

Publication ban: Any information that could identify N.S. or her children in the present decision may not be published, broadcast or transmitted in any way.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 Steven Ing
Designated Conduct Authority, "E" Division

(Conduct Authority)

and

Constable Connor McDonald
Regimental Number 65661

(Subject Member)

Conduct Board Decision

Christine Sakiris

October 16, 2023

Ms. Sabine Georges, Conduct Authority Representative

Mr. Brad Kielmann, Subject Member Representative

TABLE OF CONTENTS

SUMMARY	2
INTRODUCTION.....	3
Publication ban.....	4
ALLEGATION	4
EVIDENCE	5
Applicable legal principles to determine credibility and reliability of evidence	7
Applicable legal principles limiting the use of prior consistent statements.....	8
Evidence of N.S.	10
Evidence of T.L. and M.L.....	13
Evidence of C.T.	14
Evidence of C.K.....	15
Evidence of Constable McDonald	17
Findings of fact	19
<i>Was N.S. a vulnerable person under the law?</i>	20
<i>Did Constable McDonald reciprocate N.S.'s flirtation?</i>	22
<i>What was the time and duration of Constable McDonald's attendance at N.S.'s residence?</i>	23
<i>What occurred during Constable McDonald's visit to N.S.'s residence?</i>	27
DECISION ON THE ALLEGATION	35
CONDUCT MEASURES.....	37
Evidence.....	37
Decision on conduct measures.....	39
CONCLUSION	45

SUMMARY

The original *Notice of Conduct Hearing* contained one alleged contravention of section 7.1 of the RCMP Code of Conduct, and one alleged contravention of section 4.2 of the RCMP Code of Conduct. This second allegation was subsequently withdrawn by the Conduct Authority.

The alleged contravention of section 7.1 of the RCMP Code of Conduct pertained to discreditable conduct by Constable McDonald, involving sexual acts with a vulnerable person.

The Conduct Board found the allegation to be established and ordered Constable McDonald's immediate dismissal.

INTRODUCTION

[1] Constable McDonald was originally facing two allegations, as set out in the November 4, 2022, *Notice of Conduct Hearing*. The first is an alleged contravention of section 7.1 of the RCMP Code of Conduct (discreditable conduct). Constable McDonald is alleged to have engaged in sexual acts with N.S., a vulnerable person (Allegation 1). The second is an alleged contravention of section 4.2 of the RCMP Code of Conduct, namely that Constable McDonald failed to diligently perform his duties and carry out his responsibilities as a member (Allegation 2).

[2] On February 3, 2023, Constable McDonald filed his response to the allegations, pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. On February 6, 2023, I advised the Subject Member Representative of my concern that the response was deficient and did not comply with the requirements of subsection 15(3) of the *CSO (Conduct)*. On March 3, 2023, I held a pre-hearing conference at which I reviewed my concerns with counsel. The Subject Member Representative agreed to submit an amended response, and I provided detailed directions in this regard.

[3] On March 14, 2023, Constable McDonald submitted an amended response (Response) to the allegations as well as supporting evidence, including an audio recording of some of his interactions with N.S. While Constable McDonald admitted certain particulars, he denied both allegations.

[4] On March 31, 2023, the Conduct Authority withdrew Allegation 2. Therefore, Allegation 1 is the only one before me.

[5] I have been appointed as the Conduct Board pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*]. In accordance with section 45 of the *RCMP Act*, I must decide whether Allegation 1 is established on a balance of probabilities. In other words, I must determine whether it is more likely than not that Constable McDonald has contravened the Code of Conduct. If I find Allegation 1 to be established, then I must impose conduct measures.

[6] For the reasons that follow, I find that Allegation 1 is established and I order Constable McDonald's immediate dismissal.

Publication ban

[7] In accordance with paragraph 45.1(7)(a) of the *RCMP Act*, I order that any information that could identify the complainant, N.S., or her children, shall not be published, broadcast or transmitted in any document or in any way.

[8] Allegation 1 and its particulars have been amended to reflect this publication ban.

ALLEGATION

[9] In accordance with the *Notice of Conduct Hearing*, the allegation and particulars are as follows:

Allegation 1

On or between August 14, 2021, and August 15, 2021, at or near [redacted], in the Province of British Columbia, Constable Connor McDonald engaged in conduct contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars:

1. At all material times, you were a member of the Royal Canadian Mounted Police ("RCMP"), working general duty uniform duties, posted to "E" Division, [Detachment name redacted] in the Province of British Columbia.
2. On August 15, 2021, [N.S.] who was a chronic alcoholic and suicidal, was found unconscious and appeared to be overdosing. She was apprehended under the *Mental Health Act* and taken to [name redacted] Hospital.
3. You stayed with [N.S.] at the Hospital while she was recovering for several hours. You engaged in personal conversations and flirted with her during that time.
4. Upon being released from the Hospital, [N.S.] asked you for a ride home. Instead, you took her to the [name redacted] Mall on [location redacted] and dropped her off in front of the McDonald's Restaurant. You knew she was going to purchase more alcohol as she clearly stated that she intended on going to the liquor store.

5. [N.S.] went on to buy a six pack of beer at the Beer & Wine liquor store.
6. While seated on the street and talking on the telephone with her friend, [C.T.], [N.S.] saw you come back in the police vehicle and she pleaded to you something to the effect of “*please don’t take me back*”. [N.S.] was afraid that you would take her back to the Hospital. In return, you offered her that you would add her on Facebook if she walked back home.
7. In the early hours of August 15, 2021, you telephoned [N.S.] and asked if you could come over and she agreed. After your work shift, you attended her residence in civilian clothing. There was no lawful and/or operational justification to justify your presence at her residence.
8. Upon arrival, you stated something to the effect of “*I could get in a lot of trouble for this*”.
9. While you were at her residence, you had sexual intercourse with [N.S.] in her bedroom. In addition, you performed oral sex on [N.S.] and ejaculated in her mouth.
10. You therefore failed to abide by a high ethical standard on and off-duty and engaged in discreditable conduct by engaging in sexual acts with a vulnerable member of the public, in a highly inappropriate context.

[*Sic throughout*]

EVIDENCE

[10] The Record before me includes two statements from N.S. Statements were also provided by N.S.’s friends, C.T. and C.K, her sister T.L. and her brother-in-law, M.L.

[11] The Record also includes extensive documentary evidence. Of particular note, are :

- a) General Occurrence Reports related to N.S.’s apprehension under the *Mental Health Act*, RSBC 1996, c 288 [*Mental Health Act*], on August 14, 2021;
- b) Query logs for Constable McDonald on August 14, 2021;
- c) Images of Facebook profiles;
- d) Motor Vehicle Branch query conducted by Sergeant Michael Kokkoris;
- e) Technical Analysis Report of the GPS data from the police vehicle Constable McDonald was driving on August 14 and 15, 2023, as prepared by M/E William Speechley of the Crime Analysis Section;

- f) Map showing cell towers used by Constable McDonald's personal phone on August 15, 2021, prepared by Alicia Johnson, RCMP Crime Analyst (Cell Tower Data);
- g) Analysis of, and images from, CCTV at the Detachment and at traffic cameras;
- h) Records from the *Production Order* for, and *Warrant to Search* Constable McDonald's personal phone;
- i) Extraction Report of Constable McDonald's personal phone records prepared by Sergeant Michael Kokkoris, Professional Responsibility Unit.

[12] As is his right, Constable McDonald did not provide a statement during the Code of Conduct investigation. In support of his Response to the allegations, Constable McDonald provided an audio recording that he had made while transporting N.S. from the hospital to the mall on August 14, 2021. He subsequently provided the audio recorder used to make the recording to the "E" Division Professional Responsibility Unit, who then arranged for the audio to be enhanced and transcribed.

[13] On October 10, 2022, N.S. was found deceased at her residence.

[14] At a pre-hearing conference on March 3, 2023, the Subject Member Representative advised that he objected to the admissibility of N.S.'s statements, as well as to portions of other witnesses' statements that reference N.S.'s account of the events of August 14 and 15, 2021. Further communications ensued, with a view to clarifying the elements in the witness statements that were at issue. On March 28, 2023, I directed that a "voir dire" would be held.

[15] On April 13, 2023, the parties advised that they had reached an agreement on the admissibility of the statements at issue,¹ and they proposed a manner of proceeding at the hearing. I accepted the proposed manner of proceeding with some clarifications. My direction at the conclusion of that pre-hearing conference, which was repeated and acknowledged by the parties at the outset of the hearing,² provided:

¹ The prior consistent statements at issue, which will be set out in my examination of the evidence, were identified in the *Identification of Prior Consistent Statements*, submitted by the Subject Member Representative on April 11, 2023.

² Conduct Board summary of pre-hearing conference 2, dated April 13, 2023; and Transcript of the conduct hearing, Volume 1, at pages 6 to 8.

