

Publication ban: By order of the Conduct Board, information that may tend to identify any of the witnesses described in this decision may not be published, broadcast or transmitted in any way.



**ROYAL CANADIAN MOUNTED POLICE**

in the matter of

a conduct hearing pursuant to the

*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10

Between:

**Chief Superintendent Michel Legault**

Level III Conduct Authority, "E" Division

Conduct Authority

and

**Constable Ryan Fulcher**

Regimental Number 51465

Subject Member

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**Conduct Board Decision**

Inspector Colin Miller

January 29, 2021

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Ms. France Saint-Denis, Conduct Authority Representative

Mr. David Butcher, Subject Member Representative

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## SUMMARY

Constable Fulcher was served with a *Notice of Conduct Hearing*, which contained one allegation under section 7.1 of the RCMP Code of Conduct for discreditable conduct by exposing himself in view of members of the public.

The conduct hearing for this matter was scheduled to commence on January 12, 2021. However, on January 8, 2021, the Conduct Authority submitted a newly amended *Notice of Conduct Hearing*.

Shortly thereafter, Constable Fulcher submitted his response to the newly amended *Notice of Conduct Hearing*, in which he admitted to the allegation.

On January 11, 2021, as proposed by the parties, the conduct hearing was adjourned in anticipation of a written joint submission on conduct measures.

On January 18, 2021, the Conduct Board received separate submissions from the parties, which contained the same proposal on conduct measures. The Conduct Board subsequently accepted the joint proposal and imposed the following measures: the forfeiture of 10 days' pay and 10 days' leave.

## **INTRODUCTION**

[1] On September 29, 2018, late in the evening, two teenaged girls, Ms. L. and Ms. H., were walking along a street when they allegedly observed a naked male standing at the large front window of a residence. This naked male was visible to both girls and, to them, he appeared to be possibly masturbating. The two girls went directly to Ms. L.'s home, which was nearby, and immediately told her mother, Ms. M.L., what they had just observed. Ms. L. made an initial call to the local RCMP detachment to file a complaint.

[2] Ms. M.L. took the girls for a drive, in an attempt to locate the residence in which this naked male was allegedly observed masturbating. Ms. M.L. located the residence pointed out by Ms. L. and Ms. H.; Ms. M.L. also allegedly observed the naked adult male in the large front picture window of the residence.

[3] Ms. M.L. placed a call to the RCMP to confirm what Ms. L. and Ms. H. had reported earlier. As she could not see the actual house number of the suspect residence, Ms. M.L. provided the RCMP with a description of the residence.

[4] Members of the local detachment attended the residence and spoke with a male occupant of the residence, who matched the description provided by the witnesses. This male was subsequently identified as Constable Fulcher.

[5] Pursuant to subsection 40(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], an investigation into Constable Fulcher's actions was initiated on October 3, 2018.

[6] On May 9, 2019, the Designated Conduct Authority for "E" Division (the Conduct Authority) signed a *Notice to the Designated Officer*, in which he requested the initiation of a conduct hearing in relation to this matter. On May 14, 2019, I was appointed as the Conduct Board pursuant to subsection 43(1) of the *RCMP Act*.

[7] The *Notice of Conduct Hearing* was signed by the Conduct Authority on May 9, 2019. It was served on Constable Fulcher on June 14, 2019, along with the investigation package.

[8] On July 15, 2019, Constable Fulcher provided his response to the *Notice of Conduct Hearing*, pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. He denied the allegation, but he admitted to some of the particulars.

[9] On August 16, 2019, a pre-hearing conference was held, in which I accepted the parties' request to hold the conduct hearing after the criminal trial scheduled for December 12 and 13, 2019. It was agreed that the conduct hearing would take place in British Columbia, starting on January 14, 2020. It was also agreed that the identities of the three witnesses would be banned from publication.

[10] On December 12, 2019, the Conduct Authority Representative suggested that this matter be adjourned until after the criminal matter is resolved and the witnesses were available. In support of this proposition, he provided an email from the appropriate detachment, in which it advised that the witnesses were not available on the dates scheduled for the conduct hearing and, as a result, counsel in the criminal matter had agreed to an adjournment until July 2020.

