photograph of himself (p. 212).

[30] The Subject Member states there was no physical contact with Ms. W, and he only shook her hand as he was departing, and that he gave her a ride to a bus stop nearby, and that was the last he ever saw of her (p. 277).

[31] Ms. W reports that while taking the recorded statement and sitting on the bed, the Subject Member had his hand on her leg (p. 216).

[32] After departing, the Subject Member made some inquiries to try and find Mr. P, without success (p. 157), and that he tried to call Ms. W and there was no answer, so he sent Ms. W a text message and then wrote the Report to Crown Counsel for the Breach File (p. 278).

[33] The Subject Member did not have the text messages exchanged with Ms. W, as he deleted them, and they occurred months before he provided his statement during the Interview.

[34] In relation to the "inappropriate texting", the Subject Member indicated "[w]hat I do know is that I'm fairly certain I was the one who started…" (p. 278), which included commentary about the size of his penis, and the texting continued in to the next day, which was "definitely sexual in nature" (p. 279).

[35] Ms. W stated that the Subject Member sent her text messages that referred to having sex, about him being "hard", the fact that he wanted to thoroughly check her out or perform "a deep thorough check", and the size of his "package" or penis (pp. 210 and 217).

[36] Ms. W reported feeling "pushed or pressured" and intimidated to breach Mr. P so the Subject Member could come over and have sex with her (p. 210).

[37] The Conduct Report contains an outline of a Cellebrite Examination (pp. 238-259) of Ms. W's phone which details in numeric and chronological order the details and content of a total of 323 text messages exchanged between her and the Subject Member between March 28, 2017 and April 7, 2017 (201 from Ms. W and 122 from the Subject Member) ("Examination"), 30 of which were included (i.e., 15-45) in the Conduct Report using the same numeric and chronological order as relating to the Allegations (pp. 10-13) ("Matrix").

[38] Unfortunately, the Notice did not adopt or apply the numeric system utilized in the Examination or Matrix, choosing instead to reproduce only those text messages referring to the photograph shown to Ms. W by the Subject Member ("Notice Matrix"), which is further complicated by the fact that certain particulars in the Notice also refer to the numeric number assigned to a specific text from the Examination.

[39] The Matrix confirms that 40 minutes after leaving Ms. W's residence, she texted the Subject Member that Mr. P may be hiding at his parent's residence (p. 20), and there is an exchange in which the Subject Member promised "we will find him" and "we won't let anything happen to you" (p. 238).

[40] The Matrix then confirms that 15 minutes after this first text message by Ms. W, the Subject Member initiated inappropriate sexual comments by asking her if she liked what she

saw, referring to the photograph, making reference to her accidently showing her breasts, that he has a "pretty large package", his having a "12 inch cock", as well as comments about potential sexual contact that could have happened at her residence when he was there, his being "hard", and coming back for a "very thorough and deep check."

[41] In one particular text (52 and 55 in the Examination), upon learning from Ms. W that Mr. P had been released, the Subject Member states (p. 241):

> Fucking Christ. Fucking courts. Unfortunately I have no control over that ….
>
> Cause the courts are fucked. Welcome to my Frustration.

[42] Ultimately, a day or so later, likely around March 30, 2017, the Subject Member states he realized what he had done was not appropriate, and that the text messages show "I started to backtrack and ah trying to..fix.. or at least tighten up this stupid mess that I'd made" (double dot ellipsis original) (p. 279).

[43] According to the Subject Member he started to panic, and tried a couple of different ways to "shut this down" in order to avoid compromising the Breach File, but "[i]n retrospect I'd already…screwed it" (p. 279).

[44] The Subject Member recalls that over the following days, Ms. W contacted him by text or phone numerous times, oftentimes when he was off-duty, complaining about Mr. P and inviting the Subject Member to stay at her place, and he explained that she needed to call 9-1-1.

[45] Eventually, the Subject Member made up an excuse and told Ms. W that he had a date, and Ms. W became "incredibly upset", and there were text messages in which she stated she could not trust the police, which escalated to her threatening to take down his career, and ultimately after a few "not so nice phone calls", he blocked her number on April 1, 2017 (p. 280).

[46] Ms. W confirms that later in the exchanges she started becoming "rude and calling him a pig and saying he was disgusting and unprofessional", and the Subject Member referred to the

fact that he could lose his job, and she accused him of using her when she was "vulnerable" (p. 210).

[47] Ms. W also reports feeling that the Subject Member was pressuring her to breach Mr. P so he could come over (p. 218).

[48] Ms. W confirms that the Subject Member told -her to call the police when she complained to him about Mr. P, and the reason she was contacting the Subject Member about the threatening activities of Mr. P is that she expected the Subject Member to help her (p. 223), which is what he told her to do, and that is the reason she did not call 9-1-1 (p. 227).

[49] The Examination reveals numerous text messages in which Ms. W expressed concern about Mr. P and ongoing breaches of the Conditions, and the Subject Member prompting her to call the police and/or find some place safe (see p. 22 for a summary).

[50] Ms. W, although initially stating that the Subject Member never sent her any photographs (p. 218), later stated that he sent her a dozen or so inappropriate sexual pictures through Snapchat (p. 224).

[51] The Subject Member stated that Ms. W was not on his Snapchat and he did not remember sending anything through Snapchat (p. 289), and while they talked about adding each other, does not remember it ever happening (p. 290).

[52] The Subject Member's explanation is that he was "lonely", having just exited a multi-year relationship, they were both "flirting", and "…it was a consensual thing despite being horribly inappropriate and unprofessional…" (p. 283).

[53] Ms. W indicated she felt "violated" and that the Subject Member used her vulnerability, and she had lost Mr. P, her boyfriend of over a year (p. 222).

[54] When shown the text messages recovered as part of the Examination the Subject Member confirmed they were accurate (p. 285).

[55] In relation to further breaches of the Conditions by Mr. P as communicated by Ms. W to the Subject Member by phone or text, the Subject Member agreed they were serious and he had a concern for her safety (p. 286), and in retrospect he should have called 9-1-1 or the non-emergency line, but he did not take the initiative (p. 287), although there is some equivocation introduced by the Subject Member when he observes that he was off-duty in most, if not all, instances.

[56] On or about May 9 or 10, 2017, the Crown Counsel ("MB") calling cases in the Domestic Violence Court in Surrey Provincial Court was approached by Ms. W, who was extremely upset, hyperventilating, and sobbing, as she needed to get the keys for her residence from Mr. P who was in custody having been arrested on a warrant. Ms. W said she needed to get her phone from the apartment, as it had evidence of a police officer texting her about having sex and that was the reason Mr. P was in custody (p. 204).

[57] Based on the nature of the conversation, MB referred the situation to the Domestic Violence Crown Counsel ("DVCC") of the Surrey Crown Counsel Office. The DVCC spoke with Ms. W, who was reported as "distressed" and wanted the charges against Mr. P dropped because she was four months pregnant and wanted Mr. P in the baby's life (p. 6). When the DVCC met with Ms. W she reported receiving inappropriate text messages from a police officer, but did not have her phone with her at the time.

[58] Ms. W had to attend the court the next day, and brought her cell phone with her and showed the DVCC the text messages, which contained sexual references and connotations, as well as comments about the court process. Ms. W also said the police officer showed her several photographs of his genitals from his cell phone, and produced the Subject Member's business card (p. 7).

[59] On May 12, 2017, the Deputy Regional Crown Counsel ("DRCC") in the Surrey Crown Counsel Office sent a memorandum ("Memo") to the Officer-in-Charge ("OIC") of the Detachment, confirming a telephone conversation they had on May 10, 2017, reporting the professional misconduct and/or criminal offence of the Subject Member in relation to

inappropriate texts and photographs exchanged with Ms. W (p. 35). The DRCC further reports that Ms. W has expressed fear of the Subject Member and the police.

[60] The OIC received the Memo on May 15, 2017 (p. 3), and between May 18-24, 2017, statements were taken from MB, the DVCC, and Ms. W (pp. 4 and 209), and on June 7, 2017, the Operations Officer initiated the conduct investigation against the Subject Member and he was suspended from duty the same day (pp. 28 and 31).

[61] On May 24, 2017, the DRCC was advised that a conduct investigation had been ordered against the Subject Member, and on June 6, 2017, Surrey Crown Counsel stayed the charge against Mr. P arising from the Breach File based on the disclosure requirements for police misconduct, which would mean providing the information about the activities of the Subject Member to defence counsel (p. 10).

[62] Also on June 7, 2017, Ms. W consented to the Examination of her phone and the text messages it contained.

[63] The Subject Member was interviewed by the Surrey Professional Standards Unit on June 27, 2017, and subsequent to the Interview, the Subject Member furnished an "Intake Report" (dated June 26, 2017) (pp. 295-97), which outlined that he self-referred for therapy on May 13, 2016, for various anxiety, emotional and mood concerns and received various associated treatment methods and treatment goals, and psycho-education. The Intake Report indicates no occupational restrictions, and no mental health reasons to restrict his work.

[64] The Conduct Report was prepared on June 29, 2017, and on December 8, 2017, approximately five months later, the Notice to the Designated Officer ("DO") requesting a conduct board be appointed was signed by the Conduct Authority, which was received by the DO on December 13, 2017.

[65] The Board was appointed on December 21, 2017, the Notice was served on the Subject Member on January 9, 2018, and on January 11, 2018, the MR was retained by the Subject Member.

[66] On January 19, 2018, two days after the seven day timeframe for the Subject Member to object to the appointment of the Board, the MR asked the Board for an extension of time to provide the Subject Member's response ("Response") pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct), SOR/2014-291* ("*CSO (Conduct)*").

[67] On January 21, 2018, the Board wrote to the Representatives proposing a preliminary meeting occur before the Response is submitted, which occurred on January 29, 2018 ("Meeting 1").

[68] During Meeting 1, a number of procedural issues were addressed, including some preliminary observations by the Board in relation to the Allegations, Notice, and particulars, and the Subject Member was provided until February 22, 2018, to provide the Response.

[69] The Subject Member provided the Response on the noted date, and expressly repeats and relies upon the statement he provided during the Interview.

[70] The Subject Member admits Allegation 1, and as well he admits and/or explains the supporting particulars as enumerated in the Notice as follows:

1. admits being posted to the Detachment;

2. explains that although not present for the arrest of Mr. P for the Assault, acknowledges he read the Assault File on his Mobile Work Station before meeting with Ms. W;

3. admits the Breach File was his first contact with Ms. W;

4. admits he was the lead investigator on the Breach File;

5. admits the Assault File outlined Mr. P's history and drug use and ties with criminal organizations and drug trafficking, the circumstances of the Assault and other alleged assaultive behaviour, as well as Ms. W's fear for her safety and the reasons therefore;

6. admits he was at Ms. W's residence for just under an hour;

7. admits that he sat on the bed while speaking with Ms. W, as there were no chairs, and that he did so with her permission so he could balance his notebook on his lap while taking notes and holding the recorder, and he was not seated on the bed for the entire duration of the time he was in the residence;

8. admits that Ms. W advised him about the breach of the No Contact Condition by Mr. P and he obtained a recorded statement from her;

9. admits that he learned Ms. W has children, has struggled with a drug addiction, has been clean for a few months, and was genuinely afraid of Mr. P;

10. admits that the Assault File had no photographs of Ms. W's injuries and he asked her if she had any;

11. admits and explains that in relation to the photographs shown to him by Ms. W, she was scrolling through them on her phone and stopped at a selfie in which she was naked and showed her bare breasts, which she showed to him, and there were two or three of these photographs, and the photographs of her injuries followed the nude photographs;

12. admits that he showed Ms. W one photograph of himself from his personal phone wearing tight boxer style underwear, but he was not nude nor were his genitals exposed, and that he did not show this photograph immediately after she showed him her nude photographs, it was after the recorded statement was taken and at her insistence;

13. admits that the photograph he showed Ms. W was of himself in front of a mirror wearing very tight boxers and that if it were not for the fabric it would essentially be a "dick pic";

14. admits that Ms. W described him in the photograph as showing his penis and he was in uniform, but explains that she had not accurately described the photograph he displayed, as it did not show his exposed penis and he was not in uniform;

15. denies providing his personal cell phone number to Ms. W, as she had it on her personal cell phone as he had called her when he first arrived at her residence;

16. admits to sending inappropriate sexual and personal communications to Ms. W within an hour of leaving her apartment and referring to the revealing photograph he had shown;

17. admits to sending inappropriate sexual and personal communications to Ms. W between March 28 to 31, 2017, as well as speaking by phone several times, but explains that he attempted to end the inappropriate and sexual nature of the communications on March 30, 2017;

18. admits to texting Ms. W that he was interested in her but could not do anything right now, but only after the Breach File is resolved in a few months;

19. admits that his conduct with Ms. W was inappropriate and that he may be dismissed because of it as he indicated in a text message to her;

20. admits he blocked Ms. W's phone on March 31, 2017, without telling her but explains that she was threatening him;

21. admits that he engaged in discreditable conduct by showing her one inappropriate photograph of himself on his personal cell phone;

22. admits that he engaged in discreditable conduct through inappropriate sexual and personal text messages with Ms. W, but submits that the fact he was the lead investigator on the Breach File, that Ms. W was the victim of domestic violence and recovering from drug addiction, and that his actions would jeopardize the charge under the Breach File are aggravating factors for the measures phase, not the merit phase;

23. admits there was a power imbalance between himself in his position and that of Ms. W, but explains he was not an investigator on the Assault File as alleged, only the Breach File and his role was to inform Ms. W of Mr. P's release; and

24. admits that he was aware of Ms. W's circumstances, but does not agree she was a "vulnerable person" due her being the victim of domestic violence in the form of the

Assault, her apartment was empty, and the fact she was recovering from an addiction, and would like the MR to make further legal submissions on the issue.

[71] Although the Subject Member admits to some of the particulars, he denies Allegation 2, and submits that the first 20 particulars are exactly the same as in Allegation 1, and the remainder of particulars 21 to 28 can be characterized as aggravating factors relative to Allegation 1.

[72] Further, the Subject Member asserts in the Response that the substantive component of Allegation 2 is based on the inappropriate communications between himself and Ms. W, which he has admitted in Allegation 1, and he ought not to be "convicted" twice for the same misconduct, and wishes the MR to provide legal submissions on this issue.

[73] Turning to particulars 21-28 of Allegation 2, the Subject Member admits and/or explains or requests clarification regarding these particulars enumerated in the Notice as follows:

21. admits that he was the lead investigator on the Breach File and was having inappropriate sexual and personal communications with Ms. W, but does not address whether it put himself in a conflict of interest;

22. admits that he did not remove himself as the lead investigator on the Breach File;

23. requests that the Conduct Authority specify what policy and section of the Conflict of Interest Directive ["COI Directive"] pertains to his failure to report the conflict of interest to his supervisor;

24. requests further particularization as to who he concealed the inappropriate sexual and personal communications from and how [misnumbered as 25 in the Response];

25. denies that the situation with Ms. W lasted over one month, in that he quickly realized his poor judgment, and the jeopardy and risk to the Breach File, and tried to end the inappropriate communications with Ms. W who became upset, so he tried to mitigate the situation;

26. admits that (a) he sent texts to Ms. W criticizing the courts and referring to Mr. P as an "asshole" (52, 55, and 56), and (b) that while he admits he did not record all conversations with Ms. W in his notebook or the Breach File, submits that not all the conversations were "file related and some occurred off duty";

27. submits that he cannot reply to the assertion that the conflict of interest negatively impacted the appearance of police independence as it is not a particular but a submission and requests the MR be permitted to provide further submissions;

28. notes he has no personal knowledge that Crown Counsel stayed the Breach File charge due to the requirement to disclose the alleged misconduct of the Subject Member, but acknowledges there is a notation in the disclosure (i.e., Conduct Report) to this effect.

[74] The Subject Member denies Allegation 3, but admits, explains or clarifies particulars 21 to 29, and relies on his replies to particulars 1 to 20 articulated under Allegation 1, given they are the same 20 particulars.

[75] Dealing with particulars 21 to 29 of Allegation 3, the Subject Member submits the following, which corresponds to the enumerated particulars in the Notice:

21. explains that as set out in the texts, the new threats to Ms. W's safety and her concerns in that regard began on March 29, 2017 and not March 28, as alleged, which implicitly admits there were threats and fears arising from the texts articulated by Ms. W;

22. explains that the specific text in which Ms. W states that Mr. P is taunting and "fucking" with her life was sent on March 29, 2017, and not March 28, which implicitly admits the content of the text from Ms. W;

23. admits Ms. W sent multiple text messages asking for help and describing how Mr. P was breaching the Conditions;

24. admits he advised Ms. W to report the breaches of the Conditions to the police, explaining he was off-duty and does not reside in Surrey;

25. admits that the three texts quoted in the particular occurred (8, 56, and 145) but submits the third text (145), in which he tells Ms. W to text him if she needs help, occurred during the time he was trying to end the inappropriate communications and she was upset with him;

26. admits that when he blocked Ms. W's phone number he did not advise her that he would no longer receive calls or texts, but explains at the time Ms. W and her associates were threatening him and even though the phone number was blocked her messages still appeared as blocked messages;

27. admits that up until his suspension from duty he did not investigate or report the new alleged breaches of Conditions by Mr. P as reported by Ms. W, but explains he was off-duty at the time Ms. W reported the breaches, he advised her to report the breaches, and on at least three occasions she replied that she had reported a breach as noted in the texts identified;

28. denies that he failed to act in accordance with "E" Division Operational Manual 2.4. Violence/Abuse in Relationships ("VIR Policy") section 1.6. (requiring all reported breaches of protective conditions of criminal or civil orders receive an immediate response and investigation) or section 1.7. (requiring all complaints of reported criminal offences be investigated) because he did not receive any reports of breaches "in his capacity as an on duty police officer", "did not have supporting evidence", and he advised Ms. W to report the breaches/criminal offences using the proper procedure; and

29. denies he failed to take appropriate action to aid Ms. W due to potential, imminent or actual danger, submitting that he gave her "the best advice to help her stay safe", he encouraged her to report her concerns to the police, noting if she had time to text him she had time to contact the police, he did not honestly believe she was in imminent danger, and based on the context of the messages Ms. W was trying to encourage him to come to her residence in a personal capacity.