- a) Constable McDonald does not object to the admissibility of the witness statements in the Record, in whole or in part, including those of N.S.
- b) The parties agree that any prior consistent statements within the witnesses' statements are part of the Record and may be relied on as circumstantial and contextual evidence, and not for the truth of their contents. I will determine the weight to be given to this evidence in the context of the Record as a whole and the parties' submissions.
- c) The parties will not adduce any oral evidence at the allegations phase of the hearing.
- d) The Conduct Authority has waived his right to cross-examine Constable McDonald at the allegations phase of the hearing.
- e) Similarly, Constable McDonald has waived his right to cross-examine all other witnesses.
- f) Constable McDonald's Response to the allegations, dated March 14, 2023, including the audio recording and its transcript, form part of the Record. I will assess the weight to be given to this evidence in the context of the Record as a whole and the parties' submissions.
- g) The parties will provide an *Agreed Statement of Facts* that will be considered in the context of the Record as a whole and the parties' submissions. Consequently, my ultimate findings of fact may not directly accord with the *Agreed Statement of Facts*.

[16] On June 16, 2023, the parties provided an *Agreed Statement of Facts*, as well as an amended transcript of the audio recording.

Applicable legal principles to determine credibility and reliability of evidence

[17] In assessing each witness's evidence, I must consider whether they are being truthful and whether their evidence is reliable (i.e., whether the witness is in a position to accurately perceive and recollect what they observed). I may find a witness's evidence to be truthful, but unreliable. It is also open to me to accept some, none or all of a witness's evidence on a given point.³

[18] In assessing credibility, I must not look at a witness's evidence in isolation, but at the totality of the evidence. I must also consider the impact of the inconsistencies in that evidence and

³ *R. v R.E.M.*, 2008 SCC 51, at paragraph 65.

whether, when taken as a whole in the context of the totality of the evidence, they impact the witness's credibility.⁴

[19] In *Faryna*,⁵ the Court notes that a witness's evidence cannot be assessed solely on their demeanour, i.e., that they appear to be telling the truth. Rather, a trier of fact must determine whether the witness's story is consistent with the most probable interpretation of the surrounding facts.

[20] Finally, it is important to note that a conduct board's findings on credibility may be determinative of the ultimate issue before them.⁶

Applicable legal principles limiting the use of prior consistent statements

[21] A prior consistent statement is a declaration made by a witness prior to, in this case, a conduct hearing, which is consistent with their testimony at the hearing. Such a declaration is generally inadmissible when advanced by the party that has called the witness, as it is generally considered self-serving and of little probative value.⁷ In short, a witness's credibility cannot be enhanced simply because they have repeated the same story to other people. Moreover, prior consistent statements are considered hearsay; they cannot be relied on as proof of the truth of their contents.

[22] A prior consistent statement may still be admissible under certain exceptions, and may assist a conduct board in assessing the credibility of a witness. These exceptions include but are not limited to its use as circumstantial evidence, to rebut an allegation of recent fabrication, or as narrative (contextual) evidence.

⁴ *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], at paragraph 58.

⁵ *Faryna v Chorny*, 1951 CanLII 252 (BC CA) [*Faryna*], at page 357.

⁶ *McDougall*, at paragraph 86.

⁷ David M. Paciocco and Lee Streuser, *The Law of Evidence*, 7th edition (Toronto: Irwin Law Inc., 2015), at pages 527 and 528; and *R. v Dinardo*, 2008 SCC 24 [*Dinardo*], at paragraph 36.

[23] Where admissible, two impermissible inferences remain from such evidence: (1) a witness is more likely to be telling the truth because they made the same statement in the past; and (2) the prior consistent statement corroborates a witness's testimony.⁸

[24] In this case, the prior consistent statements at issue are found within the statements of T.L., C.T. and C.K. They reflect the witnesses' recollection of N.S.'s account of the events of August 15, 2021. In particular, they relate to N.S.'s account of the specific sexual acts she engaged in with Constable McDonald while he was at her residence, as well as statements allegedly made by Constable McDonald to the effect that he could get in trouble as a result of his actions.⁹

[25] The parties have jointly proposed, and I have agreed, that the prior consistent statements at issue are admissible as circumstantial and contextual evidence. Both parties have waived their right to cross-examine witnesses at the allegations phase of the hearing.

[26] Practically speaking, this means that I may rely on the prior consistent statements as circumstantial evidence of N.S.'s state of mind, where it is at issue.¹⁰ As I set out in my analysis below, the Subject Member Representative has put N.S.'s state of mind at issue.

[27] I may also rely on the prior consistent statements as contextual or narrative evidence of the circumstances in which the alleged incident took place /or to establish the timing of events, including the fact and timing of a complaint.¹¹

[28] In *The Law of Evidence*, the authors illustrate how these concepts are to be applied:¹²

In *R. v. Dinardo*, evidence showed the mentally challenged sexual assault complainant had difficulty situating events in time, was easily confused, and lied on occasion. The Supreme Court of Canada recognized in light of this that 'the spontaneous nature of the initial complaint and the complainant's repetition of the essential elements of the allegations provide important context for assessing her credibility'.

⁸*The Law of Evidence*, at page 530; *Commanding Officer, "E" Division and Constable John Irvine*, 2019 RCAD 03 [Irvine], at paragraph 159; and *R. v Langan*, 2019 BCCA 467 [Langan] as affirmed in *R v Langan*, 2020 SCC 33, at paragraph 1.

⁹ *Identification of Prior Consistent Statements*, submitted by the Subject Member Representative on April 11, 2023.

¹⁰ *The Law of Evidence*, at page 530.

¹¹ *The Law of Evidence*, at page 543; *Langan* at paragraph 99.

¹² *The Law of Evidence*, at page 542, citing *Dinardo*, at paragraph 39.

[...]

In essence, the spontaneous and repetitive way the prior consistent statements were made was to be considered in evaluating whether the complainant was having trouble situating the alleged events in time, or whether she was confused about what happened.

[29] And further, in *Langan*:¹³

[95] [...] the fact of the complainant's statements to the accused, the timing of them, and the circumstances in which they were made yield inferences supporting the truthfulness and reliability of the complainant's in-court testimony. That is where the probative value of these after-the[-]event text messages lies; their use for this purpose was permissible [...]

[96] A point of significance is that the messages were relied on by the defence at trial to attempt to establish inconsistencies in the complainant's account of events and emotional responses, making their consideration by the trial judge necessary. [...]

[...]

[99] It is well-established that prior consistent statements may be used to assess credibility. Proper use turns on whether the statements are used to find a witness credible because of specific, permissible inferences of credibility, such as: "evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint" (*Khan*, at para 43); understanding "the sequence of events from the alleged offence to the prosecution so that [the trier of fact] can understand the conduct of the complainant and assess her truthfulness" (*R. v. F.(J.E.)*, 1993 CanLII 3384 (Ont. C.A.) at 476, cited in *Dinardo* at para. 38); or assessing if there is "evidence that an individual has a motive to lie" (*R. v. Stirling*, 2008 SCC 10 at para 12).

Evidence of N.S.

[30] N.S. provided two statements to investigators prior to her death, which are found in the Record. As N.S. is unavailable to testify at the hearing, her statements constitute hearsay. However, their admission is necessary by virtue of her inability to testify. By consenting to their admission, Constable McDonald has conceded that they meet the threshold reliability required for

¹³ *Langan*, at paragraphs 95, 96 and 99.

admissibility. However, I must determine the weight to be given to (or ultimate reliability of) her evidence.

[31] I agree with the Subject Member Representative that, in assessing the credibility of N.S.'s evidence, I may not rely on stereotypical assumptions. For example, I cannot assume that complainants would not expose themselves to the investigation or trial process unless what they were saying is true.¹⁴

[32] While the Subject Member Representative does not explicitly argue that N.S. was lying or that her evidence lacks credibility, he does challenge the reliability of her statements on multiple grounds.

[33] First, he argues that the manner in which the statements were taken is problematic. He submits that the failure to videotape statements makes it difficult to assess demeanor, that the statements were not sworn, that the investigators did not stress the importance of telling the truth and that they suggested answers to N.S. With respect, I do not accept these arguments.

[34] N.S.'s statements were audio-recorded. Her tone and overall demeanour, which I emphasize is not determinative of credibility, can be assessed. It is clear from N.S.'s statements that she fully appreciated that anything she said could result in serious consequences for Constable McDonald. She explicitly stated several times that she does not want him to lose his job. She demonstrated empathy for Constable McDonald and she did not try to cast him in a negative light.¹⁵ Finally, as noted by the Conduct Authority Representative, it was open to Constable McDonald to call the investigators to attest to the manner in which the statements were taken. He elected not to do so. Therefore, he cannot now seek to challenge the reliability of N.S.'s statements on this basis.

[35] Second, the Subject Member Representative puts N.S.'s state of mind at issue when he submits that her evidence is unreliable due to memory lapses attributable to her alcoholism and possible interactions with other medications that she may have been taking. He further argues that

¹⁴ *R v Snell*, 2021 BCSC 673 (CanLII), at paragraph 44; *R. v. J.C.*, 2021 ONCA 131 (CanLII), at paragraph 88.