[11] On December 17, 2019, another pre-hearing conference was held. The Conduct Authority Representative confirmed that the criminal matter had been adjourned until July 2020 due to witness availability and that Constable Fulcher was involved in a motor vehicle collision and, purportedly, had issues instructing counsel. It was both parties' position that this matter be postponed until after the criminal trial.

[12] On January 27, 2020, Ms. Saint-Denis assumed carriage of this file for the Conduct Authority.

[13] On February 12, 2020, the Conduct Authority Representative advised that Constable Fulcher's criminal trial was scheduled for July 30 and 31, 2020.

[14] On May 22, 2020, Mr. Neville McDougall advised that he had taken over representation of Constable Fulcher in this matter. On June 29, 2020, Mr. David Butcher advised that he had now been retained by the National Police Federation to represent Constable Fulcher.

[15] On July 10, 2020, a conduct hearing was tentatively scheduled for September 22 to 24, 2020. It would proceed on those dates if the Subject Member Representative's appearance at a previously scheduled criminal trial was rescheduled.

[16] On August 26, 2020, the Subject Member Representative confirmed that the trial was proceeding and that this matter would have to be rescheduled. On September 25, 2020, the conduct hearing was set for the week of January 11, 2021.

[17] On December 14, 2020, the Conduct Authority Representative provided an *Amended Notice of Conduct Hearing*, which had been signed that day by the Conduct Authority. It contained the same single allegation as the original; however, the particulars had been abbreviated.

[18] On December 21, 2020, I advised the parties that, due to the travel and gathering restrictions in place as a result of COVID-19, this matter would proceed via video conference, as opposed to an in-person hearing in British Columbia.

[19] Later that day, Constable Fulcher provided an amended response to the *Amended Notice of Conduct Hearing*, in which he admitted that his conduct was discreditable, but he denied committing an indecent act.

[20] On January 8, 2021, another pre-hearing conference was held in which the parties outlined their efforts to resolve this matter and were optimistic that a resolution would be reached, which would forego the need for a contested hearing.

[21] Later that day, I received a newly amended *Notice of Conduct Hearing*, which contained an abbreviated allegation, but with the same particulars as the last version received. A short time later, I

received a response to the newly amended *Notice of Conduct Hearing*, in which Constable Fulcher admitted to the allegation.

[22] On January 11, 2021, as proposed by the parties, I adjourned the conduct hearing in anticipation of receiving a written joint submission on conduct measures.

[23] On January 18, 2021, I received separate submissions, which contained the same proposal on conduct measures. The parties jointly proposed the following measures: the forfeiture of 10 days' pay and 10 days' leave. The parties indicated that they were agreeable to the issuance of a decision in writing, which negated the need for a live hearing.

***In camera* hearing and publication ban**

[24] On December 10, 2019, the Subject Member Representative advised the Conduct Authority Representative and I that she was seeking that this matter be held *in camera*. The Subject Member Representative explained that a publication ban, pursuant to section 486 of the *Criminal Code*, RSC, 1985, c C-46, had been issued in the parallel criminal process, but that a local journalist had violated that order.

[25] That same day, I informed the Subject Member Representative that, given the presumption that conduct hearings are intended to be conducted in public, I required submissions in relation to the application and set out a schedule for receiving the parties' submissions.

[26] On December 13, 2019, the Subject Member Representative submitted the motion requesting that the conduct hearing be held *in camera*, pursuant to subsection 45.1(2) of the *RCMP Act*. Additionally, the Subject Member Representative requested a publication ban on the disclosure of any details/photographs describing Constable Fulcher's physical appearance or identifying features to prevent any possible association between his name and his appearance pursuant to subsection 45.1(7) of the *RCMP Act*.

[27] Later that same day, the Conduct Authority Representative advised having no objections to the motion.

[28] On December 20, 2019, I rendered my decision on the Subject Member Representative's motion to hold the hearing *in camera* and the issuance of a publication ban. In short, upon review of the materials provided, I granted the motion as the disclosure of the aforementioned information could be injurious to law enforcement and would expose Constable Fulcher, his family and other investigators to significant risk.