[76] After reviewing the Response, on March 1, 2018, the Board emailed the Representatives proposing a further meeting, which occurred on March 8, 2018 (“Meeting 2”), and resulted in clarification and agreement on several procedural points, including that:

- In relation to the explanation in the Response regarding particular 17 of Allegation 1 (i.e., date of attempting to end communications), it was confirmed by the MR that the date was simply being clarified, and there was a consensus with the Representatives that it did not impact any substantive point.

- In relation to the explanation in the Response regarding particular 22 of Allegation 1, it was confirmed by the MR that the Subject Member was seeking to make submissions on this particular at the measures stage as aggravating factors, if required.

- In relation to the explanation in the Response regarding particular 24 of Allegation 1, it was confirmed that the CAR will provide a submission as to whether Ms. W was a "vulnerable person" in law, which will be followed by a submission from the MR.

- In relation to the clarification sought in the Response regarding particular 23 of Allegation 2, it was confirmed that the CAR is relying upon the section 4.2.3. of the COI Directive (found at A.M. XVII.1).

- In relation to the request for further particularization sought in the Response regarding particular 24 [identified as numbered 25] of Allegation 2, the CAR will provide a brief submission on who the Subject Member concealed his communications from and how.

- In relation to the comment in the Response regarding particular 27 of Allegation 2 (which included particular 28 in discussions), the Representatives agreed that these particulars are aggravating factors for purpose of the measures phase, if required.

- The CAR will provide a submission on whether there is a need to compel Ms. W to testify.

[77] The Board noted the submissions by the CAR will be provided by March 15, 2018, and the Board would advise whether a submission is required from the MR, in addition to any submission from the MR on Ms. W being a vulnerable person.

[78] The CAR requested an extension to provide a submission, which was received on March 19, 2018, and addressed three issues arising from Meeting 2: first, whether Ms. W was a vulnerable person; second, how the Subject Member concealed communications; and third, the need to compel Ms. W to testify.

[79] Turning to the first issue, the CAR submits that, consistent with dictionary definitions, Ms. W was "vulnerable" because she was susceptible to influence, attack or harm by Mr. P, as well as influence by a police officer.

[80] Further, the CAR asserts a vulnerable person is someone who is protected by legislative measures to prevent physical, mental or emotional injury, and adverts to the VIR Policy, and in particular 5.3.1., which requires a determination of who is the most vulnerable where violence occurs, as well as the Conditions imposed on Mr. P which included the No Contact Condition.

[81] It is also proposed that "vulnerable person" has a common sense meaning in policing, but it also has a broader meaning, noting Conduct Board decisions have applied it where a person is a complainant, intoxicated, or "feeling unwell" ((2015) RCAD 1 at para. 105 and 2017 RCAD 8 at para. 68).

[82] Specific to Ms. W, the CAR notes she was using methadone to recover from a drug addiction (p. 56), her apartment was empty, with no chairs and only a mattress, indicating a level of poverty, and that she had described feeling "vulnerable" during her statement (pp. 210 and 222).

[83] The CAR also asserts that the circumstances of Ms. W also accorded with her being vulnerable as defined by Operational Manual 28.5 (Criminal History/Records Checks) at 2.3. and

2.4. and Operational Manual 37.6. (Victim Assistance[3]) ("Victim Policy") at 2.7. and 2.10., which refer to persons, who due to various circumstances, are at risk of physical, mental or emotional harm.

[84] In relation to the second issue, the CAR asserts that the Subject Member concealed the inappropriate sexual and personal communications with Ms. W from his supervisor and the RCMP by not self-reporting a conflict of interest.

[85] Third, the CAR asserts Ms. W must testify because there are contradictions and inconsistencies between her evidence and that of the Subject Member, which goes to credibility, and the Board must hear oral evidence to appreciate the credibility of the witness, as well as her emotional state and demeanor, which "could enhance" her credibility, as oral testimony can weigh more heavily than words on the page (citing 2017 RCAD 8).

[86] The CAR then provides five examples of differences in the evidence of Ms. W and the Subject Member as it pertains to what pictures were shown of her and him and at whose insistence, whether photos were exchanged on snapchat, and whether there was any physical contact at the residence.

[87] It is asserted that testimony of Ms. W will enhance her credibility, which will diminish the Subject Member's, and the conduct described by Ms. W would attract a harsher penalty than that described by the Subject Member.

[88] On March 20, 2018, the Board emailed the MR to determine if a reply would be provided in response to the submissions of the CAR, and on March 22, 2018, the MR indicated a response would be provided solely on the first issue, whether Ms. W was a vulnerable person, which was provided on March 27, 2018.

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[3] Since the oral-written decision was issued, the Board became aware that the Victim Policy was amended, and in particular 1.10. provides a definition of "vulnerable victim" as "any person or group that is susceptible to physical or emotional injury or harm." This amendment is not relied upon by the Board, but simply referenced for the Representatives.

[89] The MR submits there is a distinction between the common meaning of "vulnerable" and the legal meaning of "vulnerable person", and while the Subject Member acknowledges that Ms. W may have been feeling "vulnerable" as defined in dictionaries, that did not make her a vulnerable person in law.

[90] While the Subject Member acknowledges that victims of domestic violence are in vulnerable situations and can be physical, mentally, or emotionally hurt or influenced, the VIR Policy does not define or categorize victims of domestic violence as "vulnerable persons" but directs the investigator to determine who is the most vulnerable in the situation.

[91] The MR asserts the first Conduct Board decision cited and relied upon by the CAR is not of assistance, as it was found that the complainant was in a "somewhat vulnerable situation" and not "somewhat vulnerable", which was not a determination in law of being a "vulnerable person".

[92] Similarly, the second Conduct Board decision relied upon by the CAR is also not of assistance as it dealt with witnesses and their vulnerability due to intoxication, which was not a finding of "vulnerable person" at law, and further there is no evidence that Ms. W was intoxicated.

[93] The MR submits that the legal definition of "vulnerable person" "is a person who by nature of a physical, emotional or psychological conditions is dependent on the assistance of other persons in day-to-day living", and accepts the definition of "vulnerable persons" in the RCMP Security Manual, which refers to a temporary or permanent dependence on others.

[94] The MR then cites and refers to various sources which define a vulnerable person as someone who is dependent on others for assistance, and includes persons who are mentally ill, elderly, or victims of torture, which is not present in the circumstances of Ms. W.

[95] Thus, while the methadone treatment of Ms. W to recover from an addiction is acknowledged, the MR notes this fact is only briefly mentioned in the Conduct Report, and there

is no evidence as to Ms. W's stage of treatment, its impact on her, or side effects, and therefore it cannot be found she is dependent on others and a vulnerable person.

[96] The MR also notes the evidence that there were few items of furniture in Ms. W's residence does not establish she was living in poverty as asserted by the CAR, and the MR notes Ms. W was returning with a bag of groceries when she first met with the Subject Member.

[97] Based on the foregoing, the MR asserts that Ms. W was not a "vulnerable person" in law.

[98] On March 29, 2018, the Board wrote to the Representatives to confirm that the CAR is requesting that Ms. W be called as a witness for the reason asserted, that the MR is not proposing any witnesses at the merit stage, and that if there are no further submissions, the Board will consider the submissions of the CAR and MR, as well determining what witnesses or testimony may be required.

[99] The same day, the MR confirmed no witnesses were being requested at the merit stage, but noted if Ms. W testified, the Subject Member may also want to testify.

[100] On April 3, 2018, the CAR confirmed that Ms. W was being proposed for both the merit and measures phases.

4. Merit

Context

[101] Before addressing the merit of the Allegations, the Board notes that the purpose, objectives and intent of the new conduct regime, and in particular reforms to formal proceedings, have been articulated in the Principles section of the *Conduct Board Guidebook* (2017):

> **2. Principles**
>
> 2.1 The Legislative Reform Initiative (LRI) was tasked with developing a modernized conduct process and engaged in broad-based consultations with a wide range of stakeholders and examined various internal and external reports and studies regarding the RCMP, as well as other police agencies, relative to dealing with instances of alleged misconduct by police officers.

> 2.2 The reforms adopted under the LRI were expressly based upon certain principles arising from a broad consensus and understanding among stakeholders that conduct proceedings, including hearings before a conduct board, are to be timely and not overly formalistic, legalistic, or adversarial.
>
> 2.3 As such, proceedings before a conduct board are not to be interpreted or understood as requiring highly formalized and legalistic practices and procedures akin to a formal court-like process, but rather will be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.
>
> 2.4 In most respects, a conduct hearing will unfold much like a conduct meeting, except that a conduct board has certain authorities to compel evidence and give direction, when it considers it necessary, given it is dealing with a dismissal case. A conduct hearing is administrative in nature and will be led by the conduct board (and not the parties), and it has broad discretion to control its own process and give direction.
>
> 2.5 In support of this approach, the former right of parties to be afforded a full and ample opportunity to present evidence, cross-examine witnesses, and to make representations at a hearing were expressly removed from the *Royal Canadian Mounted Police Act*, R.S.C 1985, c. R-10 (as amended) (*Act*) (former subsection 45.1(8)).
>
> 2.6 Further, a conduct board will expressly rely upon an investigative report and supporting material in making findings and determinations. At the sole discretion of the conduct board, a witness will generally only be summoned to testify where the conduct board considers there to be a serious or significant unresolved conflict in the evidence and the testimony of the witness would be material and necessary in resolving that conflict.
>
> 2.7 The responsibility for determining whether the information in the investigative report and supporting material is sufficient to permit a determination of whether an allegation is established resides with the conduct board.
>
> 2.8 The conduct board may issue a direction for further investigation or order the production of further information or documents only where it determines that the additional investigation or information is material and necessary to resolving an outstanding issue in the conduct proceeding.
>
> 2.8 Finally, subject members are now required to admit or deny an allegation as early in the proceedings as possible and to identify any defences or evidence which they seek to rely upon, in order that the conduct board can effectively complete a conduct proceeding.

[102] More recently, responding to an assertion by the External Review Committee ("ERC") in report C-017 (dated June 28, 2017), that the role of conduct boards in the new regime does not

differ materially from the former or legacy discipline and adjudicative process, the Level II (appeal) Adjudicator in *Commanding Officer "J" Division v. Constable Cormier*, (dated November 20, 2017) (file 2016-33572) ("*Cormier Appeal*") stated:

> [132] …. With respect, this is a point of view I do not share. The amendments to the *RCMP Act* and the creation of the new conduct regime changed the nature of the role of conduct boards by enhancing their ability to actively manage proceedings and make conclusive determinations in a more informal and expeditious setting. In short, a conduct board is no longer reliant on the traditional to and fro presentation of evidence by the parties.
>
> [133] A comparative analysis of a conduct board's knowledge of the case prior to the hearing, the form and presentation of evidence, and the management of witnesses provides a useful illustration.
>
> [134] First, conduct boards now have comprehensive knowledge of the case before the hearing. In accordance with subsection 45.1(4) of the former *RCMP Act* (in effect prior to November 28, 2014), the only document provided to adjudication boards in the normal course was a bare notice of hearing containing the allegations and the particulars against the subject member. Now, conduct boards are provided with the notice of hearing, the investigation report, including witness statements and exhibits, an admission or denial of each alleged contravention of the Code of Conduct, the subject member's written submissions, any evidence, document or report the subject member intends to rely on at the hearing, as well as a list of witnesses submitted by the parties for consideration. The applicable provisions under the current process are the following:
>
> *RCMP Act*
>
> 43(2) As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.
>
> *CSO (Conduct)*
>
> 15(2) As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.
>
> 15(3) Within 30 days after the day on which the member is served with the notice or within another period as directed by the conduct board, the

> subject member must provide to the conduct authority and the conduct board
>
> (a) an admission or denial, in writing, of each alleged contravention of the Code of Conduct[;]
>
> (b) any written submissions that the member wishes to make; and
>
> (c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.
>
> 18(1) Within 30 days after the day on which the notice of hearing is served, the parties must submit to the conduct board a list of the witnesses that they want to have summoned before the board and a list of the issues in respect of which they may want to rely on expert testimony.

[135] In fact, under the former *RCMP Act,* in the absence of an admission by the subject member or evidence presented by the Appropriate Officer at the hearing, a finding of misconduct could not be established by an adjudication board. Conversely, in the current regime, by virtue of subsection 23(1) of the *CSO (Conduct),* a conduct board can render a decision based entirely on the documentary record provided before the hearing should the parties choose not to make further submissions:

> 23(1) If no testimony is heard in respect of an allegation, the conduct board may render a decision in respect of the allegation based solely on the record.

[136] Second, the rules surrounding the presentation of evidence before conduct boards have changed. Previously, evidence was presented during the hearing:

> [Repealed, 2013, c 18, s 29]
>
> 45.12(1) After considering the evidence submitted **at the hearing,** the adjudication board shall decide whether or not each allegation of contravention of the Code of Conduct contained in the notice of hearing is established on a balance of probabilities.
>
> [Repealed, 2013, c 18, s 29]
>
> 45.13(1) An adjudication board shall compile a record of the hearing before it, which record shall include
>
> (a) the notice of the hearing under subsection 43(4);
>
> (b) the notice of the place, date and time of the hearing under subsection 45.1(2);
>
> (c) a copy of all written or documentary evidence **produced at the hearing;**
>
> (d) a list of any exhibits **entered at the hearing;** and

(e) the recording and the transcript, if any, of the hearing.

[Emphasis added.]

[137] Under the current regime, in accordance with subsection 15(3) of the *CSO (Conduct)*, extensive information is filed with the conduct board prior to the hearing. Section 26 of the *CSO (Conduct)* reflects this change. While evidence and exhibits were previously produced at the hearing; now, available information and exhibits are produced beforehand and may be treated as evidence as a conduct board sees fit (see also, the long-standing powers granted by subsection 45(2) of the *RCMP Act;* and previously, section 45 of the former *RCMP Act).* This reality is demonstrated by the replacement of a specific reference to evidence produced at the hearing in former paragraph 45.13(1)(c) by a more general reference to any information provided to the conduct board in paragraph 26(c) of the *CSO (Conduct):*

CSO (Conduct)

26 The conduct board must compile a record after the hearing, including

(a) the notice of hearing referred to in subsection 43(2) of the Act;

(b) the notice served on the subject member of the place, date and time of the hearing;

(c) a copy of **any other information provided to the board;**

(d) a list of any exhibits entered at the hearing;

(e) the directions, decisions, agreements and undertakings, if any, referred to in subsection 16(2);

(f) the recording and the transcript, if any, of the hearing; and

(g) a copy of all written decisions of the board.

[Emphasis added.]

[138] Lastly, the management of witnesses has also changed. While the adjudication registrar was previously obligated to issue a summons at the request of a party, pursuant to subsection 6(1) of the *Commissioner's Standing Orders (Practice and Procedure)*, SOR/88-367 [*CSO (Practice and Procedure)*], conduct boards, in accordance with subsections 18(3) and 18(4) of the *CSO (Conduct)*, must provide the parties a list of witnesses they intend to summon. In addition, conduct boards must give reasons for accepting or refusing any witness that is requested by the parties. The applicable provisions in both the repealed and current regimes are the following:

CSO (Practice and Procedure) [Repealed, SOR/2014-293]

> 6(1) Any party requiring the attendance of a witness at a hearing shall forward the name of the proposed witness to the registrar who **shall** issue a summons of behalf of the board.
>
> *CSO (Conduct)*
>
> 18(3) The board **must** establish a list of the witnesses that it intends to summon, including any expert in respect of whom a party has indicated an intention under subsection 19(3) to question, and may seek further submissions from the parties.
>
> 18(4) The board **must** provide the parties with a list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.
>
> [Emphasis added.]
>
> [139] In all, the amendments to the *RCMP Act*, the repeal of the CSO *(Practice and Procedure)*, and the enactment of the CSO *(Conduct)* have meaningfully changed the nature of the role of conduct boards and, in particular, their authority to manage proceedings.

[103] The foregoing quotations, while somewhat lengthy, provide a clear indication of the context in which conduct boards are intended to operate, which requires a conduct authority and subject member, and in particular representatives, to critically examine the evidence and circumstances as early as possible, as the default or mindset that most matters will simply, or must be, litigated in a formal hearing before a Conduct Board is no longer extant.

Preliminary Issues

Oral Testimony

[104] The CAR has asserted that the testimony of Ms. W is required at the merit stage, and for the reasons outlined below, the Board has determined that her evidence is not material or necessary to resolving any significant or serious unresolved conflicts in the evidence.

Vulnerable Person

[105] The Representatives have provided extensive submissions on the meaning to be assigned to “vulnerable person.”