¹⁵ CARD Binder, at pages 88 to 98, *Statement of N.S., dated August 25, 2021*, at lines 137, 144 and 145, 150, 208, 308 and 309; CARD Binder, at pages 101 to 134, *Statement of N.S., dated September 10, 2021*, at lines 242 to 245, 273 to 285, 314 to 316, and 1000 to 1001.

N.S. “has shown a degree of delusional thinking that significantly undermines the reliability of her statements.”¹⁶ Here he refers to an incident on August 21, 2021, in which N.S. suffered facial injuries. She mistakenly accused police officers of causing those injuries. The Subject Member Representative further suggests that N.S.’s account of Constable McDonald’s visit to her residence is nothing more than fantasy.

[36] It is not contested that N.S. was an alcoholic. She readily acknowledges this in her statements to investigators and admits when she cannot recall information.

[37] The Subject Member Representative highlights that, in her second statement, N.S. indicates that she had recently been taking medication that affected her clarity of mind.¹⁷ N.S. is not sure when she started taking the medication. The Subject Member Representative suggests that the information in her first statement is therefore unreliable. However, this argument cuts both ways. I find that the fact that N.S. explicitly states that she does not recall what she said in her first statement, and then proceeds to give an account that is largely consistent with that first statement, enhances, rather than impugns, the credibility and reliability of her evidence. Moreover, her evidence in the second statement, in which she provides further details about her interactions with Constable McDonald, may accordingly be viewed as even more reliable than her evidence in the first statement, as her mind is clearer at that time.

[38] Third, the Subject Member Representative submits that there are multiple inconsistencies between N.S.’s evidence, and that of other witnesses. I do not agree, on the totality of the evidence, that this is the case. As I will set out, and as noted by the Conduct Authority Representative, the inconsistencies that do exist are peripheral to the ultimate issues before me. As such, I do not find that they negatively impact N.S.’s credibility, or the overall reliability of her evidence.

[39] There is no question that N.S. has trouble recalling the timing of certain elements of her interactions with Constable McDonald. However, as I set out in my analysis below, when viewed in the context of the objective evidence, and with the benefit of the contextual and circumstantial

¹⁶ Transcript of the conduct hearing, Volume 1, at page 78.

¹⁷ CARD Binder, at pages 113 and 114, *Statement of N.S., dated September 10, 2021*, at lines 389 to 415.

evidence provided by the witness statements to assess her state of mind as well as the timeline of events and of her disclosures, I find N.S.'s evidence to be both credible and reliable.

Evidence of T.L. and M.L.

[40] T.L. is N.S.'s sister. She provided a statement to investigators, in which she gave her recollection of a call with N.S., approximately one week after the alleged incident. Upon being told that N.S. had engaged in sexual relations with a police officer, T.L. shared this information with her husband M.L., a retired police officer. He subsequently contacted the RCMP and filed a complaint, which then led to the Code of Conduct investigation in this matter.

[41] The prior consistent statements at issue in T.L.'s statement, as identified by the Subject Member Representative, are either T.L.'s repetition of declarations made by N.S. or T.L.'s recollection thereof:

- a) When he finished, he looked at me and said, "you can't tell anybody because I can get in a lot of trouble for this."¹⁸
- b) Right? And then um, so she, she said that they had sex.¹⁹
- c) No, no, no. They had sex.²⁰
- d) She said, she told me that he said that she's not supposed to tell anybody because he could get into big trouble for it.²¹

[42] The Subject Member Representative has not raised nor have I identified any concerns about the credibility of T.L. or M.L. However, the reliability of their evidence is not as strong as that of other witnesses. First, there is no audio recording or transcript of M.L.'s statement, which was taken over the phone. A summary of his statement is included in the investigation report. Second, unlike C.T. and C.K., N.S. did not disclose the alleged incident to T.L. until approximately one week later. Consequently, to the extent that I have relied on any of their evidence as contextual or

¹⁸ CARD Binder, at page 49, *Statement of T.L., dated September 3, 2021*, at lines 64 and 65.

¹⁹ CARD Binder, at page 53, *Statement of T.L., dated September 3, 2021*, at line 183.

²⁰ CARD Binder, at page 53, *Statement of T.L., dated September 3, 2021*, at line 193.

²¹ CARD Binder, at page 56, *Statement of T.L., dated September 3, 2021*, at lines 284 and 285.

circumstantial evidence of N.S.'s state of mind at the time of the alleged incident or the timing of events, I have preferred the evidence of C.T. and C.K. to that of T.L. and M.L.

Evidence of C.T.

[43] C.T. is a friend and neighbour of N.S. They have known each other for over 20 years.²² She would speak with or see N.S. several times a day. She was present for, and has direct knowledge of several elements of the events that transpired on August 14 and 15, 2021. In particular, she was present when Constable Hadell Alameer returned N.S. to her residence in the early afternoon of August 14, 2021, prior to her apprehension under the *Mental Health Act*. C.T. was on the phone with N.S. while N.S. was being transported by Constable McDonald, after her release from the hospital. C.T. was also on the phone with N.S. while she was outside the liquor store and went to meet N.S. there to ensure that she got home safely.

[44] C.T. walked N.S. home from the liquor store and participated in a call (on speakerphone) with N.S. and C.K., in which they discussed the Facebook request from Constable McDonald. C.T. spent some time with her at her residence on the evening of August 14, 2021, and was present when N.S. confirmed to C.K. that she should accept the Facebook friend request from Constable McDonald.

[45] C.T. received several missed calls from N.S. over the course of the early hours of August 15, 2021. She went to N.S.'s residence between 8 and 9 a.m. on the morning of August 15, 2021, at which time N.S. disclosed that she had engaged in sexual acts with Constable McDonald.

[46] The prior consistent statements at issue in C.T.'s statement, as identified by the Subject Member Representative, are either C.T.'s repetition of declarations made by N.S. or C.T.'s recollection thereof:

- a) And then she had, eventually he said, he told her to take off her pants, take her clothes off, he went and performed oral sex on her, and then after they had sex, all he, she said he kept saying he could get in so much trouble for this, and then blew a load in her mouth. Like ejaculated into her mouth.²³

²² CARD Binder, at page 137, *Statement of C.T. dated September 3, 2021*, at lines 55 to 59.

²³ CARD Binder, at page 137, *Statement of C.T., dated September 3, 2021*, at lines 72 to 75.

- b) The first think, the first thing I saw when I woke up was a message from [C.K.] going, “The police officer was at [N.S.’s] house and he fucked her.”²⁴
- c) Yeah, he came back in here and he fucked me and he told me to tell him a story.²⁵
- d) And then he went and performed oral sex on her...²⁶
- e) Had sex with her and the ejaculated in her mouth.²⁷
- f) Especially ‘cos apparently when he said that [to tell him a story] to her, it was near the bed.²⁸
- g) And then told her to take her clothes off, or something. And then went and performed oral sex on her.²⁹
- h) Kind of made sense, and then she was, ‘cos when she was telling me that he ate her, like he went d...performed oral sex on her...³⁰

[47] These passages are discrete passages from C.T.’s evidence. I have considered them within the context of the statement as a whole. In assessing the credibility and reliability of N.S.’s evidence, I have relied on these prior consistent statements solely for the purpose of establishing the timeline of events, and assessing N.S.’s state of mind. I have not relied on them for the truth of their contents.

[48] The Subject Member Representative has not raised, nor have I identified any concerns with respect to the overall credibility or reliability of C.T.’s evidence.

Evidence of C.K.

[49] C.K. is a childhood friend of N.S. She would speak with or see N.S. several times a day. N.S. had granted C.K. access to her email and Facebook accounts as she relied on C.K. to assist her with banking, managing correspondence and her social media account(s). Like C.T., C.K. was

²⁴ CARD Binder, at page 146, *Statement of C.T., dated September 3, 2021*, at lines 336 and 337.

²⁵ CARD Binder, at page 146, *Statement of C.T., dated September 3, 2021*, at line 358.

²⁶ CARD Binder, at page 147, *Statement of C.T., dated September 3, 2021*, at line 362.

²⁷ CARD Binder, at page 147, *Statement of C.T., dated September 3, 2021*, at line 364.

²⁸ CARD Binder, at page 149, *Statement of C.T., dated September 3, 2021*, at line 447.

²⁹ CARD Binder, at page 149, *Statement of C.T., dated September 3, 2021*, at lines 449 and 450.

³⁰ CARD Binder, at page 155, *Statement of C.T., dated September 3, 2021*, at lines 634 and 635.

present for and has direct knowledge of several elements of the events that transpired on August 14 and 15, 2021.

[50] C.K. was on the phone with N.S. while N.S. was being transported by Constable McDonald, after her release from the hospital. C.K. was also on speaker phone with N.S. and C.T. while they walked from the liquor store to N.S.'s residence. They discussed the Facebook request during this call. C.K. also spoke with N.S. and C.T. on the phone after they had arrived at N.S.'s residence. C.K. was the person who confirmed and acted on N.S.'s direction to accept Constable McDonald's Facebook request.