[29] Additionally, on December 14, 2020, the Conduct Authority Representative requested a publication ban, pursuant to subsection 45.1 (7) of the *RCMP Act*, on any information that could identify the witnesses, who were under age at the time of the misconduct, including the name of the two teenagers and of the mother.

[30] I agree that a publication ban is in the public interest and order that any information that may tend to identify any of the witnesses described in this decision may not be published, broadcast or transmitted in any way. For this purpose, the names of these witnesses have been replaced by an initial.

[31] Contained within the Subject Member Representative's January 18, 2021, submission was a request for "a publication ban of all medical documentation submitted by [Constable] Fulcher or contained within the Record before [me]". The Subject Member Representative asserted that the Conduct Authority Representative had no objection.

[32] I have not issued a publication ban of Constable Fulcher's medical information as there is no legislative authority for me to specifically ban that information. Constable Fulcher intended to rely on that information in order to establish a mitigating factor in the conduct measures phase. However, it should be noted that I only reproduced in this decision the material I deemed relevant, namely, his diagnosis and a small portion of the narrative from Dr. B.'s letter.

[33] On January 19, 2021, I received a request from counsel on behalf of Constable Fulcher, requesting that Constable Fulcher not be identified in this decision. The following day, I received a response from the Conduct Authority Representative opposing this request.



[34] On January 21, 2021, I responded to the parties via email that I would not withhold Constable Fulcher's name from this decision as, ultimately, it was his appearance that was to be protected, not his identity.

[35] However, I have omitted those details from the particulars in respect to describing Constable Fulcher's appearance that I have deemed unnecessary in order to uphold the spirit of my decision on the motion.

## **ALLEGATION**

[36] The *Amended Notice of Conduct Hearing*, dated January 8, 2021, contained the following allegation:

### **Allegation 1**

On or about September 29, 2018, at or near [XXXX], British Columbia, Constable Ryan Fulcher did engage in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the *Royal Canadian Mounted Police Act*.

#### **Particulars of Allegation 1**

1. On September 29<sup>th</sup>, 2018, you were a member of the Royal Canadian Mounted Police ("RCMP") posted to the "E" Division [XXXX] British Columbia.
2. Late in the evening of September 29<sup>th</sup>, 2018, you were naked in the living room of your residence on [street name], [XXXX], British Columbia. The lights were on and the curtains were open. Two teenage girls, [Ms. L.], aged 16, and [Ms. H.], aged 17 were walking on the opposite side of the street, over 50 feet from the window. [Ms. L.] thought that you were fondling yourself. [Ms. H.] reported that you were "kind of touching [yourself] but like not really [you were] just kinda, I don't know, just standing there."
3. A short while later [Ms. L.]'s mother, [Ms. M.L.], drove by your house. She reported that you were naked and that you had your hand on your penis.

4. [Ms. L.] reported her observations to the [XXXX] RCMP at [11:34 p.m.] that evening.

5. You committed discreditable conduct by being naked in your living room, late at night, with the curtains open, exposing yourself to members of the public who walked or drove by your home.

*[Sic throughout]*

[37] The burden is on the Conduct Authority to establish the Allegation on a balance of probabilities. Practically speaking, this means that I must find that the Conduct Authority has established that it is more likely than not that Constable Fulcher has contravened section 7.1 of the RCMP Code of Conduct.

### **Decision on the Allegation**

[38] The test for “discreditable conduct” under section 7.1 of the Code of Conduct requires that the Conduct Authority prove the following on a balance of probabilities:

- a. the acts that constitute the alleged behaviour;
- b. the identity of the member who is alleged to have committed these acts;
- c. whether the member’s behaviour is likely to discredit the Force; and,
- d. that the behaviour is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

*Are the acts proven?*

[39] Although Constable Fulcher admitted to committing the Allegation, he provided the following narrative in relation to particulars 2 and 3:

[...] the Member admits that, late in the evening on September 29, 2018, he was naked in the living room of his residence of [XXXX]. He admits that the curtains were open and a light was on, and that his naked body was visible from the street.