[106] In reviewing the Notice, the only place where it is asserted that Ms. W was or appeared to be a vulnerable person is particular 24 of Allegation 1, which is not material or necessary to finding whether the Subject Member engaged in discreditable conduct relative to the inappropriate photograph and text messages, the central points of the alleged misconduct.

[107] Although not material to making a determination on merit, the Board has reviewed the submissions of the Representatives on this point, and finds that Ms. W was a vulnerable person.

[108] The MR has asserted that, in law, to be vulnerable person it is necessary for a state of temporary or permanent dependence on someone else to exist.

[109] However, the policy, common, or operational understanding of a vulnerable person in policing more closely aligns with the submissions of the CAR, which is that the person is in a situation where they are subject to physical, emotional, or mental harm or influence by another, which includes situations of domestic violence, but may also extend to other situations depending on the circumstances or factors at play.

[110] As noted by the VIR Policy at 1.2.1. violence or abuse within relationships has distinctive dynamics not found in other violent crime, and "[t]here is a high likelihood that the violence/abuse will become more frequent and more several over time", which explicitly or implicitly means those subject to abuse are, or treated as, being vulnerable. Which is likely why 2.2. of the Victim Policy defines a "high-risk victim" as "a victim of domestic… violence… where there is a continuing risk of serious bodily harm or death." Taken in tandem, these two policies directly or indirectly require the police to understand and treat victims of violence within a relationship to be vulnerable persons.

[111] Further, that Ms. W was taking methadone as part of a drug addiction treatment program, and lived in sparse circumstances, are also factors that can considered as influencing whether she is a vulnerable person in terms of the circumstances presented in this case, which appears consistent with the approach that is outlined in the Conduct Measures Guide (p. 59).

Analysis

[112] The Board reviewed the Conduct Report and supporting material, Response, as well as the submissions of the CAR and MR on various issues.

[113] It is commonly understood that members of the RCMP, by the terms of their engagement, have voluntarily agreed to abide by a higher standard of conduct than that of the ordinary citizen, although this standard does not call for perfection (*The Queen v. White*, [1956] S.C.R. 154 at 158 "*White*")). Furthermore, this agreement to abide by a higher standard of conduct covers both off, as well as on-duty behaviour.

Allegation 1

[114] Allegation 1 in the Notice asserts the Subject Member engaged in discreditable conduct by showing Ms. W "a revealing picture" of himself and exchanged inappropriate sexual and personal text messages contrary to section 7.1 of the Code of Conduct.

[115] In order to determine whether conduct is discreditable and contrary to the Code of Conduct, the evidence must establish on a balance of probabilities: first, the identity of the member; second, the act or acts constituting the alleged conduct; and third that the conduct brings discredit on the RCMP (noting that after November 28, 2014, "discreditable" supplanted "disgraceful", but the analysis is fundamentally the same), which requires some nexus to employment.

[116] Whether or not conduct is discreditable is a matter of law which must be determined in the specific context, and in view of all the circumstances of the case. Furthermore, the term "discreditable" must be given its natural and popular meaning applied in relation to the special obligations and duties of a profession (see, *Hughes v. Architects Registration Council of the United Kingdom*, [1957] 2 All E.R. 436 (Q.B.) at 442 for an understanding of "disgraceful" in this regard).

[117] The ERC summarized the test in relation to discreditable conduct in the following manner: would a reasonable person with knowledge of all relevant circumstances, including the

realities of policing in general and the RCMP in particular, be of the opinion that the conduct was discreditable? (ERC C-2015-001 (C-008), February 22, 2016 at paras. 92-93).

[118] It is not in question that the Subject Member showed a revealing photograph of himself to Ms. W while at her residence. Ms. W has indicated there was two photographs, one showing the Subject Member in uniform with his penis exposed, and the other he was in the nude with an exposed penis. The Subject Member states there was only one photograph, and that he was not nude, but his boxer shorts were so tight that it amounted to a "dick pic."

[119] The CAR has asserted that the Board must hear the testimony of Ms. W in order to resolve what was actually in the photograph or photographs that were shown by the Subject Member.

[120] However, read closely, the Notice under Allegation 1 commences at particular 12 with the assertion that the Subject Member showed Ms. W "a revealing picture of his genitals" (emphasis added), and particular 13 refers to "the revealing picture" (emphasis added) being in boxer shorts where the fabric is so tight it is essentially a "dick pick" (Subject Member's version), which is followed by particular 14 referring to "the same revealing picture" (emphasis added) in uniform of his genitals or naked penis (Ms. W's version), and then ultimately particular 21 concludes that the Subject Member "showed Ms. [W] at least one inappropriate picture from his personal phone as described above."

[121] The Board does not find it necessary to resolve whether the Subject Member was nude or not because, based on his own admission, the Subject Member showed a revealing photograph to Ms. W, as specifically alleged in particulars 12, 13, and 21 of Allegation 1.

[122] Considered another way, there is no serious or significant conflict in the evidence that requires resolution or further testimony because the Notice asserted two versions of the content of the photograph, one of which has been established. If Allegation 1 had simply referred to an inappropriate revealing photograph in the particulars, without alleging and describing both versions, it might have been the case that oral testimony was required to resolve the conflict in the evidence, but that is not the circumstances or particulars presented in the Notice.

[123] The CAR has also asserted that Ms. W must testify due to credibility and other concerns, but on the face of it, those concerns relate to collateral or non-material issues which do not require testimony in order to reach a substantive determination regarding Allegation 1.

[124] For example, while the CAR has asserted that Ms. W must testify because she states the Subject Member showed her two photographs, that is not what was alleged in the particulars of Allegation 1, which only refers to one photograph (e.g., particular 14 specifically states that Ms. W described "the same revealing picture…" (emphasis added)). Simply put, the particulars only refer to one revealing picture, not two.

[125] Further, whether Ms. W showed one or more photographs of herself to the Subject Member, and the content of the photograph(s), is not material to establishing Allegation 1, nor whether he sent one or more pictures on snapchat, as the latter is not identified in Allegation 1 as an alleged act of misconduct.

[126] Similarly, whether or not the Subject Member only shook Ms. W's hand or placed his hand on her knee is also not material to Allegation 1, as it is not identified in the particulars as forming part of any misconduct by the Subject Member.

[127] Based on the foregoing, the Board concluded that testimony of Ms. W is not required because there were no unresolved conflicts in the evidence relative to the substance of Allegation 1 (as set out by the particulars) where her testimony was material or necessary in order to resolve any conflict.

[128] Turning to the second aspect of Allegation 1, it is not in doubt, based on the texts contained in the Examination, Matrix and/or Notice Matrix that the Subject Member sent explicit messages to Ms. W of a sexual nature regarding his penis and other sexually related comments.

[129] Any reasonable person aware of the circumstances relating to the photograph or text messages would conclude that they were completely inappropriate, unprofessional and brought discredit not only upon the Subject Member but the RCMP. Simply put, a reasonable person

would find the actions of the Subject Member were appalling, if not outright disturbing, given the context in which he was dealing with Ms. W.

[130] As a result, it has been established on a balance of probabilities that the conduct of the Subject Member was discreditable for the reasons stated.

Allegation 2

[131] The basis of Allegation 2 is that the Subject Member created actual, apparent or potential conflicts of interest between his professional responsibilities and private interests based on the inappropriate sexual and personal communications with Ms. W contrary to section 6.1 of the Code of Conduct.

[132] In the view of the Board, the Subject Member has correctly asserted in the Response that the essence of Allegation 2 is either dealt with under Allegation 1 and/or particulars 21-28 constitute aggravating factors that more properly inform whether the conduct of the Subject Member was discreditable.

[133] Indeed, some of the particulars alleged to constitute Allegation 2 (21, 22, 25 and 28) are explicitly or implicitly the same as those asserted in Allegation 1 (22-24).

[134] As a result, the Board finds that Allegation 2 has not been established because the misconduct it is addressing is already dealt with under Allegation 1, which has already been established, and the additional particulars of 21-28 outline factors that further establish how the actions of the Subject Member were discreditable and/or inform the analysis as to the appropriate measures to impose.

[135] However, if, upon review, it were found that Allegation 2 did constitute a distinct and separate act of misconduct, the Board would have found it established on a balance of probabilities, given the Subject Member's personal interests in relation to Ms. W were in direct conflict with his role as a police officer and investigator on the Breach File.

[136] It goes without saying that the Subject Member cannot show an inappropriate photograph, exchange improper and sexually explicit text messages with a complainant/victim in a file in which he is the investigator, and suggest sexual or relationship possibilities, when at the same time he is responsible for processing the Breach File, which includes charging Mr. P, recently in a relationship with Ms. W.

[137] The fact that Crown Counsel was compelled to stay the charge for breaching the No Contact Condition due to the actions of the Subject Member is but one example of the consequence of the conflict of interest he created, not to mention the impact on the public interest, as he utterly destroyed his credibility and objectivity as an investigator.

[138] The COI Directive is clear at 4.2.3 that the Subject Member had the obligation to report the conflict of interest that had arisen as a direct result of his interactions with Ms. W, and he failed to do so, which constitutes a contravention of section 6.1 of the Code of Conduct.

[139] However, for the reasons stated, Allegation 2 has not been established.

Allegation 3

[140] Allegation 3 asserts the Subject Member failed to diligently perform duties and take appropriate action to aid Ms. W contrary to section 4.2 of the Code of Conduct.

[141] It is not in doubt from the texts that Ms. W expressed, multiple times, concerns about Mr. P contravening the Conditions and other actions by him or his associates, which she communicated to the Subject Member. Further, Ms. W states she did what she was told, which was to contact the Subject Member.

[142] In response to Allegation 3 and the particulars, the Subject Member, variously says, in essence, he was off-duty and did not live in Surrey, that these messages were attempts by Ms. W to get him to her residence for personal reasons, that several times he told her to report the breaches of the Conditions to the police, he did not have evidence of these alleged breaches, that by this point he was being threatened by Ms. W, and he did not "honestly believe" she was in imminent danger.

[143] The last claim by the Subject Member is particularly problematic, as he agreed in the Interview that the further breaches of the Condition were serious and that he had a genuine concern for Ms. W's safety (p. 286), and to apparently try and parse out the circumstances by indicating she was not in "imminent danger" is not only unpersuasive, but disingenuous.

[144] Moreover, while the Subject Member may have been off-duty or not acting in the capacity of a police officer when he received these texts from Ms. W, it is not clear how this relieved him of his general obligation as a police officer to protect a member of the public, but more particularly, there is no such exemption under the VIR Policy.

[145] Clearly, the Subject Member had a responsibility under the VIR Policy to take proactive steps to ensure that the alleged breaches relayed by Ms. W were reported and properly investigated, regardless of whether he was on or off-duty, a fact he frankly acknowledged during the Interview when he stated that, "I think any of them I should have called frankly… it's my job and…I Fucked it on that eh" (p. 287). Telling Ms. W to call the police, given the specific circumstances, was not going to address his responsibilities generally as a police officer as created by the Code of Conduct and/or specifically by the VIR Policy.

[146] The VIR Policy is absolutely clear on the requirement to report and investigate violence in relationship matters because it has distinctive dynamics not found in other violent crimes, given there is a high likelihood that the violence will become more frequent and severe over time (section 1.2.1.).

[147] Based on the facts, the more credible assessment is that the Subject Member found himself in an ever-expanding circle of difficulties with Ms. W and the Breach File, of his own creation, and he was not in a position to report (as clearly, by this point, it would be wholly improper for him to investigate) the alleged breaches without jeopardizing or revealing the inappropriate circumstances he found himself based on his interactions with Ms. W.

[148] It has been established on a balance of probabilities that the Subject Member failed to be diligent in the performance of his duties and responsibilities, including taking action to provide proper aid and assistance to Ms. W regarding the breaches of the Conditions by Mr. P.

Conclusion

[149] For the reasons outlined, the Board finds Allegation 1 and Allegation 3 established. The Board further finds that Allegation 2 has not been established.

5. Measures

[150] The Board provided the written-oral decision on merit to the Representatives by email on April 26, 2018.

[151] The purpose of providing a written-oral decision is to furnish the Representatives with a written record of the findings of the Board, which would better inform them in preparing submissions on measures, which is not always the case when an oral decision is made on merit and representatives are put to making submissions on measures without a written record and/or within a very short time frame, sometimes the same or next day.

[152] Subject to comments of the Representatives, the Board raised several procedural issues, and proposed that the CAR provide a submission on measures, followed by a reply from the MR, and if required, a rebuttal from the CAR, and the Board provided a preliminary view that there did not appear to be a requirement for any witnesses at the measures stage.

Background

[153] In response to the Board's issuance of the written-oral decision on merit, on May 1, 2018, the CAR sent the following email:

> **To: Conduct Board**
>
> Sir,
>
> For the record:
>
> The CAR was expecting a decision regarding witnesses, not a decision on the merits of the allegations.
>
> As the record shows, following the Member's Response to the allegations the Board requested written submissions from the CAR on specific points:
>
> - whether Ms. W was a "vulnerable person" in law;

> - who the SM concealed his communications from and how, in the context of the Member's request regarding paragraph 24 of the Notice of Conduct Hearing;
>
> - whether there is a need to compel Ms. W to testify.
>
> The Board did not inform the CAR that the forgoing submissions would be followed by a decision on the merit of the allegations. The Board's communications led the CAR to believe that the Board was going to decide on the witnesses, not on the merits of the allegations. The CAR reasonably expected that she would be provided with an opportunity to make comprehensive submissions on each allegation before the Board made a decision. The record shows that the Board was considering not the merits of the allegations but "what witnesses the Board may require and/or if testimony will be required in order to make determinations in respect of the Allegations" (Board's email dated 2018/03/29 12:27 PM). The Board did not provide the CAR with the opportunity to make comprehensive submissions on the merits of the allegations.
>
> As a consequence of the Conduct Board's decision, the CAR will proceed with the conduct measures phase of the hearing. But in doing so, the CAR is reserving its client's right to appeal the Conduct Board's final decision on grounds of procedural fairness, error of law or if the decision is clearly unreasonable.
>
> The CAR reiterates that Board should call Ms. W as a witness for the measures phase of the hearing. The CAR is relying on submissions already provided to the Board in that regard.
>
> Once the Board has made a determination on witnesses for the measures phase of the hearing, the CAR would like to be provided with an opportunity to make comprehensive submissions on measures. [bold emphasis original] ["CAR Email"]

[154] The Board will address the content of the CAR Email below, but in terms of the request to have Ms. W testify at the measures phase, based on the factors, considerations and arguments articulated in the CAR's email of March 19, 2018 (which dealt with the merit phase), the Board replied on May 2, 2018, that it was not persuaded that Ms. W can provide material information that is necessary to resolve an outstanding conflict or issue in the evidence or otherwise in relation to determining *measures*.

[155] However, the Board noted if the MR requests that the Subject Member provide oral evidence, depending on the form and nature of that evidence, the Board may reconsider the matter. The Board closed by noting that once the MR clarified whether the Subject Member is

requesting to testify, and the Board has made a decision in that regard, the Board anticipated providing seven days for the CAR to furnish a submission on measures.

[156] Turning to the assertions of the CAR Email that the Board breached procedural fairness, committed an error of law, or made a decision that was clearly unreasonable, because it did not inform the CAR a decision was going to be made on merit and/or denied the CAR an opportunity to provide "comprehensive submissions" on the Allegations, the following may provide some context.

[157] First, given Allegation 1 and Allegation 3, were established, the assertions in the CAR Email primarily relate to the non-substantiation of Allegation 2.

[158] Second, while the Board did request written submissions on the three items outlined in the CAR Email, it did so in the context of specifically stating to the Representatives, the CAR in particular, in Meeting 1 and/or Meeting 2 that any issues that were discussed were subject to any other submissions that the Representatives may want to provide to the Board.

[159] Third, the CAR was aware since Meeting 1, as noted in an email to the Board on January 29, 2018, that the Board had concerns about whether Allegation 1 and Allegation 2 were problematic, given the explicit request to include the Board's "position" in the summary of Meeting 1 (outlined in the email from the Board, dated January 29, 2018), to which the Board replied on February 8, 2018 as follows:

> I do not recall stating a "position" on Allegations 1 and 2, which connotes that I formally provided a final and decided view. Rather, I provided some comments and posed some questions and considerations that I suggested the Representatives may want to consider relative to those allegations, including whether there was the potential of subsuming elements of some of the particulars as between the allegations, all of which, of course, was subject to receipt of the Response from the Subject Member.
>
> As I outlined at the commencement of the meeting, there will not be a formal recording in writing of discussions, in part to ensure there are frank discussions, but rather, a short outline of items of the nature provided. To adopt the course suggested in your email, would of course mean that the comments of both the CAR and MR would also have to provide for "completeness", which defeats the entire underlying purpose of the meeting.

[160] Fourth, subsequent to Meeting 1, the Board received the Response from the Subject Member, which explicitly asserted that Allegation 1 and Allegation 2 were duplicative, among other arguments, and expressly contested the validity of Allegation 2, which was known to the CAR.

[161] Fifth, during Meeting 2 (which occurred after receipt of the Response and was also attended by a manager from the Conduct Authority Representative Directorate), in the context of confirming with the Representatives that there is meaning in a statement by a decision-maker that no further submission is required from one party on an issue, the Board indicated to the MR in relation to the request in the Response to make further submissions on the validity of Allegation 2 that nothing further was required from the MR on that point.