[51] C.K. received several missed calls from N.S. over the course of the early hours of August 15, 2021. She spoke with N.S. between 7:30 and 8 a.m. on the morning of August 15, 2021, at which time N.S. disclosed that she had engaged in sexual acts with Constable McDonald.

[52] The prior consistent statements at issue in C.K.'s statement, as identified by the Subject Member Representative, are either C.K.'s repetition of declarations made by N.S. or C.K.'s recollection thereof:

- a) ...and at which time she told me that the officer from the day before had come over to her house and had sex with her, and they had oral sex with each other.³¹
- b) No, they had, she told me that they had sex, actual sex together and that he performed oral sex on her. I don't remember her saying that she performed it on him, but [C.T.] told me that sh, he, she had told her directly that she had, she had performed oral sex on him and he ejaculated in her mouth.³²
- c) [Investigator]: ... So what [N.S.] told you what just that he performed oral sex on her.
- d) [C.K]: Yes. He per... he performed it on her, yes.³³

[53] These passages are discrete passages from C.K.'s evidence. I have considered them within the context of the statement as a whole. In assessing the credibility and reliability of N.S.'s evidence, I have relied on these prior consistent statements solely for the purpose of establishing

³¹ CARD Binder, at page 168, *Statement of C.K., dated September 9, 2021*, at lines 120 and 121.

³² CARD Binder, at page 169, *Statement of C.K., dated September 9, 2021*, at lines 166 to 169.

³³ CARD Binder, at page 169, *Statement of C.K., dated September 9, 2021*, at lines 172 and 173.

the timeline of events, and assessing N.S.'s state of mind. I have not relied on them for the truth of their contents.

[54] The Subject Member Representative has not raised nor have I identified any concerns with respect to the overall credibility or reliability of C.K.'s evidence.

Evidence of Constable McDonald

[55] Constable McDonald did not provide a statement in the context of the investigation, as is his right. Nor did he testify at the hearing. Again, this is his right and I have not drawn any negative inference from his decisions in this regard. I also note that the Conduct Authority waived his right to cross-examine Constable McDonald at the allegations phase.

[56] However, the end result is that the evidence from Constable McDonald is limited to his Response to the allegations, the audio recording he made of his interactions with N.S. while transporting her on August 14, 2021, and the transcripts of that recording.

[57] Constable McDonald has made certain admissions, which are consistent with the direct evidence in the Record. That said, when I examine his evidence in the context of the Record before me, I do not find it to be credible or reliable.

[58] Constable McDonald makes assertions that are not supported by the evidence before me. For example, at paragraph 10 of his Response, he asserts that N.S. told him "she was not suicidal at all and only said that in frustration". His evidence is inconsistent with that of N.S. and the General Occurrence Report completed on August 14, 2021.

[59] While N.S. does not recall the specific reason she was admitted to hospital on August 14, 2021, she states that she had been hospitalized "a few times lately", either because she "passed out" or threatened to kill herself.³⁴ She states that she calls her friends or sisters often, and that they will answer even in the early hours of the morning because they know that she is "not in a good space right now."³⁵

³⁴ CARD Binder, at page 116, *Statement of N.S., dated September 10, 2021*, at lines 467 to 469.

³⁵ CARD Binder, at pages 122 and 123, *Statement of N.S., dated September 10, 2021*, at lines 668 to 683.

[60] N.S.'s evidence is consistent with the General Occurrence Report completed by Constable Alameer on August 14, 2021. Constable Alameer was sufficiently concerned about N.S.'s expressed suicidal ideations that she found N.S. to be a danger to herself and apprehended her under the *Mental Health Act*. On this point, I prefer the evidence of Constable Alameer, who has no vested interest in this matter.

[61] Another example is Constable McDonald's assertion that he was not aware that N.S. intended to purchase alcohol after being dropped off. He relies on the audio recording he provided in support of his Response as proof of this assertion. In particular, he states that "[N.S.] never stated to [him] or to anyone while in [his] presence that she intended on purchasing alcohol".³⁶ However, there are many portions of that audio recording that are indecipherable.

[62] Conversely, N.S. stated that Constable McDonald was aware of her intention to purchase alcohol; and that she had also told C.T. that she was going to the liquor store.³⁷ She states that she did so when she was on the phone with C.T. while in Constable McDonald's police vehicle.³⁸ C.T. also noted, in her statement, that during that phone call, N.S. had told her that she wanted to get dropped off at the mall so that she could go to the liquor store.³⁹

[63] Constable McDonald seeks to rely on his conversation with N.S. in the vehicle on a number of points, including her statement as to where she wanted to be dropped off. According to the transcripts, that statement in particular was made while N.S. was on the phone with another person.⁴⁰ The transcript further establishes that N.S. was on the phone with C.T. at that time. For example, toward the end of the call, N.S. advises Constable McDonald that she is speaking to her neighbour, who will come to meet her.⁴¹ That neighbour is C.T.

³⁶ Constable McDonald's Response, dated March 14, 2023, at paragraph 12.

³⁷ CARD Binder, at page 103, *Statement of N.S., dated September 10, 2021*, at lines 56 and 57.

³⁸ CARD Binder, at page 103, *Statement of N.S., dated September 10, 2021*, at lines 56 and 57.

³⁹ CARD Binder, at page 139, *Statement of C.T., dated September 3, 2021*, at lines 133 to 141.

⁴⁰ Transcript of Transport from Hospital of N.S., as amended by the parties and submitted on June 16, 2023, at lines 47 to 149.

⁴¹ Transcript of Transport from Hospital of N.S., as amended by the parties and submitted on June 16, 2023, at lines 127 to 129, and 149.

[64] The recording demonstrates that, shortly after they entered the police vehicle, Constable McDonald asked N.S. to lower the glass partition so that he could hear her clearly.⁴² As previously noted, he seeks to rely on elements of her conversation with C.T. to prove that N.S. asked not to be dropped off at home, that she was sober when he left her, and that she had someone who was coming to meet her to ensure she got home safely.⁴³ Therefore, even if N.S. did not tell Constable McDonald directly, it is reasonable to infer that he heard N.S. telling C.T. of her intention to purchase alcohol after getting dropped off.

[65] Additionally, while it is not contested that N.S. was flirting with Constable McDonald throughout their time together, he asserts that he did not reciprocate. As I will set out in my analysis, I find that this assertion is not supported by the evidence.

[66] Most damaging to Constable McDonald's credibility is his assertion that he visited N.S. in order to perform a "follow-up" with "a complainant, victim, or witness in need" as required by RCMP Service Standards.⁴⁴ On the totality of the evidence before me, and as I will set out in my analysis below, his account is inconsistent with the most probable interpretation of the surrounding facts. Consequently, where his account diverges from that of N.S., I prefer the evidence of N.S.

Findings of fact

[67] There are a number of facts that are not contested. These are outlined in the parties' *Agreed Statement of Facts*.

[68] Constable McDonald admits that, on August 14 and 15, 2021, he was a member of the RCMP, working general duties.

[69] On August 14, 2021, N.S. was apprehended under the *Mental Health Act* and taken to hospital.

⁴² Transcript of Transport from Hospital of N.S., as amended by the parties and submitted on June 16, 2023, at lines 4 and 5.

⁴³ Constable McDonald's Response, dated March 14, 2023, at paragraphs 27 and 28.

⁴⁴ Subject Member Representative's Reference Materials, as submitted on June 6, 2023, at page 482, *Photo of RCMP Service Standards Card*.

[70] Constable McDonald stayed with N.S. at the hospital for several hours while she was recovering. They engaged in personal conversations and N.S. flirted with him.

[71] Upon being released from the hospital, N.S. requested a ride. Constable McDonald agreed and took her to a mall near her residence. He dropped her off in front of a McDonald's restaurant. N.S. had told Constable McDonald that she did not want to be dropped off at her residence.

[72] After she was dropped off, N.S. bought a six-pack of beer from the liquor store.

[73] Having observed that N.S. was not travelling in the direction of her residence, Constable McDonald turned his vehicle around to locate her. He then found her near the liquor store.

[74] After a brief exchange in front of or near the liquor store, Constable McDonald sent a Facebook friend request to N.S. using his personal profile.

[75] In the early hours of August 15, 2021, Constable McDonald attended N.S.'s residence after his shift, in civilian clothing and using his own vehicle.

[76] The facts that are contested are related to whether Constable McDonald reciprocated N.S.'s flirtations, the timing and duration of his visit to N.S. on August 15, 2021, and what happened while Constable McDonald was at N.S.'s residence. The question of whether N.S. was a vulnerable person is also somewhat contested. I will start there.

Was N.S. a vulnerable person under the law?