He says that the two pedestrian passers[-]by were about 100 feet away from his window. The Member denies that he was fondling himself, but admits that it was possible that his hand briefly touched his penis. [...]

[40] While I acknowledge Constable Fulcher's explanation, I note that this speaks more to the narrative of those particulars and not the substance thereof. Hence, upon my review of the materials contained within the Record, including Constable Fulcher's admission, I find the acts, as set out in the particulars, to be established.

*Has the identity of the member been established?*

[41] Similarly, by virtue of Constable Fulcher's admission to the Allegation and my review of the materials, I find that his identity as the member who committed the contravention is established.

*Is Constable Fulcher's conduct discreditable?*

[42] Entrenched in our various legal systems and foundational to the benefits enjoyed by the citizens of this wonderful country is the sanctity of one's home, as evidenced in the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> However, that right is assailable. One instance in which it may be fettered is when occupants are engaging in activities that cause people outside of the home to be impacted, such as in this instance. The fact that Constable Fulcher was charged criminally, even though it was subsequently withdrawn, with the offence of committing an indecent act is evidence of this.

[43] It is not surprising that Constable Fulcher's conduct caused concern among the witnesses. By being naked in front of a large window, in a room that was lit up while it was dark outside, it is quite foreseeable that he would be observed and that his motive for such behaviour would be questioned. This is especially significant given his proximity to the street and that an elementary school was only a short distance down the road.

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[44] As a member of the RCMP, Constable Fulcher ought to have known the potential impact of engaging in this type of behaviour and cannot be protected from accountability due to his being inside his residence. I find that a reasonable person in society, with knowledge of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view his actions as likely to bring discredit to the Force.

*Is Constable Fulcher's behaviour sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him?*

[45] On page 21 of the Annotated Code of Conduct, the following commentary is provided in relation to section 7.1:

[...] As a member of the RCMP, you should at all times, whether on or off duty, consider how your actions and behaviours will affect your ability to preserve your credibility and the trust of the public. These two elements are necessary to effectively carry out policing duties. Given the nature of your duties and responsibilities, any criminal behaviour would be considered discreditable. [...]

[46] Constable Fulcher was off-duty at the time of this incident. However, he acted in a manner that caused members of the public to call the police, required a police response and justified the completion of criminal and Code of Conduct investigations. This clearly demonstrates that he, in his role as a member of the RCMP, could be called upon to respond to, and investigate, similar occurrences.

[47] Furthermore, when the responding members were conducting the initial investigation, Constable Fulcher identified himself as a member of the RCMP. Hence, I find that Constable Fulcher's behaviour is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

### *Conclusion*

[48] For the aforementioned reasons, I find that Constable Fulcher was exposed in view of members of the public and that he did, no matter how briefly it may have been, touch his penis. I find

that such activity would bring discredit to the RCMP and that his behaviour is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him. Therefore, I find his conduct to be discreditable and, as a result, I find the Allegation against him to be established on a balance of probabilities.

## **CONDUCT MEASURES**

[49] With my finding that the Allegation has been established, I am now required, in accordance with paragraph 36.2(e) of the *RCMP Act*, to impose conduct measures that are “proportionate to the nature and circumstances of the contravention of the Code of Conduct, and where appropriate, which are educative and remedial rather than punitive”.

[50] The Subject Member Representative and the Conduct Authority Representative jointly proposed the following conduct measures: the forfeiture of 10 days’ (80 hours) leave and the forfeiture of 10 days’ (80 hours) pay, pursuant to paragraphs 5(1)(i) and 5(1)(j) of the *CSO (Conduct)*, respectively.

### **Conduct Authority Representative’s submission**

[51] The Conduct Authority Representative noted that the examples of “sexual misconduct” provided in the *Conduct Measures Guide* are very different from the present case, but she submitted that sexual misconduct attracts serious conduct measures, which include dismissal.

[52] The Conduct Authority Representative also expressed her disagreement with some of the mitigating circumstances proposed by the Subject Member Representative. She argued that no weight should be given to Constable Fulcher accepting responsibility, as that was done more than two years after the incident.