[162] In other words, in the presence of the CAR, the Board advised that after reading the Response, it did not require anything further from the MR regarding the validity of Allegation 2.

[163] Sixth, and relatedly, at no time, and in particular in Meeting 2, subsequent to the Response, did the CAR make a formal request to provide a submission regarding the validity of Allegation 2 given the Board's comment to the MR, or more generally despite notice from the Board during Meeting 2 that discussions were subject to any further submissions the Representatives may want to make.

[164] Seventh, upon receipt of the submissions from the Representatives regarding the need for oral testimony and how the Subject Member concealed his communications and/or the meaning of vulnerable person, as noted in the CAR Email the Board wrote to the Representatives, stating, "[i]f there are no further submissions, I will consider the submissions that have been provided and proceed accordingly in determining what witnesses may [be] required and/or if testimony will be required in order to make determinations in respect of the Allegations" (emphasis added), which confirms that the Representatives had an opportunity to comment upon any other issue, including Allegation 2, which was not exercised.

[165] While in isolation the Board's email could be interpreted as stating it would solely make a decision on witnesses before proceeding to merit, it would have to be divorced from the

context in which the Board repeated orally (Meeting 1 and Meeting 2) and in writing that the Representatives could make further submissions on issues, which would have included the validity of Allegation 2 given it was specifically raised in Meeting 1 and the Response.

[166] Further, given the issue of the validity of Allegation 2 had been raised in Meeting 1 and the Response, and in the absence of the CAR making a request to provide a submission on this issue, it was not considered by the Board as an issue of contention.

[167] More generally, however, the Board had indicated during Meeting 2 that if Ms. W was not required to testify, the Board would move on to consider merit, although it is acknowledged the email from the Board on March 27, 2018, is not as clear as it may have been in that regard.

[168] It is in this context that the Board did not have notice that the CAR wanted to make any further submissions on merit, and it is the Board's view that it was reasonably understood that if witnesses were not going to be required it would proceed directly to a decision on merit, but that does not appear to be the understanding or interpretation of the CAR based on the CAR Email.

[169] It is also not clear what "comprehensive submissions" would be required on the Allegations by the CAR, as the Notice (and particulars) and Conduct Report should contain the necessary information in the first instance to address the Allegations, absent notice there may be an issue, which was known as outlined above.

[170] The Board will not comment on raising the procedural concern identified in the CAR Email at the present stage, given the outcome on merit, and it does not appear to be one that is subject to waiver if it were not raised during the course of the proceeding.

[171] Returning to the procedural chronology, on May 3, 2015, the MR confirmed that the Subject Member is not making a request to provide oral evidence at the measures phase, but intends on providing a letter to the Board along with some other documents.

[172] Given the MR was not requesting any testimony be provided, and the Board's decision not to hear testimony from Ms. W, on May 4, 2108, the Board proposed that the CAR provide a submission on measures by May 14, 2018.

[173] In response, the CAR replied that: (1) given the MR has indicated she will be providing some documentation for the measures phase, the CAR must have this information before the Board can set a date for the CAR to provide submissions; (2) the Board may wish to have the MR provide submissions first; and (3) due to leave, training, or other work, the CAR would not be able to complete any submission before June 26, 2018.

[174] The Board replied to the CAR on May 5, 2018, noting that, although the MR has indicated she will be providing some documentation for the measures phase, that will not alter the usual process, in that the CAR provides its submissions on measures first, followed by the MR, and then if necessary, a reply from the CAR.

[175] The Board further noted that the MR is not obligated to provide its documentation or information prior to receiving and reviewing the submission of the CAR. As a consequence, the Board advised it would not be requiring the MR provide documentation first nor setting a date in that regard. The Board confirmed that if something contentious or that otherwise required comment in the MR submission on measures, that opportunity could exist for the CAR.

[176] In relation to the CAR request for further time to provide submissions on measures, the Board noted that the timeframe requested was approximately eight (date of request) to nine weeks (date written-oral decision provided). Even acknowledging competing time demands, the Board noted the file is not extremely complex, the factual findings of the Board have been provided in a written format, and at least at present, there did not appear to be a requirement for any oral testimony. As a result, the Board advised it was not inclined to provide the eight week timeframe requested to provide the submissions on measures, and requested that the CAR discuss with the Director of the Conduct Authority Representative Directorate the potential of having someone assist the CAR with preparing the measures submission earlier.

[177] The CAR replied on May 9, 2018, seriously concerned about the ability to provide a submission before June 22, 2018, but given the Board's comments, would seek to provide one by May 30, 2018, a date which the Board approved the next day.

CAR Submission

[178] On May 29, 2018, the CAR provided a written submission on measures along with supporting cases ("CAR Submission").

[179] As an introductory statement, the CAR Submission states "the appropriate global measure to be imposed in the present matter is the dismissal of the Subject Member" (understood to mean in relation to Allegation 1 and Allegation 3), however, under the respective heads of analysis, it then requests a measure of dismissal for Allegation 1 and 25-30 days' forfeiture of pay for Allegation 3.

[180] In respect of Allegation 1, the CAR Submission relies on section 30 of the Conduct Measures Guide (p. 59) dealing with "Sexual Activity on-duty – member of the public" which states that on-duty members are expect to be professional at all times and not use their position for personal gain, which includes intimate relationships stemming from power imbalances or pursuing relationships with members of the public that the member knows are vulnerable.

[181] The CAR Submission further notes that whether under the mitigated, normal, or aggravated range of measures in the Conduct Measures Guide (p. 60), sexual activity on-duty with a member of the public where a power imbalance exists attracts dismissal.

[182] As noted by the CAR Submission, "sexual, intimate or romantic" activity is used to define the class of misconduct of "sexual activity on-duty – member of the public" in the Conduct Measures Guide, which is not limited to sexual intercourse or sexual physical contact.

[183] The CAR Submission notes that Ms. W is a member of the public and a power imbalance existed between her and the Subject Member because: (1) he was a police officer and investigator responsible for the Breach File, (2) Ms. W was a victim of violence (i.e., Assault), and (3) Ms. W was a vulnerable person.

[184] In terms of inappropriate sexual, intimate, or romantic activities, the CAR Submission notes the Subject Member acknowledged flirting with Ms. W, showed a revealing picture of himself and his genitals, initiated sexual and personal texting that included comments about the

size of his penis and being hard, stating that if Ms. W had changed in front of him she would probably have seen his penis (suggesting sexual intercourse), that he would complete a "very thorough and deep check" of Ms. W (suggesting sexual intercourse in the future), and that he indicated in a text he wanted to pursue a relationship with Ms. W after the Breach File was completed.

[185] The *Commanding Officer "E" Division and Constable Eden*, 2017 RCAD 7 ("*Eden*") is cited by the CAR Submission in support of the proposition that RCMP members are justifiably expected to observe the highest ethical and professional standards, and will not deliberately exploit vulnerable persons (para. 92), which not only includes a young person, but also Ms. W, being a victim of domestic violence and recovering from a drug addiction.

[186] Further, the CAR Submission contends that the Subject Member was aware of Ms. W's situation and "pressured her into breaching her partner" so he could be in a relationship with her, most likely a sexual relationship.

[187] Citing the *Commanding Officer "H" Division and Constable Greene*, 2017 RCAD 5 ("*Greene*"), which defined aggravating factors as those external to the essential constituents of the misconduct which require a harsher sanction, the CAR Submission, in summary, identified the following aggravating factors:

- Subject Member had two years of service;
- Ms. W is a member of the public, a vulnerable person, and there was a power imbalance;
- Ms. W feared for her safety and was reluctant to trust police;
- Subject Member was the lead investigator on the Breach File;
- Subject Member was aware of the Conditions imposed on Mr. P;
- Ms. W was shocked by the photograph presented by the Subject Member;

- Ms. W felt pushed and pressured to breach Mr. P so the Subject Member could have sex with her;

- Subject Member repeated the misconduct over three days and therefore it was not isolated; and

- other agencies (e.g., Crown Counsel) became aware of the Subject Member's actions, which could have impacted image and professional relationships.

[188] Although Allegation 2 was not established, the CAR Submission notes that the actual conflict of interest created by the activities of the Subject Member was recognized by the Board, and it should be treated as a significant aggravating factor in relation to Allegation 1.

[189] According to the CAR Submission, if Allegation 2 had been established, it would have been in the aggravated range of dismissal as identified in the Conduct Measures Guide (p. 42) because the conflict was solicited by the Subject Member and caused a stay of proceeding of the Breach File.

[190] In terms of aggravating factors, either in terms of Allegation 2 if it had been established, or alternatively, as aggravating considerations in relation to Allegation 1, the CAR Submission references, in summary, that the Subject Member:

- had two years service;

- was the investigator on the Breach File;

- knew his actions would jeopardize the Breach File;

- did not remove himself from the Breach File;

- caused the charge to be stayed on the Breach File due to his misconduct;

- had inappropriate sexual and personal communications with Ms. W;

- admitted there was a power imbalance and he was aware of Ms. W's circumstances;
- enjoyed the flirting and did not stop it;
- wanted to pursue a relationship with Ms. W after the Breach File was over;
- tried to mitigate the situation to avoid revealing his misconduct rather than being forthcoming;
- never reported or disclosed the conflict of interest to a supervisor contrary to the COI Directive;
- criticized and made derogatory comments regarding the court process in texts to Ms. W;
- made a profane reference regarding Mr. P in the texts; and
- created a conflict of interest that impacted the appearance of police independence and public perception (which is understood to mean police impartiality, as independence generally relates to governance in this context).

[191] In closing on Allegation 2, the CAR Submission asserts that in addition to the conflict of interest created by the Subject Member, the foregoing factors also ought to apply to Allegation 1.

[192] Turning to Allegation 3, the CAR Submission proposes measures in the aggravated range consisting of 25 to 30 days' of forfeiture of pay.

[193] Citing the Conduct Measures Guide (pp. 21-2) in relation to neglect, the CAR Submission posits that the gravity of the misconduct depends on the risk to the RCMP and/or the safety of the public or individuals, and where a criminal case is compromised, such as here, where the charge arising from the Breach File was stayed, the normal range cannot be considered, making the aggravated range applicable.

[194] The CAR Submission also adverts once again to the negative impact on police "independence" (again, understood as impartiality), as well as the RCMP image and public perception.

[195] In terms of aggravating factors supporting a significant forfeiture of pay for Allegation 3, the CAR Submission, in summary, notes the Subject Member:

- had two years of service;
- knew Ms. W was a member of the public, a vulnerable person, a victim of domestic violence, and recovering from a drug addiction;
- knew about the Conditions, specifically the No Contact Condition;
- knew Ms. W feared Mr. P and that there had been threats directed at Ms. W;
- claimed he had a genuine concern for Ms. W's safety but yet also said he did not honestly believe she was in imminent danger;
- provided Ms. W his personal cell phone number;
- told Ms. W to call him if she needed assistance but subsequently blocked her messages without notice to her;
- received multiple text messages from Ms. W asking for help and reporting breaches of the No Contact Condition but he did not meet his obligations to protect or aid her;
- failed to meet obligations in the VIR Policy;
- admitted he did not investigate or report the alleged new breaches of the Conditions by Mr. P as reported by Ms. W;
- "Insulted the justice system";

- was responsible for the Breach File, which he jeopardized and resulted in the stay of the charge against Mr. P.; and

- caused Ms. W to fear him and the police in general.

[196] Although the CAR Submission expressly seeks a "global measure" of "dismissal" at the start, within the submission, it seeks dismissal for Allegation 1 and a forfeiture of pay for Allegation 3, and then concludes by seeking a "global measure" for Allegation 1 and Allegation 3 in the form of "an order to resign…within fourteen days, in default of which the Subject Member will be dismissed" (emphasis added), which are not the same thing.

[197] After receiving the CAR Submission, on May 30, 2018, the Board inquired of the MR as to a timeframe to provide a submission on measures, and on May 31, 2018, the MR requested until June 18, 2018 to provide a submission, which was approved by the Board on June 1, 2018.

MR Submission

[198] Through two emails on June 18, 2018, the MR provided a submission on measures, along with supporting materials and authorities ("MR Submission").

[199] With respect to measures relating to Allegation 1, the MR Submission notes that it was admitted and found that the Subject Member showed Ms. W at least one inappropriate picture and engaged in inappropriate sexual and personal text messaging with Ms. W.

[200] In terms of discreditable conduct, the MR Submission notes that the Conduct Measures Guide (p. 42) divides this form of misconduct into three types: off-duty criminal, off-duty non-criminal, and sexual.

[201] In this case, the MR Submission asserts that the misconduct of the Subject Member did not involve criminal or provincial offences off-duty, and it is somewhat unique as there was no suggestion, evidence or finding of actual (physical) sexual activity or conduct, although there were text messages of a sexual nature.

[202] The MR Submission also asserts that none of the sexual misconduct categories under discreditable conduct (i.e., abuse of position (intimate relationship), sexual activity on-duty (pre-existing relationship), sexual activity on-duty (member of public), and sexual activity with detainee) fit the description of the Subject Member's misconduct, but some of the principles dealing with these activities are applicable.

[203] In this regard, the MR Submission cites the Conduct Measures Guide (at p. 58) where it indicates that in situations where the sexual relations, while improper, were clearly consensual, had little to no effect on moral or operations, and amounted to a lower risk, a mitigated range of 20-30 days' forfeiture of pay is proposed.

[204] Asserting that the Subject Member's misconduct has similarities to the circumstances described above, the MR Submission posits that there is no pressure or coercion evident from the text messages (i.e., as contained in the Examination or Matrix), but rather they demonstrate a mutual attraction and joint participation, which along with mitigating factors, supports a measure of 20-30 days' forfeiture of pay for Allegation 1.

[205] In support of the suggested measures, the MR Submission relies on *The Appropriate Officer "E" Division and Constable Hamlyn*, 11 A.D. (4th) 407 ("*Hamlyn*") and *The Appropriate Officer "K" Division and Sergeant Sawatzky* 11 A.D. (4th) 392 ("*Sawatzky*"), two legacy cases rendered in 2012.

[206] In *Hamlyn*, one of the substantiated allegations involved the member using his status as a police officer to obtain the personal phone number of a young woman who he subsequently sent unwanted text messages of a sexual nature. During an expedited hearing, the adjudication board accepted and imposed a joint proposal of a reprimand and forfeiture of five days' pay, taking into account the member's youth and lack of maturity.

[207] In *Sawatzky*, the member admitted to disgraceful conduct which included sexual touching of a female in a police vehicle, sending the female inappropriate text messages (one of which included a picture of his erect penis), and making advances toward the female in the detachment (who at the material times appears to have been addicted to drugs but was rehabilitated at the

time of the investigation, as the agreed statement of facts is not entirely clear on this point). As part of an expedited hearing, the adjudication board accepted the joint submission of the parties and imposed a reprimand and forfeiture of ten days' pay.

[208] The MR Submission contests the assertion in the CAR Submission that the Subject Member's conduct involves on-duty sexual activity with a member of the public, noting that the Conduct Measures Guide (p. 59) refers to "sexual activity, consensual sex and sexual contact" and that it specifically adverts to *Appropriate Officer "K" Division and Cst. X*, 6 A.D. (4th) 271 and *Appropriate Officer "K" Division and Cst. X*, 5 A.D. (4th) 136, both of which the MR reports involved on-duty sexual activity with an intoxicated civilian (collectively, "Intoxication Cases").

[209] Reiterating that the Subject Member's conduct did not involve sexual activity, sex or contact (in the physical sense) as outlined in the Conduct Measures Guide and adjudication decisions, the MR Submission states the interpretation of "sexual activity" in the CAR Submission and its application to the Subject Member is not supported.

[210] The MR Submission states *Eden* involved more aggravated facts and allegations (two discreditable conduct contraventions and two unauthorized use of government property contraventions), in particular that two citizens were improperly contacted using unauthorized information, one of the citizens was underage, that the underage citizen was a complainant in a sexual assault file, there were repeated requests for images of the underage citizen, and the member's prior informal discipline (para. 86).

[211] Further, the MR Submission asserts that the conduct board in *Eden* recognized two ranges for purposes of determining measures in cases involving inappropriate text messages: first, inappropriate personal texting by a member with a traffic violator ordinarily attracts non-dismissal measures; and second, "extraordinarily inappropriate" communications with a complainant, subject to aggravating and mitigating factors, falls within a severe forfeiture of pay and other measures addressing public confidence to dismissal (para. 89).

[212] According to the MR Submission the Subject Member's misconduct falls within the lower end of the second range of measures, and as such it should attract a significant forfeiture of pay and other measures such as counselling, training and a transfer, but not dismissal.

[213] In terms of the aggravating considerations or factors identified in the CAR Submission, the MR Submission contests as speculative the assertion that the Subject Member pressured Ms. W into breaching Mr. P so he could be in a (sexual) relationship with Ms. W based on the reference to performing "a deep thorough check" on her: first, because there is no mention of breaching Mr. P in the text messages prior to this comment; second, Ms. W was the first person to use these words; and third, the Board made no finding that Ms. W was pressured as alleged.

[214] The MR Submission contests a number of the aggravating considerations contained in the CAR Submission, noting that aggravating factors are considered in the Conduct Measures Guide (p. 10) to be, based on a Black's Law Dictionary quote (which the Board has rephrased using conduct process terminology), any circumstance attending the contravention which increases its seriousness or adverse consequences, beyond the essential elements of the contravention itself.