[77] The evidence is clear that N.S. was an alcoholic. Shortly before August 14, 2021, she had lost custody of her children due to her alcohol use.⁴⁵

[78] On August 14, 2021, the RCMP received a call reporting a female who was passed out and "might be overdosing". Constable Alameer responded and located N.S. sitting on a bench. I agree with the Subject Member Representative that there is no evidence that N.S. had consumed any illicit substances. However, she was heavily intoxicated by alcohol.

⁴⁵ CARD Binder, at page 69, *General Occurrence Report 2021-122945*.

[79] Constable Alameer returned N.S. to her residence, where she learned that N.S. had recently lost custody of her children due to her alcohol addiction. N.S. expressed suicidal ideations and was emotionally distraught. N.S. was ultimately apprehended under the *Mental Health Act* and taken to the hospital at 3 p.m.⁴⁶

[80] Constable McDonald was dispatched to assist as a cover unit at the hospital at 4:42 p.m. He arrived at 4:51 p.m. and stayed with N.S. until her discharge from the hospital at 8 p.m.⁴⁷ He knew that she was intoxicated when she arrived at the hospital.⁴⁸

[81] Constable McDonald queried the complainant on CPIC at 5:15 p.m. on August 14, 2021.⁴⁹ N.S. was identified as someone who may be of interest to firearms officers. He also accessed the General Occurrence Report, as initiated by Constable Alameer, which reflected the circumstances under which N.S. was hospitalized. While it is not clear when he first accessed the General Occurrence Report, he definitely accessed it to make his own entries at 8:49 p.m. that evening. I note that the General Occurrence Report specifically identifies the complainant as an “Emotionally Disturbed Person” and that her apprehension under the *Mental Health Act* was due to risk of harm to self or others.

[82] While I agree with the Subject Member Representative that N.S. had a support network, she had difficulty functioning on her own. C.K, C.T. and T.L. all noted that N.S. was very anxious, and that she called them multiple times a day, at all hours of the day. N.S. had granted C.K. access to her personal information, including banking information, so that she could help her pay bills, as well as manage her email and Facebook accounts.

[83] As seen from N.S.’s own evidence, she was “not in a good space”. She stated that, in or around the time of the alleged incident on August 14 and 15, 2021, she had several interactions

⁴⁶ CARD Binder, at pages 67 to 75, *General Occurrence Report 2021-122945*.

⁴⁷ CARD Binder, at pages 76 to 85, *Prime query log*.

⁴⁸ CARD Binder, at pages 67 to 75, *General Occurrence Report 2021-122945*; and amended transcript of the audio, at lines 50 and 51.

⁴⁹ CARD Binder, at page 72, *General Occurrence Report 2021-122945*.

with the police, some of which led to her being taken to hospital.⁵⁰ Her account is corroborated by the evidence related to the incident of August 21, 2021, which resulted in N.S.'s facial injuries.

[84] Consequently, I find that, at all material times, N.S. was a vulnerable person and that, on August 14 and 15, 2021, Constable McDonald knew that she was in fact a vulnerable person.

Did Constable McDonald reciprocate N.S.'s flirtation?

[85] It is not contested that N.S. flirted with Constable McDonald while at the hospital and in his police vehicle. However, the evidence does not support the Subject Member Representative's assertion that her flirtations were never reciprocated.

[86] I have listened to the audio recording submitted by Constable McDonald numerous times. I do not accept certain portions of the amended transcript jointly submitted by the parties. I find that there are elements that are audible and not reflected in the amended transcript. I have added these in bold, in the following passage:

M: OK. Do you need anything from me at all?
N.S.: **I need a hug.** Yup, (INDECIPHERABLE) can do.
M: OK.
N.S.: But you're so delicious!
M: Oh, no... um, **I can't give you that right now,** it's OK. [...]⁵¹

[87] Even if the amended transcript is accurate, when viewed in context of Constable McDonald's actions, it demonstrates flirtatious behaviour by Constable McDonald. In particular, after N.S. suggestively stated that she would like some "follow-up" from Constable McDonald, he gave N.S. his business card, on which he crossed out his work phone, and wrote what has been confirmed to be his personal cell phone number.⁵² He then stated:

⁵⁰ CARD Binder, at pages 122 and 123, *Statement of N.S., dated September 10, 2021*, at lines 668 to 683.

⁵¹ Transcript of Transport from Hospital of N.S., as amended by the parties and submitted on June 16, 2023, at lines 130 to 134, with additional bold text from the audio recording, beginning at approximately 12 min 50 s.

⁵² CARD Binder, at page 44, *Picture of business card*; CARD Binder, at page 24, *Technical Analysis*; audio and amended transcript.

M: OK. I crossed out my work phone on there, OK so the phone on there is...

N.S.: (LAUGHS)

M: The phone on there is the working one, alright?

[88] Constable McDonald offers no credible explanation for providing N.S. with his personal cell phone number. If the flirting was solely one-sided, there would have been no reason for Constable McDonald to cross out his work number, write his personal number and then draw N.S.'s attention to it as "the number that works". Consequently, I find that while N.S. was certainly much more overt in her flirtation, the overall tone of their exchange demonstrated that it was reciprocated toward the end of their time together on the afternoon of August 14, 2021.

What was the time and duration of Constable McDonald's attendance at N.S.'s residence?

[89] Constable McDonald admits that he attended N.S.'s residence in the early hours of August 15, 2021, while off-duty and in civilian clothing.⁵³ The time and duration of this visit is relevant to assessing the plausibility of both Constable McDonald's and N.S.'s account of what transpired.

[90] The Subject Member Representative refers to N.S.'s statement of August 25, 2021, in which she states that Constable McDonald stayed "probably a few hours like I'd say a maximum of two hours."⁵⁴ He argues that this account is implausible in the face of the objective evidence and is inconsistent with her statement of September 10, 2021, in which she states several times that Constable McDonald did not stay long, perhaps half an hour.⁵⁵

[91] The Subject Member Representative relies on C.K.'s evidence, and what is, at the end of the day, her conjecture that Constable McDonald attended the complainant's house in or around 3 a.m. in further arguing that N.S.'s timeline, if accepted, would have left 8 minutes between his

⁵³ *Agreed Statement of Facts*, dated June 16, 2023, at paragraph 8.

⁵⁴ Statement of N.S., dated August 25, 2021, at line 198, at page 94 of the CARD Binder.

⁵⁵ Statement of N.S., dated September 10, 2021, at lines 121 – 122, 364 – 367, 662 – 669, at pages 105 – 123 of the CARD Binder.

arrival at N.S.'s residence and her call to C.K. at 3:09 a.m. He submits that it is not feasible for Constable McDonald to have engaged in the alleged sexual acts within this short time frame.

[92] However, there is extensive evidence that was not available to C.K. when she gave her statement.

[93] The objective evidence, and in particular the Technical Analysis, Cell Tower Data, CCTV footage (at the detachment and at traffic cameras), the Production Order and Extraction Report, is integral to establishing the timeline of events. Ultimately, this timeline aligns with N.S.'s evidence of the timing of her interactions with Constable McDonald, and is indicative of the reliability of her evidence.

[94] N.S. left the hospital with Constable McDonald at 8:36 p.m. on August 14, 2021.⁵⁶ It took approximately 16 minutes from the time they left in Constable McDonald's police vehicle, to the time that he dropped N.S. off in front of the McDonald's. Constable McDonald made an audio recording of the car ride, during which N.S. spoke with Constable McDonald. She also received two phone calls.⁵⁷ There are 49 instances in which Constable McDonald's or N.S.'s words are indecipherable, ranging from a few seconds to over 2 minutes in length.⁵⁸

[95] When N.S. exits the police vehicle, Constable McDonald provides her with his business card, referencing the General Occurrence Report file number for her apprehension. He also crosses out his work number and writes his personal cell phone number, telling N.S.: "The phone on there is the working one, alright?"⁵⁹

[96] Constable McDonald made entries in the General Occurrence Report at 8:49 p.m.⁶⁰ He completed N.S.'s transfer at 8:53 p.m., and was "back in service" at 8:56 p.m.⁶¹

⁵⁶ CARD Binder, at pages 76 to 85, *Prime query log*.

⁵⁷ Audio recording, original and amended transcripts.

⁵⁸ Audio recording, original and amended transcripts.

⁵⁹ CARD Binder, at page 44, *Picture of business card*; CARD Binder, at page 24, *Technical Analysis*; audio and amended transcript.

⁶⁰ CARD Binder, at page 70, *General Occurrence Report 2021-122945*.

⁶¹ CARD Binder, at pages 76 to 87, *Prime query log*.

[97] After being dropped off, N.S. purchased a six-pack of beer at the liquor store.⁶²

[98] Constable McDonald states that he noticed that N.S. was not travelling in the direction of her residence. He turned his vehicle around, and located her near the liquor store. Both N.S. and Constable McDonald state that they had a conversation. Constable McDonald did not provide an audio recording for this part of their interaction.

[99] It is not contested that Constable McDonald offered or agreed, to add N.S. on Facebook if she agreed to go home.