[53] She also submitted that no weight should be given to a diagnosis of post-traumatic stress disorder (PTSD), as there is no evidence that there is a causal link between the PTSD and the misconduct. In other words, there is no evidence that the PTSD contributed to the misconduct.

[54] Moreover, she asserted that no weight should be given to his psychologist, Dr. B.'s diagnosis or opinion on recidivism, because the procedure to have him qualified as an expert had not been followed.

#### **Subject Member Representative's submission**

[55] The Subject Member Representative submitted that Constable Fulcher has had an excellent career in the RCMP prior to this incident. He had become proficient in the use of various investigative techniques that are an asset to the RCMP and had led a team that had investigated various targets involved in serious organized crime.

[56] He also submitted that Constable Fulcher's performance appraisals show an exceptional willingness to do more than expected, noting that he was praised more than once for his voluntary overtime as well as his willingness to step up and take on extra tasks to make the team successful.

[57] Moreover, the Subject Member Representative asserted that the circumstances surrounding this misconduct were unusual. In Constable Fulcher's life, nothing like this has happened before and no more concerns have arisen in the more than two years since. Constable Fulcher continues to see his psychologist and has taken significant steps to ensure it is never repeated.

#### **Decision on conduct measures**

[58] When a conduct board is presented with a joint submission, there are very narrow circumstances in which it may refuse to accept the proposed conduct measures.

[59] Generally speaking, courts or administrative tribunals, such as this one, will not override a settlement reached by the parties unless doing so would go against the public interest. The public interest test has a very high threshold. In the 2016 decision *R. v Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada recognized the value of settlement discussions and indicated that a joint submission should not be rejected lightly.

[60] The public interest test was also applied in the context of professional discipline in the case of *Rault v Law Society of Saskatchewan*, 2009 SKCA 81 (CanLII) [*Rault*], and by the Commissioner of the RCMP in decision (2018) 18 AD (4th) 270.

[61] According to *Rault*, a conduct board has an obligation to give serious consideration to a joint submission unless it is unfit, unreasonable or contrary to the public interest. In addition, when departing from a joint submission, a conduct board must also give cogent reasons as to why it is inappropriate.

[62] In order to determine whether the proposed conduct measures submitted by the parties go against the public interest, I must determine what the range of possible conduct measures may be. It is important to note that dismissal is the most serious punishment that can be imposed in a disciplinary process such as this one.

[63] In her submissions, the Conduct Authority Representative advised that she had reviewed the discipline cases related to indecent exposure to a member of the public under the previous and current *RCMP Act*, but she did not find any similar cases that would be of benefit to me in establishing an appropriate range.

[64] Similarly, the *Conduct Measures Guide* does not speak specifically to the misconduct committed by Constable Fulcher. However, I do note that, on page 59, a discreditable conduct in relation to an allegation of sexual activity on duty – pre-existing relationship, provides that engaging in that activity with the potential to be caught in the act in uniform falls into the aggravating range and suggests measures in the range of 16 to 30 days' forfeiture of pay.

[65] The normal range for that misconduct suggests measures that fall between 11 and 15 days' forfeiture of pay.

[66] While there is little doubt that the behaviour noted in the *Conduct Measures Guide* is much more serious than what has been established against Constable Fulcher, I think it is helpful in that it provides an upward limit for the conduct measures that could be reasonably expected to be imposed

against him. As such, I find that the range of conduct measures is a forfeiture of pay of 11 to 30 days' pay.

*Aggravating factors*

[67] I have considered the factors presented by the parties and I accept the following aggravating factors:

- a. There were members of the public involved, which includes two underage girls.
- b. Constable Fulcher's house was located in close proximity to a primary school.
- c. Constable Fulcher's action resulted in the police being called.
- d. Constable Fulcher's actions attracted the attention of the media.