[215] Specifically, the MR Submission notes that the particulars in the Notice included that Ms. W feared for her safety and that the Subject Member was the investigator on the Breach File so they cannot be considered as aggravating factors as stated in the CAR Submission.

[216] Further, and presumably in the alternative, the MR Submission states it is not known whether Ms. W was being truthful about her claims of being shocked and pressured, and as such they are not proper aggravating factors.

[217] Assertions in the CAR Submission that the misconduct was repeated (over three days) and cannot be considered an isolated incident are also contested in the MR Submission, noting the Examination of the texts shows the misconduct occurred over two days (March 29 and 30) when the Subject Member tried to put a stop to it, which is a short period of time and is isolated as there were no other complainants or similar incidents.

[218] The MR Submission further asserts that the CAR Submission improperly refers to aggravating factors that constitute elements of Allegation 2, which was not established, although it is conceded that the Subject Member was in a conflict of interest as an aggravating factor relative to Allegation 1.

[219] With respect to Allegation 3, the MR Submission refers to the Conduct Measures Guide, and notes that failures to diligently perform duties are dealt with under two areas, only the second of which, failure to properly investigate a complaint (pp. 20-22), has application to the Subject Member's circumstance, although he was off-duty at the material times, which makes it somewhat unique.

[220] Quoting from the Conduct Measures Guide, the MR Submission rejects the claim in the CAR Submission that the normal range cannot be considered if the misconduct has compromised a criminal case, and also posits that a conduct board is not bound by the measures recommended in the Conduct Measures Guide, as it is not binding (citing the *Cormier Appeal* at paras. 116-18).

[221] The MR Submission further claims that the Subject Member's misconduct under Allegation 3 did not compromise a criminal case, noting it was the misconduct under Allegation 1 that led to the withdrawal of the charge on the Breach File, which is distinct from Allegation 3.

[222] It is also suggested that there is no evidence to support the CAR Submission that there was a negative impact on police independence/impartiality, the image of the RCMP, or public perception.

[223] Relying upon the Conduct Measures Guide (p. 10) and the *Cormier Appeal* (para. 56) the MR Submission reiterates that there is a distinction between "established facts" and "aggravating factors", and the latter cannot include the constituent elements arising from the allegation and/or supporting particulars.

[224] As a result, the MR Submission asserts that a number of aggravating factors identified in the CAR Submission relate to the substance of Allegation 3 and/or formed part of the particulars in the Notice, including, in summary, that the Subject Member: knew about the Conditions (in

particular the No Contact Condition); knew that Mr. P had breached the No Contact Condition; knew Ms. W's circumstances, that she feared Mr. P, and there were threats directed at her; provided his personal cell phone number; told Ms. W to call him if she needed assistance and subsequently blocked her number without advising her; received multiples tests from Ms. W asking for help and reporting breaches of the Conditions; claimed he directed Ms. W to call the police as he was off-duty and not in Surrey, failed to call 911 or aid Ms. W; failed to act in accordance with the requirements of the VIR Policy; did not investigate or report the alleged breaches by Mr. P; and was responsible for the Breach File.

[225] The assertion in the CAR Submission that the Subject Member's actions caused Ms. W to fear him and/or the police in general is also challenged in the MR Submission, stating there was no finding of fact to express this fear and the reference to this claim in the Memo from the DRCC to the OIC is hearsay, and therefore it cannot be an aggravating factor.

[226] Given there were no injuries as a result of the Subject Member's conduct, and based on the overall circumstances, the MR Submission asserts that the misconduct under Allegation 3 should fall within the normal range of measures, being two to eight days' forfeiture of pay.

[227] The MR Submission also outlines a number of mitigating factors (supported by various documents), including, in summary, that the Subject Member:

- accepted responsibility for his actions and he is remorseful;
- admitted Allegation 1 and many particulars of Allegation 3, which avoided the necessity of an oral hearing;
- has no prior conduct/discipline record;
- has a good work record;
- had personal stressors in his life at the material time (i.e., recent break-up);
- sought and received treatment through a psychologist;

- has a low risk of recidivism;
- has the support of his peers and is a team player (i.e., letters of reference);
- is involved in the community;
- cooperated with the investigation;
- is young in age and service (i.e., *Hamlyn*); and
- has a desire to resolve the matter quickly.

[228] In closing, noting that a conduct board must impose measures that are proportionate to the nature and circumstances of a contravention, that the purpose of measures is to correct, rehabilitate and preserve public trust in precedence to being punitive, and that the lowest measure possible should be considered, the MR Submission asserts that appropriate measures in the circumstances are:

- 20-30 days' forfeiture of pay for Allegation 1;
- two to eight days forfeiture of pay (and/or leave) for Allegation 3;
- a reprimand;
- direction to undergo/continue counselling sessions and/or direction to undergo training; and
- transfer to another work location in the Lower Mainland or reassignment to another position not involving a relocation.

[229] In support of the proposed measures, the MR Submission included a number of documents, commencing with a written statement (undated) from the Subject Member outlining his background and profile ("SM Statement").

[230] The SM Statement indicates he became a member of the RCMP on March 16, 2015, when he graduated from Depot, and that he was born and raised in the Lower Mainland of British Columbia, where he attend secondary and post-secondary institutions, and during which time he worked in various customer service and hospitality jobs, as well as being active in community and volunteer activities.

[231] The Subject Member's parents are both professionals, and involved in the community, and the SM Statement outlines his initial experience working at the Detachment, as well as his career aspirations.

[232] The Subject Member notes the impact of his being suspended, that he is ashamed of his actions (and how it has damaged his reputation, the reputation of his father and uncle who are associated with the RCMP, and that of the RCMP), and has been attending therapy, also noting he has lost the respect of his co-workers.

[233] The SM Statement closes by accepting responsibility for his actions, expressing regret, and that the same "mistake" will not be made again.

[234] Reliance is also placed on a letter from Dr. Morosan (dated May 9, 2018) ("Morosan Letter"), which outlines his work as a Registered Psychologist treating patients with work-related psychological injuries, such as depression, with a current focus that includes RCMP members (which is also supported by a copy of his resume).

[235] Dr. Morosan notes that the Subject Member self-initiated psychological treatment with his office in May, 2016 (and attended sessions every three weeks since June, 2017), due to a series of cases involving child abuse as the Subject Member wanted help to manage intrusive symptoms associated with those cases and to avoid career burn-out observed in his colleagues.

[236] The Subject Member "first discussed" his conduct case with Dr. Morosan in June, 2017, and since that time they "…have spent 14 sessions primarily focused on de-briefing the event, discussing his experience of being suspended, and exploring the various outcomes of the related disciplinary process as they might affect his personal and future career."

[237] Dr. Morosan states he has "…not conducted [a] systematic assessment or diagnosis of [the Subject Member], but do not believe he would meet the criteria for a DSM V [i.e., Diagnostic and Statistical Manual of Mental Disorders, 5th Edition] diagnosis" (emphasis added).

[238] It is Dr. Morosan's opinion that the symptoms the Subject Member has reported and presented are essentially normal reactions expected from "psychologically well persons" encountering career events and personal experiences as reported by the Subject Member, and his continued pursuit of treatment also "affirms a relatively high degree of psychological health."

[239] Returning to the conduct case, the Morosan Letter relates that the Subject Member "has provided [a] thorough description of the case details, including a thorough assessment of his own behavior and the disciplinary procedures that followed", leading Dr. Morosan to state that "I do not believe that he is at risk of making a similar mistake in the future" (emphasis added).

[240] According to Dr. Morosan, it was clear to him that the Subject Member's "initial motivation for extended contact" with Ms. W "was motivated by compassion and genuine empathy for her state of distress", and "at no time has [the Subject Member] expressed any exploitive or abusive intent."

[241] Dr. Morosan also indicates that in June, 2017, when they first discussed the conduct matter, the Subject Member's "presentation included self-doubt about the naïveté of his compromised professional communications and shame regarding the impact his behavior would have on the reputation of himself, his father…and the RCMP generally."

[242] Dr. Morosan outlines that the Subject Member's treatment has included analyses of factors that "might" have made him vulnerable to a relationship with a member of the public while on-duty and that make some distressed members of the public attracted to a "kind young professional man." Treatment also included reviewing "the negative psychologic impact that misinterpretations of his communications might have on vulnerable persons" (emphasis added).

[243] Treatment also included discussing "the importance of establishing professional boundaries during early interactions with clients", how to remain mindful of these boundaries

and communicating them in a professional manner, which included the Subject Member acknowledging the importance of this "psycho-education" without any defensive reactions or denial of relevance to his professional conduct.

[244] Recent developments in the Subject Member's life since he was suspended also reinforces Dr. Morosan's view that "he is at low risk for making similar mistakes in the future", including increased stability in his personal life, reinforcement of social supports and valued relationships with his family, a renewed sense of the value of this career, and the realization that his personal and social life must be maintained as strong priorities to make his career sustainable and satisfying.

[245] In summary, Dr. Morosan states:

> …as his treating psychologist I strongly support the return of [the Subject Member] to policing duties. I have witnessed no indication that motivation for his errors ever included intentional malice. He is now better informed, has become more self-aware, and his increased social supports during the time has been away from work. His identity as an RCMP officer is strengthened and balanced by personal growth as a result of the difficult period he has been through. I am confident that [the Subject Member] would serve and protect the public well in the future. [emphasis added]

[246] Also provided with the MR Submission is a three page document entitled Health Services Management Information System which contains various communications and information recorded by various individuals pertaining to the Subject Member between December 11, 2017 and January 22, 2016, and appears to have been provided to confirm that the Subject Member was involved in at least one file involving child neglect that led him to request counselling, as already noted in the Morosan Letter.

[247] Performance Evaluation and Learning Plans for the periods of April 1, 2016 to March 31, 2017, and April 1, 2015 to March 31, 2016 ("Performance Evaluations"), were also furnished with the MR Submission, and they reflect that the Subject Member performed competently, developing relevant organizational and functional competencies, and was progressing.

[248] Five letters of reference were submitted ("Reference Letters"), including from Constable Majid (dated January 8, 2018) ("Majid Letter"), who worked with the Subject Member for approximately a year and half, at one point as his coach officer, and indicates that he considered the Subject Member above average, and increasingly competent, who performed tasks requested, and had a positive attitude. They developed a "friendship", and although the Subject Member was the son of a senior non-commissioned officer in the Detachment, this did not result in any "smugness" on his part. After completing recruit field training, the Subject Member continued to develop and it was clear he enjoyed his career and being an RCMP member.

[249] The Majid Letter does not excuse the actions of the Subject Member, and feels his "momentary lapse in judgement does not reflect on his character in any way", and since these events, the Subject Member has entered into a long term relationship and is expecting a child, and it is hoped that the information provided will be taken into consideration.

[250] The reference letter of Constable Chang (dated January 22, 2018) ("Chang Letter") notes that he worked with the Subject Member for approximately one year and based on his observations believes the Subject Member is compassionate, a team player, professional, composed, sociable, and learns from his mistakes. As the Subject Member's "friend", he has witnessed his remorse and knows he is sad not to be in uniform, and will embody the Core Values of the RCMP if he is permitted to return to work.

[251] A letter (dated January 22, 2018) by Sergeant Pauls, the Subject Member's former District NCO ("Pauls Letter"), states he observed the Subject Member for about one year in 2016-17, and found he "performed as expected" as a junior member, had a positive attitude, contributed to a positive workplace, was open and honest, and was forthright in describing errors and accepting guidance.

[252] Ms. E, who has a Doctorate in Pharmacy, and is a Certified Executive Coach, Trainer, and Facilitator, states in a letter of reference (dated February 13, 2018) ("E Letter") that she has known the Subject Member for many years, as he was a friend of her son, and she has known his family for over 15 years. Ms. E notes becoming an RCMP member was a life-long ambition of

the Subject Member and while in university he completed a 13 week restorative justice course in a medium security federal institution, during which he was observed to act appropriately during his interactions, including with inmates.

[253] Ms. E notes it has been difficult watching the Subject Member try to make sense of how he misconducted himself, but that he spoke with her early on about his transgressions and "took responsibility for his clear mistakes." It is also noted that it has been difficult for the Subject Member to be "under-occupied", but he has been supportive of her son and others, and she is "certain that with appropriate accountability structures and opportunities to continue to learn, and grow from his ongoing experience" the Subject Member will be an asset.

[254] In an undated document (which appears to have been created and provided on or about May 7 or 8, 2018), Constable Harrison ("Harrison Letter") refers to the positive and supportive impact the Subject Member had on him while in Depot. Constable Harrison has spoken with the Subject Member about the seriousness of the current situation, is confident that he has been forthcoming and honest with him regarding the details, and believes that the Subject Member recognizes "the magnitude of his errors and is truly remorseful…" Constable Harrison believes it was a "momentary lapse in judgement" and the Subject Member will learn from his actions, and hopes he is given another opportunity to continue as a member.

[255] The final document forming part of the MR Submission is an undated letter written by the Subject Member to the DRCC and DVCC expressing regret and shame for his actions and apologizing for the impact it had on the Breach File ("SM Apology Letter"). However, it was noted in the index to the documents forming part of the MR Submission that the SM Apology Letter was "to be delivered."

[256] The next day, after briefly reviewing the MR Submission, the Board wrote to the MR seeking clarification regarding the Morosan Letter, given it did not appear to express any expert/medical assessment, opinions or diagnosis relative to the Allegations, and in particular whether it is to be characterized as a letter of support read in light of the principles set out in *R. v. Graat*, [1982] 2 S.C.R. 819 ("*Graat*") pertaining to non-expert opinions.

[257] Subject to the response of the MR regarding the Board's inquiry about the Morosan Letter, the CAR was asked to indicate if a rebuttal to the MR Submission was being sought, and the timeframe required.

[258] On June 20, 2018, the MR indicated she would attempt to have a response to the Board's inquiry by June 22, 2018, which was subsequently provided, and advanced the following regarding the Morosan Letter.

[259] First, that the Morosan Letter be considered as one from an expert and that he be qualified as an expert in psychological assessment, diagnosis, treatment and prognosis based on his curriculum vitae.

[260] Second, the MR relies on *R. v. Mohan*, [1994] 2 S.C.R. 9 ("*Mohan*") to support the position that Dr. Morosan is able to provide information that is likely to be outside the experience and knowledge of the Board.

[261] Third, the purpose of the Morosan Letter as expert evidence is in relation to the conduct measures phase, not the Allegations, with a view to mitigating factors, in that the Subject Member sought out psychological assistance, that he was receptive to treatment, that he continues to participate in treatment, and that in the opinion of Dr. Morosan the Subject Member is not likely to repeat the same behaviour.

[262] In this regard, the MR further relies on *Children's Aid Society of Toronto v. R.(M.),* 2016 ONCJ 215 ("*Children's Aid*") at paras. 114-116, where the Court found that the opinion evidence of three clinicians (including a psychiatrist and a counsellor) was admissible as they were professional witnesses who formed opinions based on personal observations or examinations related to the subject matter of the litigation, and the Court found that such witnesses were not required to comply with the rules regarding expert witnesses.

[263] Fourth, in the alternative, the MR requests that the Board accept the Morosan Letter as non-expert evidence (presumably, but not stated, in accordance with *Graat*), and that it be given

considerable weight as Dr. Morosan has the necessary experiential capacity to provide an opinion on the likelihood of the Subject Member to repeat similar behaviour.

[264] The MR also submits that *Canada Post Corp. v. C.U.P.W.* 2004 CarswellNat 1192 ("*Canada Post*") is helpful, as the analysis (commencing at para. 6) dealt with provisions similar to subsection 24(1) of the *CSOs (Conduct),* which provides that a conduct board may examine any material submitted by the parties and hear their oral evidence and any witnesses in determining the appropriate conduct measures to impose, and, similar to *Canada Labour Code* matters, RCMP conduct boards and adjudicators have repeatedly accepted and considered expert evidence of a psychological nature during the conduct measures phase, such as in *Commanding Officer "J" Division and Constable Cormier*, 2016 RCAD 2 ("*Cormier*").

[265] In *Canada Post*, the MR notes that the arbitrator ruled that the evidence of the psychologist was admissible, and reasoned that it may be relevant and useful when considering mitigating factors and sanction (paras. 9-10).

CAR Rebuttal

[266] On June 25, 2018, the Board inquired whether the CAR wanted to provide a response to the MR Submission and/or reply to the MR's comments regarding the treatment of the Morosan Letter.

[267] The CAR replied the same day that a rebuttal would be provided in response to the MR Submission, and on June 27, 2018, the CAR requested until July 18, 2019, to provide the rebuttal, which the Board approved on June 28, 2018.

[268] Subsequently, on July 18, 2018, the CAR provided a rebuttal along with supporting cases and information ("CAR Rebuttal").

[269] The CAR Rebuttal commences by contesting the admission of the Morosan Letter as an expert opinion on several grounds, the first being that, in accordance with section 18 of the *CSO (Conduct),* Dr. Morosan was not identified as a witness within 30 days of the Notice being served on the Subject Member.

[270] Second, the CAR Rebuttal states that the Morosan Letter does not comply with the mandatory requirements of an expert report under subsection 19(2) of the *CSO (Conduct),* and it is the CAR's "opinion" that the Board does not have a discretion as the expert report must comply with all the requirements to be admissible as evidence.