[100] Shortly after this interaction, Constable McDonald sent N.S. a Facebook friend request, using his personal profile.⁶³ His personal profile picture on the “Connor Glen” account is consistent with his profile picture with the RCMP.⁶⁴

[101] That same evening, C.K. accepted Constable McDonald’s friend request on N.S.’s behalf.⁶⁵

[102] At 2:32 a.m. on August 15, 2021, Constable McDonald entered the detachment, wearing his uniform. He walked out of the detachment at 2:42 a.m., wearing a black t-shirt with a design or image on the front and back, teal shorts, black socks and flip flops.⁶⁶

[103] At 2:44 a.m., Constable McDonald walked to the southwest corner of the detachment parking lot. He exited the parking lot at 2:47 a.m. in a red pick-up truck.⁶⁷ At all material times, Constable McDonald owned a red 2020 Ford 150 pick-up truck.⁶⁸

⁶² *Agreed Statement of Facts*, at paragraph 5; CARD Binder, at page 91, *Statement of N.S.*, dated August 25, 2021, at line 116; CARD Binder, at page 105, *Statement of N.S.*, dated September 10, 2021, at line 141.

⁶³ *Agreed Statement of Facts*, at paragraph 7; CARD Binder, at pages 91 and 92, *Statement of N.S.*, dated August 25, 2021, at lines 116 to 118; CARD Binder, at page 143, *Statement of C.T.*, dated September 3, 2021, at line 240; CARD Binder, at page 166, *Statement of C.K.*, dated September 9, 2021, at lines 77 to 79.

⁶⁴ CARD Binder, at page 158, *Log of N.S.’s Facebook account*, with pictures of Constable McDonald’s profile; CARD Binder, at page 21, *Constable McDonald’s RCMP profile picture*.

⁶⁵ CARD Binder, at page 166, *Statement of C.K.*, dated September 9, 2021, at lines 77 to 79.

⁶⁶ CARD Binder, at pages 192 to 202, *Still images of CCTV video of the detachment*.

⁶⁷ CARD Binder, at pages 192 to 202, *Still images of CCTV video of the detachment*.

⁶⁸ CARD Binder, at pages 21 and 22, *Final Investigation Report*.

[104] Constable McDonald's residence was located to the south of the detachment. N.S.'s residence was northwest of the detachment.⁶⁹

[105] N.S. states that Constable McDonald called her.⁷⁰ The evidence confirms that, at 3:23 a.m., Constable McDonald called N.S. using his personal cell phone. That call lasted 3 min 24 s. While I recognize that cell phone tower data cannot provide a caller's exact location, it does place Constable McDonald at a location south to southwest of the detachment at the time of the call.⁷¹

[106] At 3:35 a.m., Constable McDonald placed a second call to N.S. using his personal cell phone. This call lasted 3 min 51 s. Cell tower data shows that the Constable McDonald was northwest of the detachment, approximately midway between the detachment and N.S.'s residence. Constable McDonald subsequently deleted the record of these calls from his phone.⁷²

[107] Also at 3:35 a.m., traffic camera footage shows a red pick-up truck, matching the one Constable McDonald was driving when he left the detachment, travelling north on a main road close to N.S.'s residence.⁷³

[108] At 4:14 a.m., traffic camera footage shows a red pick-up truck, matching the one Constable McDonald was driving when he left the detachment, travelling south on that same main road. The intersection at which the footage was captured is in close proximity to N.S.'s residence. The time elapsed between the traffic camera sightings is 39 minutes.⁷⁴

[109] The screenshot of the call record on C.K.'s phone is consistent with the evidence of all witnesses: N.S. would call them repeatedly, at all hours of the day. It shows missed calls at 3:09 a.m., 3:12 a.m., 4:14 a.m., 4:19 a.m., 5:52 a.m., 6:21 a.m., 6:34 a.m. and 6:35 a.m. Here, I note a gap of 1 h 2 min between 3:12 a.m. and 4:14 a.m.⁷⁵ This gap aligns with the timing of the phone calls and the evidence placing Constable McDonald near N.S.'s residence in this time frame.

⁶⁹ CARD Binder, at page 28, *Analyst Map*; CARD Binder, at page 208, *Extraction Report*.

⁷⁰ CARD Binder, at pages 109 and 110, *Statement of N.S., dated September 10, 2021*, at lines 269 to 280.

⁷¹ CARD Binder, at page 28, *Analyst Map*.

⁷² CARD Binder, at page 208, *Extraction Report*; CARD Binder, at page 30, *Final Investigation Report*.

⁷³ CARD Binder, at page 28, *Analyst Map*.

⁷⁴ CARD Binder, at page 27, *Still shot of CCTV traffic cameras*.

⁷⁵ CARD Binder, at page 163.

[110] Consequently, I find that the preponderance of the evidence establishes that Constable McDonald attended N.S.'s residence between 3:35 a.m. and 4:14 a.m. on August 15, 2021, and that he stayed for approximately half an hour.

What occurred during Constable McDonald's visit to N.S.'s residence?

[111] I agree with the Conduct Authority Representative that Constable McDonald's and N.S.'s accounts of what transpired during his visit at her residence cannot co-exist.

[112] N.S. told investigators that Constable McDonald called her in the early hours of August 15, 2021, and then attended her residence. She stated that he was in civilian clothes. She did not see the vehicle he was driving. She asserted that, while Constable McDonald was at her residence, he performed oral sex on her, they had sexual intercourse, and he ejaculated in her mouth.⁷⁶ She stated that the sexual acts were consensual and that Constable McDonald left shortly thereafter. She also said that, while at her residence, Constable McDonald made comments to the effect that he could get in a lot of trouble for what they had done.⁷⁷

[113] Constable McDonald admits that he attended N.S.'s residence, but he insists that it was only to check on her well-being, as required by RCMP Service Standards. While not directly advanced in Constable McDonald's Response, the Subject Member Representative submits that, in the alternative, Constable McDonald had forged a personal connection with N.S. and wanted to check on her out of a general sense of concern. Constable McDonald asserts that, while at N.S.'s residence, they had a conversation and he left. He denies engaging in any sexual acts with N.S.

[114] The Subject Member Representative has repeatedly put N.S.'s state of mind at issue by submitting that N.S.'s evidence is unreliable because she was, by virtue of being under the influence of alcohol or other medication, confused about what happened, or that she was delusional and fabricated the realization of a fantasy. The Subject Member Representative further submits that N.S.'s account of her interactions with Constable McDonald evolved over time. In this

⁷⁶ CARD Binder, at pages 94 and 95, *Statement of N.S., dated August 25, 2021*, at lines 208, 209 to 222; CARD Binder, at pages 104 and 105, *Statement of N.S. dated September 10, 2021*, at lines 101 to 122.

⁷⁷ CARD Binder, at pages 104 and 122, *Statement of N.S. dated September 10, 2021*, at lines 106, 107, 662 to 663.

context, the prior consistent statements and, in particular, the timing and manner in which disclosure has been made may be indicative of credibility and reliability.

Was N.S. mistaken about Constable McDonald's identity?

[115] The Subject Member Representative suggests that even if N.S. engaged in the sexual acts as described, she was mistaken as to the identity of the person she was with. Here, he submits that she “misidentified” Constable McDonald’s Facebook profile and her description of his clothing when he attended her residence. She described a surfer-style shirt, whereas the detachment video shows Constable McDonald in a black t-shirt with a design or logo on the front and back. He further relies on her misidentification of the officer who allegedly attacked her on August 21, 2021, and her inaccurate recollection of the events leading to her facial injuries. In sum, he argues that her intoxicated state rendered her unable to reliably identify Constable McDonald.

[116] The evidence does not support the Subject Member Representative’s assertion that N.S. misidentified Constable McDonald’s Facebook profile. To the contrary, Constable McDonald admits that he sent her a friend request using his personal Facebook profile. C.K. and C.T. have direct knowledge of the circumstances in which Constable McDonald’s friend request was accepted. Their evidence is consistent: C.K. showed N.S. the request and confirmed with her that the person in the profile picture was in fact Constable McDonald before accepting the friend request on N.S.’s behalf. Constable McDonald does not deny that the screenshot provided by C.K. is, in fact, his personal profile picture. It is also uncontested that when C.K. checked N.S.’s Facebook account again at 8 a.m. on August 15, 2021, Constable McDonald had “unfriended” N.S.⁷⁸ As noted in the investigation report, when N.S. showed Staff Sergeant Douglas Constable McDonald’s profile on August 25, 2021, she did not have the same access privileges and, consequently, the profile picture may not have been the same.

[117] Constable McDonald admits, and N.S. is consistent in her evidence, that he was in civilian clothing. She “thinks” he was wearing a surfer-style shirt.⁷⁹ The design on the black t-shirt seen on the CCTV video is not clearly visible. It may have evoked a “surfer style” to N.S. Moreover,

⁷⁸ CARD Binder, at page 169, *Statement of C.K., dated September 9, 2021*, at lines 160 to 163.

⁷⁹ CARD Binder, at page 113, *Statement of N.S., dated September 10, 2021*, at lines 378 to 380.