*Mitigating factors*

[68] I accept the following mitigating factors:

- a. Although its value is limited due to the late timing of Constable Fulcher's admission, it has avoided the need for a contested hearing.
- b. Constable Fulcher has expressed remorse for his actions.
- c. Constable Fulcher has no prior discipline.
- d. Constable Fulcher has a strong work record and has been consistently recognized as a team player.
- e. This was a momentary lapse of judgment by Constable Fulcher due, in part, to sleep deprivation.
- f. A letter of reference from Constable Fulcher's current supervisor, Acting Sergeant C.P., commented positively on Constable Fulcher's performance and expressed his support for him to return to active duty.



- g. The lack of malicious intent was proposed and, although I do find that it was somewhat foreseeable that Constable Fulcher would be observed by individuals outside his home, I will afford this factor some weight. This is solely based on my presumption that, had there been such intent, this matter would have been resolved in an alternative manner.
- h. Constable Fulcher has taken steps to prevent a reoccurrence of this event.

[69] Constable Fulcher proposed that his PTSD medical condition, with which he was subsequently diagnosed, as evidenced by Dr. B.'s letter, as well as Dr. B.'s opinion in relation to Constable Fulcher's risk of recidivism should be considered mitigating factors. While I do find his attending to his mental health a positive step for Constable Fulcher, I have not retained his submission in relation to his medical condition or the likelihood of recidivism. In addition to the issue of Dr. B. not being properly qualified as an expert—which may have come as a result of this matter being resolved by joint submission—is the lack of causality indicated in the report.

[70] Furthermore, and more troubling, are that the facts on which Dr. B. relied upon are not accurate. On page 3 of Dr. B.'s letter, dated November 12, 2020, the first paragraph associated to the topic of "Legal History", Dr. B. stated:

[Constable Fulcher] reports that he has been off work for about a year after two teenage girls allegedly confused a location of where they saw a [XXXX] male touching himself in front of a living room window as the girls passed by. [...] While the witness statements were contradictory, and describe someone that does not match [Constable Fulcher]'s description, Crown proceeded with charges possibly because he is a police officer.

[71] It can be reasonably deduced that, at the time Dr. B. wrote his letter, Constable Fulcher had represented to him that he did not commit the actions as alleged, which is in contradiction to the admission before me.

[72] Moreover, on page 2 of his letter, although he acknowledges his duty to assist the [Conduct Board] and not to be an advocate for any party, Dr. B. also lobbies for Constable Fulcher's return to duty.

[73] As a result, I can give little weight to Dr. B's report.

[74] Finally, as evidenced by the joint proposal on conduct measures, the Conduct Authority is no longer seeking Constable Fulcher's dismissal. While not being specifically identified as a mitigating factor, it is indicative of the Conduct Authority's willingness to have Constable Fulcher return to duty.

### **Conclusion**

[75] Having considered the materials before me, the nature of the misconduct as well as the mitigating and aggravating factors, I cannot find that the proposed conduct measures go against the public interest. These conduct measures fall within the proposed range and impose a significant sanction on Constable Fulcher, which clearly communicates that he is being held accountable for his behaviour. Furthermore, I believe that these conduct measures will provide significant deterrence, both specifically, and generally.

[76] Consequently, I accept the parties' joint submission and impose the following conduct measures:

- a. pursuant to paragraph 5(1)(j) of the *CSO (Conduct)*, a financial penalty of 10 days (80 hours), to be deducted from Constable Fulcher's pay; and
- b. pursuant to paragraph 5(1)(i) of the *CSO (Conduct)*, a forfeiture of 10 days (80 hours) of annual leave.

[77] Constable Fulcher has been given an opportunity to continue his career with the RCMP. However, any future contravention of the Code of Conduct will be seriously reviewed by the appropriate conduct authority and could lead to his dismissal from the Force.

[78] I trust that, in the future, he will be more cognizant of his surroundings and conduct himself in a manner that is in accordance with the expectations that the public holds in regard to members of the RCMP.

[79] Any interim measures in place should be resolved in accordance with section 23 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[80] Either party may appeal this decision by filing a statement of appeal with the Commissioner within 14 days of the service of this decision on the Subject Member, as set out in section 45.11 of the *RCMP Act* and section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289.

January 29, 2021

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Inspector Colin Miller

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Ottawa, Ontario

Conduct Board