[271] In this instance, the CAR Rebuttal is referring to the fact that subsection 19(2) of the *CSO (Conduct)* states that an expert report "must" contain certain information as enumerated in paragraphs (a) to (k), and because the Morosan Letter does not state (among other things), the issues to be addressed (para. (a)), contain a description of Dr. Morosan's qualifications with respect to the issues identified (para. (b)), or the facts and assumptions on which his opinions are based (para. (e)), it is not admissible and/or considered an expert opinion.

[272] Third, it is "the CAR's opinion that once the expert evidence meets, *prima facie*, the requirements of section 19 of the *CSO*" *(Conduct),* the MR has the additional burden of demonstrating that the Morosan Letter, as expert opinion evidence, meets the criteria set out in *Mohan* by the Supreme Court of Canada ("Mohan Criteria").

[273] The CAR Rebuttal then cites *White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23 ("*WBLI*") indicating the "the Supreme Court summarized the applicable [Mohan] test" at p. 184 and provides a quote, which upon examination, was found to be from the headnote of the decision and therefore it is part of the editorial summary, not a direct quote of the Court.

[274] It is not clear whether the CAR Rebuttal recognized that *WBLI* reformulated, to some degree, the approach for determining the admissibility of expert opinion evidence, and in particular, provided clarity and guidance regarding challenges to experts on the basis of bias, independence, and impartiality, which will be dealt with further below.

[275] Other than expressing an opinion that the Morosan Letter must also meet the Mohan Criteria, the CAR Rebuttal provides no further comments or submissions on this point, or whether or not they are met, and simply moves to addressing the alternative explicit or implicit argument in the MR Submission that the Morosan Letter be accepted as non-expert evidence in accordance with *Graat*.

[276] The CAR Rebuttal adopts the principles in *Graat* in respect of the Morosan Letter, and states that it should not be given any more weight than that of an ordinary lay witness, but then goes further and asserts it should be given no weight because if fails to state the facts upon which the opinion(s) are based, is vague, and to the extent it relies on any "facts" these were reported by the Subject Member which is tantamount to self-serving evidence.

[277] The CAR Rebuttal further indicates that if the Board should choose to "give any probative value to the evidence" in the Morosan Letter the CAR would like to have the opportunity to cross-examine Dr. Morosan.

[278] The CAR Rebuttal also addresses the Performance Evaluations, indicating that they do not reveal a consistent pattern of above-average performance, and therefore cannot be a mitigating factor, as was the case in *Greene*, where the conduct board found that average performance is not mitigating.

[279] Although the Performance Evaluations contain a "few good comments", the CAR Rebuttal notes that areas of improvement were also identified (e.g., reports sometimes lack detail and are too succinct). The CAR Rebuttal asserts that there is no pattern of above-average performance based on the limited two year period covered, and while the Performance Evaluations report promise or potential, they cannot be considered as providing mitigating information.

[280] With respect to the Reference Letters, the CAR Rebuttal asserts that little, if any, weight should be given to them based on a "framework" that considers whether the letter: (1) is dated; (2) is addressed to the conduct board; (3) reveals the extent to which the person is aware of the misconduct of the subject member; (4) explains the extent, timeframe, and depth of any relationship with the subject member; and (5) is based on personal knowledge of the facts it contains. No authority or source is provided in the CAR Rebuttal for the "framework."

[281] Applying the framework, the CAR Rebuttal first states that dated letters have more weight than undated letters (because it establishes origination and recency), and in this case all of the Reference Letters are dated.

[282] Second, according to the CAR Rebuttal, a letter addressed to a conduct board has more weight than a letter addressed "To whom it may concern" because the former demonstrates that the author was aware of the seriousness of the matter, and in this case notes the Reference Letters were all addressed "To whom it may concern".

[283] Third, in relation to the extent of the knowledge of the misconduct, the CAR Rebuttal consider this an important criterion, because it reveals whether the author has full knowledge of the totality of the misconduct (e.g., having read the applicable Notice of Conduct Hearing) and with that knowledge, is ready to support the member, and the source of the knowledge is also relatedly important (e.g., self-reported by member versus an official or established source).

[284] The CAR Rebuttal states the Reference Letters "are vague" regarding their knowledge of the misconduct, and therefore no weight should be given to the opinions stated in them, especially as it pertains to the Subject Member's character.

[285] Fourth, the extent, nature, timeframe and depth of the relationship with a subject member impacts the weight of a letter of reference where it is: based on a long term versus recent or superficial relationship; arises in the context of co-worker, friend, or acquaintance; based on daily or occasional contact; and arises from recent or dated interactions.

[286] Although not named, the CAR Rebuttal states three letters come from co-workers having worked with the Subject Member from one to one and a half years (i.e., Majid Letter, Chang Letter, and Pauls Letter), one is from a Depot colleague (i.e., Harrison Letter) and one arises from a 15 year personal relationship (i.e., E Letter), but does not provide any comments on how this applies to the relationship criterion in this case.

[287] Fifth, the extent of personal knowledge of the facts contained in a letter of reference raises considerations around whether the author explains how she or he became aware of the facts, and in this case the CAR Rebuttal simply states the Reference Letters "could have been clearer".

[288] The next issue addressed in the CAR Rebuttal is the SM Statement and SM Letter of Apology, and although a timely, genuine apology to the relevant persons can be a mitigating factor, in the present case the Subject Member (will have) apologized to the DRCC and DVCC a year after-the-fact (as it has yet to be delivered), which the Subject Member himself acknowledged came "too late", and more importantly, there is no apology to Ms. W.

[289] The CAR Rebuttal then asserts the "opinion" that the SM Statement is not a mitigating factor, without providing any explanation.

[290] Citing *Greene* (which relied on *Rault v. The Law Society of Saskatchewan*, 2009 SKCA 81), the CAR Rebuttal asserts the *Hamlyn* and *Sawatsky* decisions have limited precedential value because they arose from expedited cases involving joint submissions on sanctions which were resolved based on a negotiation process to which boards must give deference.

[291] Finally, the CAR Rebuttal states there is "no evidence" that the Subject Member had personal stressors, or apparently, if present, they were not significant enough to be considered a mitigating factor, as an expert witness would have been required for this type of opinion.

[292] In conclusion, the CAR Rebuttal asserts that the mitigating factors are not sufficient to save the Subject Member from being dismissed.

[293] On July 26, 2018, the Board advised the Representatives that absent any other submissions, it anticipated completing a review of the materials by the end of August, 2018.

[294] The Board also sought clarification from the MR on the Subject Member's intentions relative to appearing before the Board and whether the reading of the Allegations was waived, as well as proposing any appearance occur by videoconference, followed by the issuance of the final written decision by the Board.

[295] The MR replied that the Subject Member wished to appear in person before the Board (and would travel to Ottawa if required), and waived the reading of the Allegations, noting it was understood the CAR or Board may have some questions of the Subject Member.

[296] On July 27, 2018, the CAR sought clarification from the MR on whether the Subject Member was seeking to provide an apology or testify before the Board, and if the latter, the CAR may have some questions for the Subject Member.

[297] On July 30, 2018, the MR indicated that the Subject Member wanted to apologize to the Board, and in reply, the CAR advised that there was no objection to the Subject Member travelling to Ottawa.

[298] Although the Board had indicated that it anticipated being able to provide a final decision by the end of August, on September 10, 2018, the Board updated the Representatives that it would be several more weeks before it finished reviewing their submissions and/or advised whether further information is required from the Subject Member, which was acknowledged by the Representatives.

[299] On November 9, 2018, the Board contacted the Representatives and advised that the CAR Submission and MR Submission and related materials had been reviewed, and the final step was to determine if the Subject Member still wished to address the Board, and it was understood that the CAR did not object to this approach provided the Subject Member did not testify and was restricting himself to an apology.

[300] The Board also sought confirmation as to the Representative's views on whether the Subject Member was required to be under oath/affirmation when addressing the Board, as well as identifying prospective dates, whether the Subject Member could appear in person or by video conference, and whether their respective clients waive the requirement to serve the final decision personally (and accept service through their respective Representatives).

[301] On November 13, 2018, the MR provided potential hearing dates, confirmed the Subject Member is willing to address the Board in person but can appear by videoconference, that an oath/affirmation should not be required, and that the Subject Member waives the requirement to serve the final decision and the MR will accept service on his behalf.

[302] The CAR confirmed on November 19, 2018, that an oath/affirmation is not required if the Subject Member is not testifying, but any facts should only be considered by the Board in evaluation of the apology, and provided her availability.

[303] The same day the Board advised the Representatives that given it is already in receipt of the SM Statement, a videoconference is the preferable course for the Subject Member to address the Board, and that the Registrar would be contacted to make arrangements based on the availability provided by the Representatives.

[304] The Board also confirmed its understanding that the CAR will accept service of the final decision and the Conduct Authority is waiving the obligation that it be served personally.

[305] In the same communication, the Board requested that the Registrar complete arrangements for a videoconference, and that no witnesses would be testifying, as the purpose of the videoconference was to permit the Subject Member to address the Board.

[306] Later the same day, the Registrar confirmed the date for the videoconference as December 15, 2018 at 1100 hours Eastern Standard Time, with the Subject Member appearing through the Pacific Region Training Centre ("PRTC") conferencing facilities.

[307] On December 5, 2018, the Board, CAR, and MR assembled in a conferencing facility at National Headquarters and the Subject Member was present at the PRTC facility.

[308] After the Board completed the required formalities to record the proceeding, confirmed the official language would be in English, and provided a brief overview, the Subject Member addressed the Board, and in so doing acknowledged that his behavior was highly inappropriate, that he had failed and/or breached the trust of Ms. W, co-workers, his family, Crown Counsel, the RCMP, and the public, assured the Board that he would never make the same mistake again, and that he had taken steps to learn and grow, and ameliorate certain factors in this life, such as isolation from his family, in an effort to ensure he can still be a valuable police officer ("SM Address").

[309] The Representatives indicated they did not have any submissions after the SM Address, other than the CAR indicating that the facts of the address could not be used other than within the parameters of the apology by the Subject Member.

[310] In closing the proceeding, the Board confirmed that the Subject Member and Conduct Authority had waived the requirement to serve the final decision on them personally, and given the Representatives had no other issues or submissions, the proceeding concluded with the Board indicating that final decision should be available within two weeks.

Analysis

[311] The Board has given careful consideration to the CAR Submission, MR Submission, CAR Rebuttal and related supporting documentation, decisions, and authorities, and as these materials outline, there are several guiding considerations relating to the imposition of measures for misconduct in policing, and the RCMP in particular.

[312] First, having established Allegation 1 and Allegation 3, the Board is obliged pursuant to paragraph 36.2(e) of the *RCMP Act* and subsection 24(2) of the *CSO (Conduct)* to impose measures that are proportionate to the nature and circumstances of the contraventions of the Code of Conduct, and where appropriate, that are educative and remedial rather than punitive.

[313] Second, the framework for determining the appropriate measures in a specific case requires a conduct board to first consider the range of measures that may apply to the misconduct that has been established, and then second, aggravating and mitigating factors must be taken into account, at which point the measures to be imposed are determined in the specific case before the conduct board.

[314] Third, a conduct board is not bound by previous decisions of other boards, but if similar in nature, they do help to establish the range of measures applicable to established misconduct, as the principle of consistency in imposing measures is to ensure fairness and that similar forms of misconduct are treated similarly.

[315] Fourth, the Conduct Measures Guide is available to provide guidance on considerations around the imposition of measures, but it is just that, a guide, and not binding or determinative, nor does it necessarily address every conceivable form or category of misconduct, or subsets thereof.

[316] Fifth, generally speaking, aggravating factors are those that exist above or beyond the essential constituents of the misconduct itself (normally found in the allegation or accompanying particulars or as determined by a conduct board) (*Cormier,* para. 89)).

[317] Sixth, police officers hold positions of trust, and are held to higher standards of behavior (*White*).

Allegation 1

[318] Turning first to the range of measures that may apply to Allegation 1, the CAR asserts that the misconduct of the Subject Member aligns with "sexual activity" on-duty, which involved pursuing an intimate relationship with Ms. W, a member of the public, and stemmed from a power imbalance and/or where she was known to be vulnerable, and based on *Eden*, attracts dismissal.

[319] According to the CAR Submission, sexual misconduct is not limited to intercourse or physical contact, and extends to sending revealing photographs and sexually explicit texts, as well as explicit or implicit references to sexual activities and relationship.

[320] The MR Submission posits that the misconduct of the Subject Member substantiated in Allegation 1 is somewhat unique and does not fit within the categories or types dealt with in the Conduct Measures Guide, but based on the applicable principles and facts, supports measures in the mitigated range of 20-30 days' forfeiture of pay, citing *Hamlyn* and *Sawatzky*.

[321] The cases provided and Conduct Measures Guide generally confirm that sexual misconduct of the nature dealt with in Allegation 1 is considered to be very serious and the range of measures is a significant financial penalty to dismissal.

[322] In this regard, consistent with and for the same reasons as cited in G*reene*, the Board does not find that sanctions or measures, whether under the legacy discipline process or the new conduct process, that arise from a joint submission can be assigned significant weight, as they are the product of resolutive efforts or negotiations that resulted in an agreement which a conduct board can only reject in very limited circumstances (although the CAR relied upon *Greene* (which relied upon *Rault*), the most recent affirmation of this principle is found in *R. v. Anthony-Cook*, 2016 SCC 43 ("*Cook*") (involving a unanimous majority of seven justices) at paras. 32-34).

[323] Moreover, as also observed by the Commissioner in *Inspector Lemoine and The Appropriate Officer "C" Division*, 12 A.D. (4th) 192:

> [124] …. As I noted recently in *Poirier*, the relevance of some cases may be questionable when they would not necessarily be decided the same way if they were heard today, given the growing intolerance that society and the Force have expressed towards certain acts of misconduct, such as sexual harassment.

[324] While the MR Submission relies upon *Hamlyn* and *Sawatzky* for the measures it proposes, the Board notes that both these cases were resolved on the basis of a joint proposal during an expedited hearing, and as such are of little value or weight in the present circumstance.

[325] Moreover, because they were decided in 2012, *Hamlyn* and *Sawatzky* may no longer be relevant given the increasing intolerance towards sexual misconduct.

[326] To be clear, the Board is not stating that every case of sexual misconduct must result in dismissal, but rather, sexual misconduct, in its varied manifestations, is increasingly perceived as an extremely serious issue that must be addressed as such, taking into account the specific circumstances and based on applicable mitigating and aggravating factors.

[327] The Board also does not find that the Intoxication Cases dealing with on-duty sexual activity with intoxicated civilians are particularly relevant to the present case.

[328] While the MR Submission attempts to distinguish *Eden* as involving more serious misconduct, what is more apposite, as noted by the conduct board is that:

> [92] The powers granted a police officer are considerable; the public justifiably expects members of the RCMP to observe the highest ethical and professional standards. This necessarily includes the bedrock expectation that member shall only act to protect the health and safety of Canada's youth, and shall never deliberately and repeatedly exploit any vulnerable young person.

[329] Which is equally applicable to victims of domestic violence and/or who are vulnerable due to personal, social, economic, physical or medical circumstances.

[330] Ultimately, the Representatives concur that *Eden* has application to the present case, but the CAR Submission asserts it must lead to dismissal whereas the MR Submission endorses the lower end of the "extraordinarily inappropriate communications", which brings matters to a consideration of the essential elements of the misconduct established under merit, as well aggravating and mitigating factors.

[331] As a preliminary matter, the MR Submission is correct in pointing out that the CAR Submission has improperly attempted to advance several factors as being aggravating when they formed or constituted essential elements that were established in relation to Allegation 1 (e.g., Ms. W is a member of the public and vulnerable person, there was a power imbalance, Subject Member was the lead investigator on the Breach File and aware of the Conditions).

[332] Indeed, the essential elements established under Allegation 1 and the related admissions in the Response of the Subject Member under merit speak for themselves and demonstrate the photograph and text messages were explicitly sexual, highly inappropriate and extremely unprofessional, which is exacerbated by the fact that Ms. W was the victim of violence in relationship, of limited means, and recovering from a drug addiction.

[333] In terms of aggravating factors, the CAR Submission is correct in pointing out the Subject Member had limited service, and based on the SM Statement, wherein he states that he became a member on March 16, 2015, his probationary period would have only expired about 12 days prior to March 28, 2017, when he initially engaged in the misconduct constituting Allegation 1.

[334] While there is disagreement over the duration of time which inappropriate messages were sent, even accepting that the inappropriate messages underpinning Allegation 1 may only have been over two days, the fact is that the Subject Member knew the circumstances of Ms. W, and despite those facts, and based on his knowledge of the Assault File and Breach File, he initiated the sexually inappropriate communications with Ms. W very shortly after meeting her and they continued over a two day period, which is not inconsequential.

[335] While the Subject Member may have realized the highly inappropriate nature of his conduct, and attempted to extricate himself, he had already created a serious conflict of interest by his actions, and wholly undermined the impartiality of not only himself, but the RCMP, which ultimately led to the staying of the charge on the Breach File.

[336] In this respect, and aside from the damage to the Breach File, it is also not inconsequential that the Crown Counsel office became involved and Ms. B, the DVCC, and the DRCC became aware of the misconduct of the Subject Member.

[337] Although the MR Submission asserts that the CAR Submission has improperly referred to aggravating factors that constitute elements of Allegation 2, which was not established, the Board is not persuaded that none of the factors relating to Allegation 2 can be relied upon.