Constable McDonald left the detachment more than half an hour before I have found that he arrived at N.S.'s residence. He has not provided any account of his activities after he left the detachment. It is possible that he changed again at some point before he arrived at N.S.'s residence. In short, the evidence is ambiguous as to the specific style of shirt he was wearing and I do not find any inconsistency in this regard to be significant.

[118] There is no question that N.S. was mistaken about the origin of her facial injuries of August 21, 2021. She was consistent that she was physically assaulted by a police officer, and she initially misidentified that officer. However, at the time she sustained the injuries in question, she was profoundly intoxicated. She appeared to have lost consciousness and fallen face first on the sidewalk. On August 25, 2021, N.S. states that she cannot describe the officer who was hitting her, admitting that she was "pretty obliterated" at the time.⁸⁰

[119] It is not contested that N.S. was heavily intoxicated when Constable Alameer first located her at approximately 1:30 p.m. on August 14, 2021. However, some seven hours later, when she was released from hospital, she was coherent. Constable McDonald asserts that she was, in fact, sober when she was discharged from the hospital, and he relies on the audio recording as proof of his assertion.⁸¹

[120] While T.L. stated that N.S. was intoxicated on the evening of August 14, 2021, and the early hours of August 15, 2021, N.S. did not speak with T.L. about the incident until approximately one week later. Unlike T.L., C.T. and C.K. spoke with N.S. while she was in the police vehicle with Constable McDonald, outside the liquor store, on her walk home, and again when she was at home. C.T. was with her in person for her walk home and remained at her residence until approximately 11:30 p.m. that night.⁸² Both C.T. and C.K. indicated that N.S. was still under the influence, but coherent and, relatively speaking, not very intoxicated. This accords with N.S.'s own assessment of her level of intoxication on the evening of August 14, 2021.⁸³

⁸⁰ CARD Binder, at page 96, *Statement of N.S., dated August 25, 2021*, at lines 245 to 247.

⁸¹ Constable McDonald's Response, dated March 14, 2023, at paragraph 27.

⁸² CARD Binder, at pages 144 and 145, *Statement of C.T., dated September 3, 2021*, at lines 285 to 307.

⁸³ CARD Binder, at page 105, *Statement of N.S., dated September 10, 2021*, at lines 145 and 146.

[121] It is not contested that N.S. had access to six beers from the time that she was dropped off by Constable McDonald to the time that she spoke with C.K. the following morning. I accept N.S.'s evidence that six beers would only be enough to "even her out".⁸⁴ I also note that she indicated that she still had beer left while Constable McDonald was at her residence.⁸⁵

[122] Both C.K. and C.T. spoke with N.S., either on the phone or in person, early on the morning of August 15, 2021. Neither noted that she was significantly intoxicated at the time that she spontaneously disclosed her sexual encounter with Constable McDonald. Rather, they described her as happy and excited to tell them what took place.

[123] In light of the foregoing, I find that N.S.'s ability to observe and recall the events of August 14 and 15, 2021, is significantly more reliable than with respect to the events on August 21, 2021, when she sustained the facial injuries. Consequently, I do not find that her inability to accurately recall the events of August 21, 2021, impugns the credibility or reliability of her evidence with respect to the events of August 14 and 15, 2021 and in particular, her identification of Constable McDonald as the person who attended her residence and with whom she engaged in sexual acts.

Did N.S. concoct a fantasy?

[124] It is not contested that N.S. was attracted to police officers. N.S. was very open about this fact. She stated that she always wanted to have sex with a police officer.⁸⁶

[125] The Subject Member Representative argues that N.S. had a fixation with police officers and that Constable McDonald had been kind to her. He submits that she accordingly concocted a fantasy of having had a sexual encounter with Constable McDonald. In support of this position, the Subject Member Representative further submits that N.S.'s account of their interaction evolves over time.

⁸⁴ CARD Binder, at page 105, *Statement of N.S., dated September 10, 2021*, at lines 138 to 143.

⁸⁵ CARD Binder, at page 105, *Statement of N.S., dated September 10, 2021*, at line 139.

⁸⁶ CARD Binder, at page 104, *Statement of N.S., dated September 10, 2021*, at line 104.

[126] In assessing this argument, the timing of N.S.'s disclosures and her state of mind at that time are important.

[127] When N.S. first disclosed her sexual encounter with Constable McDonald to C.K. between 7:30 and 8 a.m. on August 15, 2021, N.S. described having sexual intercourse with Constable McDonald and that he performed oral sex on her. C.K. does not recall N.S. telling her that she performed oral sex on Constable McDonald.

[128] N.S. then spoke with C.T., in person, shortly after 8 a.m. C.T. reported that while she believed N.S. had alcohol in her system, she was not "intoxicated".⁸⁷ C.T. further stated that N.S. was "extremely excited that she had had sex with a police officer."⁸⁸ C.T. reported that N.S. described Constable McDonald's request that N.S. tell him a story, telling her to get undressed, performing oral sex on her, engaging in sexual intercourse, and ejaculating in her mouth.⁸⁹ C.T., who has known N.S. since their teens, is clear that N.S. does not enjoy receiving oral sex and that N.S. gave her "a really gross look" when explaining it.⁹⁰

[129] In both instances, N.S.'s account includes Constable McDonald leaving shortly after they finished engaging in sexual activity, and stating while he was there that he could get in trouble for what they were doing.

[130] I note that the Subject Member Representative drew attention to C.T.'s comment that N.S. was soiled and wondered about the likelihood of engaging in oral sex in that state. However, C.T. left N.S. alone in her residence at about 11:30 p.m. on August 14th. She has no direct knowledge of what N.S. did after that and, in particular, whether she showered before Constable McDonald arrived.

⁸⁷ CARD Binder, at page 137, *Statement of C.T., dated September 3, 2021*, at lines 77 to 85.

⁸⁸ CARD Binder, at page 137, *Statement of C.T., dated September 3, 2021*, at lines 55 to 59.

⁸⁹ CARD Binder, at page 137, *Statement of C.T., dated September 3, 2021*, at lines 72 to 75.

⁹⁰ CARD Binder, at pages 155 and 156, *Statement of C.T., dated September 3, 2021*, at lines 634 to 637.

[131] When N.S. provided her first statement on August 25, 2021, she reported that she and Constable McDonald had sex. She repeatedly stated that she is embarrassed and clearly did not want to go into detail about the encounter.⁹¹

[132] I do not accept the Subject Member Representative's suggestion that N.S. spent more time recounting the incident of August 21, 2021, than her interactions with Constable McDonald. The incident of August 21, 2021, was briefly mentioned at the outset of her statement of August 25, 2021. It was not mentioned again until N.S. asked the investigators to leave, at which point the investigator briefly redirected her attention to the incident of August 21, 2021. He then returned to ask further questions about the events of August 14 and 15, 2021.

[133] N.S. then stated that she did not want to press charges, that Constable McDonald was a nice man, and that she didn't want to "do this". She went on to say that, when she was 12 years old, she was sexually assaulted, spent two years going through the court process, and repeatedly stated that she didn't want to "do this again."⁹² The investigators advised that they would conclude her statement and she thanked them for understanding.

[134] In her second statement of September 10, 2021, N.S. again expressed her embarrassment and reluctance when asked to explain, in detail, what she did with Constable McDonald.⁹³ She said that they had sex, confirmed the investigator's understanding that Constable McDonald performed oral sex on her, and stated that he ejaculated in her mouth. She stated that she was grossed out about the latter.⁹⁴ She further stated that they were upstairs, in her bedroom and that they were naked. Finally, she reported that Constable McDonald repeatedly said "he could get in a lot of trouble for this" and that he left quickly after they were done.

[135] N.S. made detailed and spontaneous disclosures to her two closest friends within a few short hours of the alleged sexual encounter. The spontaneous nature of those disclosures, and repetition of the essential elements of the allegation provide context for assessing her credibility.⁹⁵

⁹¹ CARD Binder, at page 95, *Statement of N.S., dated August 25, 2021*, at lines 209 to 221; CARD Binder, at pages 104 and 105, *Statement of N.S., dated September 10, 2021*, at lines 101 to 122.

⁹² CARD Binder, at page 98, *Statement of N.S., dated August 25, 2021*, at lines 308 to 320.

⁹³ CARD Binder, at pages 104 and 105, *Statement of N.S., dated September 10, 2021*, at lines 111 and 117.

⁹⁴ CARD Binder, at page 113, *Statement of N.S., dated September 10, 2021*, at lines 375 to 377.

⁹⁵ *Dinardo*, at paragraph 39.

N.S.'s embarrassment and reluctance when speaking with investigators reasonably explains the more abbreviated account of the sexual acts at issue in her statements and, in particular, her first statement.

[136] There is no evidence to suggest that N.S. had ever lied about, or made up fantasies of engaging in sexual activity with a police officer or any other person. C.T. specifically states that N.S. had never done so.⁹⁶

[137] Moreover, I find it unlikely that N.S. would concoct a fantasy of a sexual encounter that included two sexual acts she did not enjoy, namely of Constable McDonald performing oral sex on her and of him ejaculating in her mouth.