[338] For instance, the MR Submission has admitted that the conduct of the Subject Member did create a conflict of interest and is properly an aggravating factor, and in addition to the inappropriate sexual messages, the Subject Member also admitted in the Response that he sent inappropriate texts criticizing the courts and making disparaging commenting about Mr. P.

[339] Despite knowing the seriousness of his actions, it also not the case that the Subject Member came forward and reported the situation, rather it is clear he hoped the whole thing would play itself out, which ultimately did not happen, and the matter came to the attention of the OIC based on the Memo from the DRCC.

[340] As noted above, in mitigation, the MR Submission relies upon elements of the Conduct Measures Guide, prior decisions, and supporting documentation to demonstrate that the Subject Member should be subject to a financial penalty rather than dismissal.

[341] As an initial point, the MR Submission states there is no evidence of pressure or coercion in the text messages outlined in the Examination, and further, that there was a mutual attraction and joint participation, in effect consensuality, as between the Subject Member and Ms. W, but in the circumstances of a woman who has been the subject of abuse, as well as other vulnerable factors, the Board cannot accept that mutuality, participation, consensuality, or the lack of pressure or coercion, somehow vindicates or has significant mitigative effect of what many would also consider a breach of trust by the Subject Member in his professional role as a police officer, especially where power imbalances and vulnerability are present.

[342] Indeed, both in the SM Statement and SM Address, the Subject Member himself makes repeated reference to the violations of trust that arose from his misconduct and the impact it had on various individuals, but most particularly the protection of Ms. W given the charge relating to the Breach File was stayed.

[343] While the language and content of the texts in the Examination may not demonstrate on a balance of probabilities that Ms. W was pressured by, or afraid of, the Subject Member, it is clear that the public would be outraged at the gross misjudgment of the Subject Member in engaging with Ms. W in the circumstances and fashion outlined.

[344] The Board also does not accept the explicit or implicit claim that the misconduct of the Subject Member had little or no effect on operations, and indeed it constituted extremely high risk activity for not only himself, but the reputation and role of the RCMP, and the integrity of the Breach File.

[345] Similarly, there may not have been other complainants or similar incidents reported, but that is not a significant mitigating factor given the egregiousness of the Subject Member’s misconduct.

[346] The MR Submission properly asserts that the Subject Member cooperated with the investigation and accepted responsibility for his actions, but that is diminished somewhat by the fact that, as noted above, he did not proactively disclose his misconduct, which only came to the attention of the OIC based on the disclosure of Ms. W to the DVCC and DRCC.

[347] There is also mitigative value in the fact that the Subject Member did admit to Allegation 1 and provided a detailed Response addressing the particulars in the Notice, and in specifically admitting to many of the particulars relating to Allegation 1, assisted the Board in proceeding to a decision and provided an opportunity to make findings without requiring oral testimony.

[348] Although the Majid Letter asserts that the Subject Member is an "above average" performer, the Performance Evaluations reveal the Subject Member has been a good and increasingly more competent performer over his two years of service, although the Pauls Letter may be read as describing satisfactory performance, but as noted in *Greene*, average performance carries little, if any, mitigative weight, nor indeed does having no prior conduct record given the Subject Member's very limited service.

[349] In considering the Reference Letters, the Board does not subscribe fully to the "framework" and analysis proposed in the CAR Rebuttal, although some of the considerations identified do have application.

[350] In this regard, the CAR Rebuttal is correct to note that the level and source of the author's knowledge about the circumstances of the misconduct is important to determining the weight or value of the letter, and in the present case, the Reference Letters are solely based on information provided by the Subject Member, which aside from his apparent self-interest, does not give the Board confidence that the authors were fully informed of the circumstances relating to Allegation 1 (or Allegation 3).

[351] In fact, all of the Reference Letters (with the exception of the Harrison Letter) are dated prior to the Board's provision of the oral-written decision, and there is no reference to having read the Notice or other source of information (e.g., Interview), making knowledge of the nature of the misconduct unclear or minimal at best, which reduces their value, although the Board does

not, in the present case, accept the CAR Rebuttal's assertion that the Reference Letters be given no weight because of the "vague" level of knowledge.

[352] The Board is not overly concerned by the fact that the Reference Letters are addressed "To whom it may concern", because it is clear based on their content that the authors knew or intended that the letter be used in the conduct process in support of the Subject Member.

[353] The CAR Rebuttal has properly identified that the extent, nature, timeframe and depth of the relationship with a subject member is also relevant to considering the weight of a letter of reference.

[354] In this case, the Majit Letter, Chang Letter, and Pauls Letter have been provided by work colleagues (two of which are also self-described "friends" of the Subject Member), who have known him for one to one and half years, and the Harrison Letter is also from a workplace colleague and friend from Depot, who has known the Subject Member slightly longer (approximately two and half years).

[355] The Majid Letter, Chang Letter, Harrison Letter, and Pauls Letter confirm that the Subject Member is a team player, supportive, positive, compassionate and reliable and has contributed to the workplace, which are positive considerations in his favour.

[356] The E Letter is more substantive in that it is based on a lengthy personal relationship and knowledge of the Subject Member, and confirms his educational, community and volunteer experience and contributions.

[357] For the most part, where addressed, the Reference Letters have described the Subject Member as being remorseful, and consider his misconduct to be a singular mistake or momentary lapse in judgment.

[358] The CAR Rebuttal is not entirely clear, but seems to suggest that the Reference Letters "could have been clearer" about the extent of the authors' personal knowledge of the facts, which may be a further statement about their knowledge regarding the **misconduc**t of the Subject Member, since the Reference Letters are clear that they are based on personal observations,

communications, or interactions with the Subject Member as they pertain to knowledge of his *character* and actions (as opposed to knowledge about the misconduct being solely from the Subject Member).

[359] The Board also considers it a positive factor that the SM Apology Letter to the DRCC and DVCC has been drafted, although apparently not yet sent.

[360] The Board does not accept the invitation in the CAR Rebuttal to make an adverse finding because no apology has been provided to Ms. W, given it is generally understood, and recently reaffirmed in a policy amendment (Administration Manual XII.1. (Conduct) at 5.4.2.1.2.1.6. (effective March 21, 2018)), that suspended members are not to communicate with witnesses or complainants unless authorized.

[361] In summary, the Reference Letters have provided some positive comments and observations about the Subject Member, which are to his credit.

[362] This brings matters to a consideration of the Morosan Letter, which raises questions of its admissibility and/or use.

[363] As noted above, the MR has stated that, for purposes of the measures phase, the Morosan Letter demonstrates in mitigation that the Subject Member sought psychological assistance, he was receptive to treatment, and continues to participate in treatment, and in the opinion of Dr. Morosan, he is not likely to repeat the same behaviour.

[364] The CAR Rebuttal states that the Board is precluded from admitting the Morosan Letter because it does not comply with subsections 18(1) and 19(2) of the *CSO (Conduc*t), while the MR Submission relies on *Children's Aid*, *Canada Post*, and *Cormier* to assert it is admissible, but these cases were not addressed by the CAR Rebuttal.

[365] In *Children's Aid*, there were rules in place that governed expert evidence (which are not dissimilar to those in the *CSO (Conduct)*), and the court found that the evidence of certain experts was admissible even though it did not comply with those rules, which the MR

Submission relies on as a basis to explicitly or implicitly assert that the Morosan Letter can be admitted.

[366] However, there is an important distinction made by the court in *Children's Aid* that is not addressed fully by the MR Submission. In *Children's Aid*, while the court found that the opinions of professionals based on personal examinations or observations related to the subject matter of the litigation were not required to comply with the rules relating to expert evidence, that only applies where they were *not* retained solely to provide an opinion in the litigation (para. 115).

[367] In other words, various opinions or reports provided to the Children's Aid Society by experts in the normal course as part of assisting it with how to manage and make decisions on dealing with child protection issues and care, is distinct from a professional who is retained to provide an opinion in the litigation.

[368] In the case of the Morosan Letter, it quite clear that Dr. Morosan was asked to provide an opinion for purposes of the measures phase, which forms part of the "litigation", and it is not something he prepared during the normal course of business so to speak in treating the Subject Member, and as such, *Children's Aid* does not support it being admitted as asserted by the MR Submission.

[369] Even if the Morosan Letter were admissible under *Children's Aid*, the court expressly noted that even if a witness did not have to comply with the rules regarding expert evidence, that does not mean the "gatekeeper function" should not be exercised (para. 116), which would comport with the direction of the Supreme Court of Canada in *WBLI* decided a few months before *Children's Aid*.

[370] Further, or in the alternative, the MR Submission suggests that the Morosan Letter be accepted as "non-expert evidence" and that it be given "some considerable weight" because Dr. Morosan has "the necessary experiential capacity to provide an opinion on the likelihood of the SM [Subject Member] to repeat similar behaviour."

[371] The MR Submission cites *Canada Post* as being helpful on this issue, noting that similar to subsection 24(1) of the *CSO (Conduct)* (which provides that in considering measures a conduct board "may" examine any material submitted by the parties (and although not referenced, see also subsection 45(2) and paragraph 24.1(3)(c) of the *RCMP Act* which permits a conduct board to receive evidence whether or not it would be admissible in a court of law)), the arbitrator found evidence of a psychologist was admissible because it may be relevant and useful when considering mitigating factors, which the MR asserts has also been the case in RCMP legacy discipline cases and current conduct proceedings.

[372] The exact nature of the argument here is not entirely clear, because unpacked, it is correct that legacy boards and conduct boards have accepted and considered evidence of a psychological nature when determining the appropriate sanctions or measures, but that does not mean it is automatically admissible.

[373] Indeed, although the MR Submission cites *Cormier* as a recent example, in that case there was no objection to the admission of the psychological evidence, which is not the case here, as the CAR has objected to the admission of the Morosan Letter.

[374] Moreover, in requesting admission as non-expert evidence, it is not clear whether the MR Submission is relying upon *Graat*, as the decision is quite clear that non-expert evidence is not given more weight, but the request in the MR Submission is to give it "considerable weight".

[375] If not relying on the *Graat* approach, it is unclear how *Canada Post* and *Cormier* aid in admitting the Morosan Letter as non-expert evidence, as in both of those cases, the evidence was most decidedly being admitted and considered on the basis of being expert evidence.

[376] The CAR Rebuttal does not provide much assistance on this point, as it simply asserts the Morosan Letter is wholly inadmissible due to the requirements of the *CSO (Conduct)* and/or the Mohan Criteria, although no analysis is provided on the application of the latter.

[377] Thus, commencing with the argument that there is no discretion to admit or consider the Morosan Letter, the Board finds that this is a misinterpretation, primarily because section 19 of

the *CSO (Conduct)* is setting out the requirement that "any party" must meet, and does not say anything about it being binding on a conduct board.

[378] In fact, subsection 13(3) of the *CSO Conduct* expressly empowers a conduct board to remedy any failure to comply with the rules, and subsection (2) permit a conduct board to adapt the rules if the principles of procedural fairness permit.

[379] Read as a whole and in context, it appears clear that a conduct board can consider any evidence in determining measures, and in the case of expert evidence, if it does not comply with the rules, a conduct board has a discretion to determine what will happen.

[380] In making this determination, the CAR Rebuttal has correctly asserted that that Mohan Criteria, as modified by the *WBLI*, have application to considering the admissibility and application of the Morosan Letter.

[381] So, in the present circumstance, it is clear that the Morosan Letter does not meet all of the requirements of subsection 19(2) of the *CSO (Conduct)*.

[382] Indeed, in the Board's recent experience, it is not an uncommon practice that expert medical or psychological reports are being proferred by member representatives with no or little compliance with subsection 19(2) of the *CSO (Conduct)*, and the Board intends to provide some commentary on what should occur as a result, which requires some analysis of *WBLI*.

[383] As a starting point, section 19 of the *CSO (Conduct)* exists in a specific legislative context, and it is intended to make proceedings more expeditious, and to ensure that, like other amendments to the *RCMP Act* dealing with conduct, and the concurrent creation of the *CSO (Conduct)*, parties, meaning both the subject member and conduct authority, disclose relevant information and evidence as early as possible in order to avoid protracted motions and arguments over evidence, and to militate against unnecessary adjournments and delay, or indeed where appropriate, rendering decisions without the requirement of hearing witnesses.

[384] As evidenced in some of the cases reviewed above, the specific requirements of subsection 19(2) of the *CSO (Conduct)* are similar to provisions that exist in other administrative

and civil contexts, and it is clear that parties should comply with them, among other practical considerations, because failure to do so risks impacting the weight to be given to any expert opinion, if it is admitted.

[385] For example, paragraphs 19(2)(e) and (f) of the *CSO (Conduct)* require that the expert report contains the facts and assumptions on which any opinions are based and the reasons supporting each opinion expressed.

[386] Put into practice, if an expert report or opinion simply says, as the Morosan Letter does, that it is solely based on the self-disclosed "facts" provided by Subject Member, but does not contain some level of detail about what those facts are, it not only risks diminishing the value of the report or opinions, as will become evident, it can make the report inadmissible based on *MBLI*.

[387] Contrary to the apparent suggestion in the MR Submission, it is not simply whether the Morosan Letter is relevant or useful in considering mitigating factors (i.e., *Canada Post*), or addresses matters beyond the ken of the Board, as it is clear that an expert report must be found admissible first, which is why subsection 24(1) of the *CSO (Conduct)* says a conduct board "may" consider any material at the measures phase.

[388] In *WBLI*, Cromwell J. set out a two stage process for assessing the admission of expert evidence.

[389] At the first stage, the proponent of the evidence must meet the four Mohan Criteria (i.e., (1) logical relevance, (2) necessity in assisting the decision maker, (3) absence of an exclusionary rule, and (4) a properly qualified expert) (para. 23).

[390] At the second, discretionary gatekeeping stage, the potential risks and benefits of admitting the expert evidence is balanced to determine if the potential benefits justify the risks (best stated as whether the expert evidence is sufficiently beneficial to the proceeding to warrant admission despite the potential harm (e.g., time, prejudice, confusion to the proceeding that may flow from its admission)) (para. 24).

[391] In considering the requirements for expert evidence in *WBLI*, Cromwell J. reinforced that expert witnesses have a *duty* to give fair, objective, and non-partisan opinion evidence (para. 10), also stated as duty to be *impartial* (i.e., reflects an objective assessment of the questions or issues), *independent* (i.e., a product of independent and uninfluenced judgment (e.g., not influenced by a retainer or who retained the expert or the outcome of the proceeding)) and *unbiased* (i.e., does not unfairly favour one position over another) (para. 32), which must be applied in the realities of litigation (e.g., simply being retained, instructed and paid by one party does not by itself undermine impartiality, independence and unbiased).

[392] One of the main clarifications arising in *WBLI*, is that Cromwell J. was unequivocal in stating that an expert's independence, impartiality and being unbiased goes to admissibility and not simply weight (para. 33 and 45), and the test is not a simple appearance of bias or whether a reasonable person would think the expert is not independent, it is "whether the expert's lack of independence renders her or him incapable of giving an impartial opinion" (para. 36 citing *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 106) (e.g., exclusion has occurred based on an expert's interest in litigation or relationship to the parties or stance or behaviour as an advocate (para. 37)).

[393] Procedurally, Cromwell J. was not prepared to find that an expert's independence and impartiality should be presumed unless challenged, but absent any challenge, the expert's attestation or testimony recognizing and accepting their duty establishes the threshold (para. 47), also finding that the threshold requirement is not onerous, and it will likely be rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it.

[394] Once the threshold for the expert's duty is established, the burden is on the opposing party to demonstrate on a balance of probabilities "that there is a realistic concern that the expert's evidence should be received because the expert is unable or unwilling to comply with the duty" (para. 48), and (para. 49):

> Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[395] The question of an expert meeting the duty to be impartial, independent and unbiased is to be addressed under the fourth Mohan criterion as to whether the expert is properly qualified (para. 53), and even if admitted, concerns about the expert's independence and impartiality are still taken into account in weighing the evidence at the second gatekeeping stage of the Mohan Criteria, and (para. 54):

> At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risks of the dangers materializing that are associated with expert evidence.

[396] Thus, returning to the Morosan Letter, and setting aside the first three of the Mohan Criteria for a moment, the Board notes there is no clear indication that Dr. Morosan is aware of the duty to be impartial, independent, and unbiased (e.g., such as an attestation often seen in expert reports), but the CAR Rebuttal has not challenged admission on this specific ground.

[397] The other factor is that the Morosan Letter arises solely out of a patient-psychologist "therapeutic" relationship, and as noted in *Eden*, a degree of caution must be exercised in such circumstances (para. 74). It was also noted in *WBLI* that an expert's relationship with a party can properly be considered in determining whether the duty of the expert is satisfied.

[398] The Board is also concerned by the fact that the Morosan Letter does not rely upon any independent information as the basis for any opinion(s), and at one level it has a definite air of advocacy rather than being independent, impartial, and unbiased reporting and diagnosis (e.g., "…as his treating psychologist I strongly support the return of [the Subject Member] to policing duties"), which is somewhat amplified by the fact that it is stated no "systematic assessment or diagnosis" had been conducted.

[399] Despite the foregoing concerns, the Board does not find that the Morosan Letter fails to meet the threshold of admissibility under the fourth Mohan criterion (i.e., properly qualified expert), but nevertheless they do have application to the weight it will be given in terms of mitigation as will be discussed below.

[400] The Board is also prepared to find that the Morosan Letter is relevant, but has some concern about its necessity in assisting the Board, given at one level, it is not based on any

testing, there is no apparent diagnosis under the DSM V, there is no current or past existence of any condition or disorder relevant to the Allegations, and ultimately, its opinion about recurrence is wholly based on what the Subject Member told Dr. Morosan, which is in no way described, but rather than be too rigorous for purposes of admissibility, and consistent with the apparent lower expectations regarding this criterion in some of the cases provided, the Board is prepared to find necessity has been met.

[401] Having dealt with the first, second and fourth Mohan Criteria, the final consideration is the absence of an exclusionary rule. Although not asserted directly, the CAR Rebuttal can be understood as relying on subsection 19(2) of the *CSO (Conduct)* as an exclusionary rule where its requirements have not been met.

[402] However, even if subsection 19(2) of the *CSO (Conduct)* were considered to be an exclusionary rule where it is not met, at least in the present case, the Board is prepared to exercise its discretion to admit the Morosan Letter despite the non-compliance with subsection 19(2) of the *CSO (Conduct)*, but reiterates that the failure to address the requirements of subsection (2) will have application to the weight it will be given in terms of mitigation (and does not foreclose the possibility that other such reports may not be admitted in other conduct cases).

[403] The first opinion expressed in the Morosan Letter is that, although no systematic assessment or diagnosis has been conducted, Dr. Morson "does not believe" the Subject Member meets the requirements of a DSM V diagnosis, which in plain terms, is understood to mean the Subject Member did not and does not suffer from a condition that can be diagnosed under the DSM V.

[404] The second opinion expressed in the Morosan Letter is that, based on what the Subject Member has reported and presented, his reactions to anxiety and emotions are those expected from a psychologically well person given the career events and encounters he has experienced, and in fact, the Subject Member has a "relatively high degree of psychological health."

[405] Taken together, these two opinions seem to have both mitigating and aggravating value: first, in mitigation, the Subject Member did not and does not have a mental disorder or other condition and is in good psychological health; and second, in aggravation, there is no real medical or psychological explanation for his misconduct that may mitigate the misconduct.

[406] The third opinion expressed by in the Morosan Letter is that based on the Subject Member's "thorough description of the case details", and assessment of his own behaviour, Dr. Morosan does "not believe that he is at risk of making a similar mistake in the future" and further:

> On the contrary, it is clear to me that his initial motivation for extended contact with the young woman involved was motivated by compassion and genuine empathy for her state of distress. At no time has [the Subject Member] expressed any exploitative or abusive intent.
>
> ….
>
> Recent developments in [the Subject Member's] personal life since he has been suspended from work also reinforce my view that he is at a low risk for making similar mistakes in the future.
>
> ….
>
> In summary, as his treating psychologist I strongly support the return of [the Subject Member] to policing duties. I have witnessed no indication that motivation for his errors even included intentional malice.

[407] The weight of the Morosan Letter is seriously undermined in the foregoing, first because as alluded to above, it is clear that Dr. Morosan is wholly reliant on the self-reporting of the Subject Member in forming his opinion, and he cannot be aware fully of the content of the text messages in the Examination, or the Subject Member's Interview, as it is apparent to any person that the Subject Member was acting on more than "compassion" and "empathy" for his "extended contact" with Ms. W given the explicit sexual content of those messages and the photograph.

[408] Moreover, given the circumstances, in particular those of Ms. W, to conclude that there was no exploitative aspect on the part of the Subject Member is simply not based on an understanding of the facts, timeline of events, nor the actual content of the text messages.

[409] To be specific, after showing Ms. W a totally inappropriate photograph of himself within minutes of arriving at her residence, within an hour of leaving her residence, the Subject Member was sending text messages containing explicit sexual comments, which are not indicators of someone who was acting on compassion and empathy.

[410] To be clear, the Board is not substituting its opinion on this point for that of Dr. Morosan, but is simply identifying that it cannot be given significant weight because it has not stated the facts relied upon to form the opinion, and further or in the alternative, the objectives facts that do exist as established by the Examination and Interview are wholly inconsistent or incompatible with those apparently relied upon by Dr. Morosan as reported by the Subject Member.

[411] Dr. Morosan may "believe" that the Subject Member is not at risk of making a similar "mistake", but he has done no testing or stated the facts or assumptions underlying this opinion (and relied solely on the Subject Member's account), which is equivocal at best, and overall, there is a real sense that the Morosan Letter is written as an advocate, or as stated, a "treating psychologist" who "strongly support[s]" the Subject Member's return to work, which does not imbue it with a sense of impartiality or independence, and diminishes its weight.

[412] The Board recognizes that the Subject Member has sought and received counselling and developed tools for dealing with work-related stress and anxiety as described in the Morosan Letter, but ultimately, it is hard to see how this mitigates misconduct which at its best, occurred based on the Subject Member's own acknowledgement that he was "lonely" (p. 283 at line 357).

[413] While the Board is prepared to accept the MR invitation to find the Subject Member sought psychological assistance, was receptive to treatment, and continues to participate in treatment, it is not highly relevant to the misconduct or mitigation, because the treatment did not arise out of or pertain to the misconduct.

[414] Although the Morosan Letter speaks to "treatment" of factors that made the Subject Member "vulnerable to initiating relationships with a member of the public", that may make some "distressed members of the public" attracted to the Subject Member, the "negative impact that misinterpretations of his communications might have on vulnerable persons", and

establishing, maintaining, and communicating "professional boundaries" during interactions with clients, it is not the case that the Subject Member had unwittingly strayed into some grey area of professionalism given the form, manner, content and timeline of how he engaged in inappropriate sexual interactions and communications with Ms. W, as there was no lack of clarity around the professional responsibilities in the circumstances.

[415] Relative to the further suggestion of the MR that the opinion of Dr. Morosan that the Subject Member is not likely to repeat the same behaviour, for the reasons already stated, the Board does not find it has significant weight or mitigation in the Subject Member's situation.

[416] The Board has also considered the MR's alternative request that the Morosan Letter be admitted as a non-expert opinion and given significant weight, but even admitted as such, the Board does not give it significant weight for the reasons stated above and/or because under *Graat* it is not to be accorded greater weight.

[417] The Board acknowledges that the CAR Rebuttal requested the ability to examine Dr. Morosan if the Board intended to place "any weight" on the Morosan Letter, but in the circumstances, the Board is of the view that oral examination would not be required because of the little weight assigned to the opinions or in mitigation, and any weight it has been given does not overtake the substantive circumstances of the misconduct or the aggravating considerations, individually or collectively.

[418] However, even if the Board is incorrect in its above assessment of the Morosan Letter and admitted and relied upon it without qualification, it does not, in mitigation, overcome the necessity to ensure that public has complete confidence that it will be protected and treated professionally when an RCMP member attends their door.

[419] The final component of the MR Submission relates to the SM Statement. It is clear that during his formative years the Subject Member was active in community and volunteer service while completing his education, and developing his work experience. As well, the Subject Member has remained active during his period of suspension.

[420] It is also evident that the Subject Member has strong ties to his family and the RCMP, and is remorseful and ashamed of his actions, and apologizes in that regard, all of which has some mitigating value.

[421] Based on the SM Address, the Board accepts that the Subject Member is remorseful, but that factor is not of sufficient weight on the scale of proportionality to tip matters towards remedial and educative measures when the trust and confidence of the public and RCMP in the Subject Member has been so significantly compromised based on the circumstances of this case and his actions.

Allegation 3

[422] With respect to Allegation 3, the CAR Submission states the misconduct falls within the aggravated range, and should be subject to 25 to 30 days' forfeiture of pay.

[423] The MR Submission has asserted that Allegation 3 falls within the normal range of measures, being two to eight days' forfeiture of pay.

[424] Based on the circumstances of the misconduct in relation to Allegation 3, and taking into account the Conduct Measures Guide, the Board finds that the range of measures for neglect of duty ranges from a moderate to significant financial penalty.

[425] The CAR Rebuttal did not reply to the assertion in the MR Submission that the CAR Submission improperly identified a number of factors as aggravating when they formed part of the particulars in the Notice, and the Board has taken note of these factors, outlined above, and they are not considered aggravating, although they do form part of the seriousness of the substantive findings relating to the misconduct established in Allegation 3.

[426] The CAR Rebuttal also did not reply to the specific claim in the MR Submission that the staying of the charge relating to the Breach File cannot be considered a factor relevant to Allegation 3, as that action by Crown Counsel arose out of the misconduct dealt with under Allegation 1.

[427] The Board accepts that the basis for staying the criminal charge relating to the Breach File is not related to the misconduct dealt with under Allegation 3, which must be taken into account when determining the appropriate measures.

[428] The Board does not, however, wholly accept that the fact there were no injuries is of significant mitigating value, given it is commonly understood, and in particular is noted in the VIR Policy that violence in relationships is a high risk area and that serious injury and death is a primary concern, and as a result, it seems incongruous to significantly mitigate conduct in such a context because no one was injured or killed.

[429] While the circumstances may be somewhat "unique", in that they are not dealt with as a specific incidence, form or category of misconduct in the Conduct Measures Guide, the reality is that the Subject Member knew Ms. W's circumstances, and when she contacted him, albeit off-duty, by his own admission, he took little or no action to ensure her safety and protection, and worse, attempted to block her communications without her knowledge.

[430] As a result, the Board finds that the misconduct forming Allegation 3 falls within the aggravated range because it was directly grounded in his inappropriate behaviour and communications, which caused him to intentionally and deliberately not take the steps he was required to do in order to ensure the safety of Ms. W.

[431] Indeed, the Subject Member admitted in the Interview that, despite later equivocation in the Response, he knew the circumstances were serious and he had a concern for Ms. W's safety (pp. 286-7) but failed to act, which he confirmed in the SM Address.

[432] The Board has also considered the Reference Letters and Performance Evaluations as outlined under Allegation 1, and assigns them the same weight and consideration for purposes of Allegation 3.

6. Conclusion

[433] It is commonly understood under the legacy and new conduct process that although rehabilitation, remediation and corrective potential are important considerations, they do not

subsume the ability of the RCMP to terminate employment of a member where the contravention goes the heart of the employer-employee relationship and/or public confidence, even where the member is apologetic and remorseful, as the damage can simply be too significant, which is the case here.

[434] In respect of Allegation 1, the retention of the Subject Member, given the wholly unacceptable form and nature of the sexual misconduct, would clearly imperil the public's confidence and trust, and the Board directs that the Subject Member be dismissed.

[435] In respect of Allegation 3, the Board imposes a forfeiture of 15 days' pay, which would have been higher had the measure for Allegation 1 not been dismissal.

[436] The Conduct Authority is to take the necessary steps to execute the measures imposed by the Board, including but not limited to notifying the Compensation Section of "E" Division and/or the Benefit Trust Fund.

[437] The Subject Member is given notice that decisions rendered by a conduct board are available to the public, and the Subject Member will not be notified of any requests for this decision.

[438] Pursuant to subsection 25(2) of the *CSO (Conduct)*, this decision takes effect as soon a copy is served on the Subject Member.

[439] This record of decision constitutes the final decision of the Board and the Subject Member or Conduct Authority may appeal this decision as provided for in the *RCMP Act.*

December 17, 2018

Craig S. MacMillan Date

Assistant Commissioner

Conduct Board

Table of Defined Terms

Act	*Royal Canadian Mounted Police Act*, R.S.C 1985, c. R-10 (as amended)
Allegation 1	Engaging in discreditable conduct by showing Ms. W a revealing picture of himself and exchanging inappropriate sexual and personal text messages contrary to section 7.1 of the Code of Conduct
Allegation 2	Creating actual, apparent or potential conflicts of interest between his professional responsibilities and private interests based on inappropriate sexual and personal communications with Ms. W contrary to section 6.1 of the Code of Conduct
Allegation 3	Failing to diligently perform duties and take appropriate action to aid Ms. W contrary to section 4.2 of the Code of Conduct
Allegations	Collectively, Allegation 1, Allegation 2, and Allegation 3
Assault	Assault of Ms. W by her boyfriend Mr. P on or about March 27, 2017
Assault File	Surrey Detachment operational occurrence file relating to the Assault
Board	Conduct Board appointed to deal with the conduct proceeding
Breach	File Breach of the No Contact Condition by Mr. P that was investigated by the Subject Member
Canada Post	*Canada Post Corp. v. C.U.P.W.* 2004 CarswellNat 1192
CAR	Conduct Authority Representative
CAR Email	Email from the CAR to the Board dated May 1, 2018 in response to the Board's issuance of the written-oral decision.

CAR Rebuttal	Rebuttal provided by the CAR on July 18, 2018 in response to the MR Submission and/or reply to the MR submission regarding the treatment of the Morosan Letter
CAR Submission	Conduct Authority Representative's written submission on measures along with supporting cases received on May 29, 2018
Chang Letter	Reference letter written by Constable Chang and submitted by the MR on behalf of the Subject Member.
Children's Aid	*Children's Aid Society of Toronto v. R.(M.).* 2016 ONCJ 215
COI Directive	Conflict of Interest Directive, A.M. XVII.1.
Conditions	Mr. P's conditions upon release on March 28, 2017, related to the Assault File, which included the No Contact Condition
Conduct Report	Code of Conduct Investigation (dated 2017-06-29) and Appendices
Cook	*R. v. Anthony-Cook*, 2016 SCC 43
Cormier Appeal	Level II decision in *Cormier* on appeal (File 2016-33572)
Cormier	*Commanding Officer "J" Division v. Constable Cormier,* 2016 RCAD 2
CSO Conduct	*Commissioner's Standing Orders (Conduct)*
Detachment	Surrey RCMP Detachment
DO	Designated Officer
DRCC	Deputy Regional Crown Counsel
DVCC	Domestic Violence Crown Counsel

E Letter	Reference letter written by Ms. E submitted by the MR on behalf of the Subject Member
Eden	*The Commanding Officer "E" Division and Constable Eden*, 2017 RCAD 7
ERC	RCMP External Review Committee
Examination	Cellebrite Examination of 323 text messages sent between the Subject Member and Ms. W
Graat	*R. v. Graat*, [1982] 2 S.C.R. 819
Greene	*Commanding Officer "H" Division and Constable Greene*, 2017 RCAD 5
Hamlyn	*The Appropriate Officer "E" Division and Constable Hamlyn, 11 A.D.* (4th) 407
Harrison Letter	Reference letter from Cst. Harrison submitted by the MR on behalf of the Subject Member
Interview	Subject Member statement and interview on June 27, 2017
Intoxication Cases	*Appropriate Officer "K" Division and Cst. X*, 6 A.D. (4th) 271 and *Appropriate Officer "K" Division and Cst. X*, 5 A.D. (4th) 136
LRI	Legislative Reform Initiative
Majid Letter	Reference letter written by Constable Majid submitted by the MR on behalf of the Subject Member
Matrix	Table of text messages sent between the Subject Member and Ms. W as listed in the Conduct Report
MB	Crown Counsel calling cases in Domestic Violence Court first approached by

	Ms. W
Meeting 1	Meeting between the Board, CAR and MR on January 29, 2018 in Ottawa, Ontario
Meeting 2	Meeting between the Board, CAR and MR on March 8, 2018 in Ottawa, Ontario
Memo	Memorandum sent from the DRCC to the OIC of the Detachment confirming a conversation relating to conduct of the Subject Member.
Mohan	*R. v. Mohan*, [1994] 2 S.C.R. 9
Mohan Criteria	Criteria for dealing with expert evidence as outlined in *Mohan*
Morosan Letter	Letter submitted to the Board by the MR from Dr. Morosan, a registered psychologist on behalf of the Subject Member
MR Submission	The Member Representative's submission on behalf of the Subject Member received via two emails along with supporting materials and authorities on June 18, 2018.
MR	Member Representative
Mr. P	Ms. W's boyfriend and subject of Assault File investigation involving Ms. W
Ms. W	Member of the public who was assaulted by Mr. P and contacted by Subject Member pursuant to the breach of No Contact Condition by Mr. P
No Contact Condition	One of the nine Conditions imposed upon Mr. P by the Provincial Court Judge upon his release on March 28, 2017.
Notice	Notice of Conduct Hearing and particulars (dated December 21, 2017)

Notice Matrix	Matrix contained in Notice outlining certain text messages exchanged between the Subject Member and Ms. W
OIC	Officer in Charge
Pauls Letter	Reference letter written by Sergeant Pauls submitted by the MR on behalf of the Subject Member
Performance Evaluations	Performance Evaluation and Learning Plans for the Subject Member for the periods of April 1, 2016 to March 31, 2017, and April 1, 2015 to March 31, 2016 submitted by the MR on behalf of the Subject Member
RCMP Act	*Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as amended)
Reference Letters	Letters of reference submitted by the MR on behalf of the Subject Member
Response	Subject Member's response pursuant to subsection 15(3) of the C*ommissioner's Standing Orders (Conduct)*
Sawatsky	*The Appropriate Officer "K" Division and Sergeant Sawatzky* 11 A.D. (4th) 392
SM Address	Comments provided to the Board by Subject Member on December 5, 2018
SM Apology Letter	Apology letter written by the Subject member submitted by the MR on behalf of the Subject Member (to be delivered to DRCC and DVCC)
SM Statement	Written statement provided to the Board by the Subject Member outlining his background
Victim Policy	Operational Manual 37.6 (Victim Assistance) at 2.7 and 2.10
VIR Policy	"E" Division Operational Manual 2.4. Violence/Abuse in Relationships

WBLI	*White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23
White	*The Queen v. White*, [1956] S.C.R. 154