[138] By contrast, Constable McDonald's account of the purpose of his visit to N.S.'s residence, as a duty-related or compassionate wellness check, strains credulity.

[139] As noted by the Conduct Authority Representative, and as I have found, the audio recording, in particular the segment in which Constable McDonald provides his business card, is indicative of reciprocal flirting.

[140] Constable McDonald asserts that N.S. had repeatedly requested that he add her on Facebook, and that he declined. He further asserts that he only told N.S. that he would add her on Facebook in order to encourage her to return home. Constable McDonald knew that C.T. was coming to meet N.S. and he asserts that he waited to make sure she was safe before leaving. Given that N.S. was in the care of C.T., there was no reason for him to actually send N.S. a Facebook friend request: the inducement was no longer necessary to ensure N.S. arrived home safely. I find his assertion that he did so "as he wanted to keep his promise"⁹⁷ to be implausible if he did not intend to pursue further contact with N.S.

⁹⁶ CARD Binder, at page 155, *Statement of C.T., dated September 3, 2021*, at lines 611 to 619.

⁹⁷ Constable McDonald's Response, dated March 14, 2023, at paragraph 17.

[141] Constable McDonald denies that he asked N.S. if he could come over. N.S.'s evidence on this point is ambiguous, but she does acknowledge that she may have asked him to come over. Her evidence indicates that she would have done so in a flirtatious manner.⁹⁸

[142] Regardless of whether Constable McDonald asked if he could come over, or was invited, it is clear that Constable McDonald is the one who initiated communications. At no point did N.S. initiate contact with Constable McDonald after she walked home from the liquor store. Rather, as stated by N.S., the objective evidence shows that he called her.

[143] Furthermore, the calls were placed by Constable McDonald after his shift. He was not acting in an operational capacity at that time.

[144] Constable McDonald offers no details of what was discussed in the two calls that he placed to N.S. in the early hours of August 15th, after his shift. Nor, as noted by the Conduct Authority Representative, does he indicate that N.S. said anything in those conversations that led him to believe an urgent, in-person follow-up was required.

[145] In his Response, Constable McDonald stated that N.S. asked him to come over to check in on her. Yet, as noted by the Conduct Authority Representative, he relied on the fact that C.T. accompanied N.S. home as evidence that he had tried to ensure N.S. got home safely. Additionally, Constable McDonald stated that N.S. told him that "she was not suicidal at all".⁹⁹ In short, even by his own evidence, Constable McDonald had no operational reason to follow up with N.S. within such a short period of time.

[146] Constable McDonald does not provide any evidence, or even an explanation of a change in circumstances that led to an urgent need to attend N.S.'s residence in the middle of the night, while off-duty, and in civilian clothes. I do not accept the Subject Member Representative's suggestion that he did so in order to avoid causing embarrassment to N.S.

[147] Nowhere in his Response, which is the only instance of his stated position, did Constable McDonald explain why, if a follow-up was in fact required by RCMP Service Standards or for

⁹⁸ CARD Binder, at page 104, *Statement of N.S., dated September 10, 2021*, at lines 101 to 104.

⁹⁹ Constable McDonald's Response, dated March 14, 2023, at paragraph 10.

other operational reasons, he did not advise a colleague or supervisor of his intent to attend N.S.'s residence, make any notes of his attendance, or pass the follow-up off to the next shift.

[148] The lack of any record of his visit to N.S.'s residence, if indeed an operational follow-up, is striking given that Constable McDonald felt it necessary and had the presence of mind to record his interactions with N.S. while transporting her in his police vehicle on the afternoon of August 14, 2021.

[149] Furthermore, in the context of the extensive flirting by N.S., which is clearly established, his stated reason for attending her residence without any notice or record of his actions is implausible. As noted by the Conduct Authority Representative, it is unlikely that a police officer would put themselves in such a compromising position.

[150] Consequently, when viewed in the totality of the evidence, I prefer N.S.'s evidence and, in particular, her account of the sexual acts as set out in her statements. I find that, while at her residence between 3:35 a.m. and 4:14 a.m. on August 15, 2021, Constable McDonald had sexual intercourse with N.S., performed oral sex on her and ejaculated in her mouth.

DECISION ON THE ALLEGATION

[151] Section 7.1 of the RCMP Code of Conduct states: "Members behave in a manner that is not likely to discredit the Force."

[152] The test for "discreditable conduct" under section 7.1 of the RCMP Code of Conduct requires the Conduct Authority to establish the following four elements 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) that the member's behaviour is likely to discredit the Force; and
- d) that the member's actions are sufficiently related to their duties and functions as to provide the Force with a legitimate interest in disciplining them.

[153] The acts that constitute the alleged behaviour are as follows: On August 14, 2021, Constable McDonald met N.S., a vulnerable person, in the course of his duties. While on duty, he

reciprocated N.S.'s flirtations. He provided N.S. with his personal phone number, and connected with her on Facebook. In the early hours of August 15, 2021, while off-duty, Constable McDonald placed two calls to N.S. and attended at her residence in civilian clothes. I have found that Constable McDonald attended N.S.'s residence between 3:35 a.m. and 4:14 a.m. on August 15, 2021, and that while there, Constable McDonald had sexual intercourse with N.S., performed oral sex on her and ejaculated in her mouth.

[154] The identity of the member is not in question. Constable McDonald admits to being with N.S. at the hospital, driving her to the mall near her residence upon her discharge, providing her with his personal cell phone number, speaking to her outside the liquor store, sending her a Facebook friend request, and attending her residence while off-duty in the early hours of August 15, 2021. For reasons already stated, I do not accept the Subject Member Representative's suggestion that N.S. was mistaken as to the identity of the person with whom she engaged in sexual acts in the early hours of August 15, 2021.

[155] It is evident that Constable McDonald's behaviour is likely to discredit the Force. I have found that N.S. was a vulnerable person whom Constable McDonald came to know in the course of his duties. As a member of the RCMP, Constable McDonald held a position of trust and authority. I have further found that at all material times, Constable McDonald knew that N.S. was a vulnerable person. In this context, there was a clear power imbalance. I agree with the Conduct Authority Representative that Constable McDonald crossed the boundary of professional behaviour expected of a member of the RCMP by providing his personal phone number, connecting with N.S. on Facebook, and attending her residence while off-duty in the early hours of August 15, 2021. That he also engaged in sexual acts with N.S., a vulnerable person, is particularly egregious and reprehensible behaviour. I find that his actions would, without question, cause a reasonable person, with knowledge of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, to view his actions as likely to bring discredit to the Force.

[156] I further agree with the Conduct Authority Representative that Constable McDonald used his position of trust and authority as a member of the RCMP to his personal advantage in order to facilitate his attendance at N.S.'s residence and while there, to engage in sexual acts with her.

Accordingly, I find that his behaviour is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

[157] In light of the foregoing, I find that Allegation 1 is established.

CONDUCT MEASURES

[158] Having found Allegation 1 to be established, I am required, per subsection 45(4) of the *RCMP Act* and with the *RCMP Conduct Measures Guide*, to impose “a fair and just measure that is commensurate to the gravity of the contravention, the degree of blameworthiness of the member, and the presence of mitigating and aggravating factors.”¹⁰⁰

Evidence

[159] As N.S. did not provide a Victim Impact Statement prior to her death, the Conduct Authority Representative provided the written impact statement of T.L., N.S.’s sister, which I read into the Record during this hearing.

[160] T.L. noted the trauma that N.S. had experienced in her life, from childhood to her death. She spoke of N.S.’s loving and caring nature, how she showed kindness to those around her; and of her love and dedication to her children.

[161] T.L. described how repeated trauma left N.S. unable to trust and living in fear. She wrote, in part:

[...] The one exception to her lack of trust was police officers. She had many dealings with first responders over the course of her life and was always treated with dignity and respect by police regardless of her condition at the time of her encounters. For this reason she felt they were the only ones she could be sure would never harm her. [...]

[162] T.L. described the direct impact of Constable McDonald’s actions on N.S. and the ensuing investigation:

¹⁰⁰ *RCMP Conduct Measures Guide*, at page 3.

[...] [T]his caused further trauma as she began experiencing severe anxiety and expressed how it was bringing her back to when she was subject to court processes related to the sexual assault she endured when she was a child. My sister was in a tail spin and the more she drank, the less she felt. She actually stated that she would rather die tha[n] have to relive that again. [...]

[163] T.L. described her own inability to sleep due to her fear for N.S. and her children's well-being. She noted that N.S. was calling her 10 to 15 times at all hours of the day and night due to her distress. This continued until October 10, 2022, when one of N.S.'s minor children found her deceased.

[164] Constable McDonald addressed me as the Conduct Board. He shared his lifelong desire to be a police officer and his pride at being a member of the RCMP. He explained how he had difficulty coping in 2021, primarily due to his separation from his support network and his experiences on duty. He stated that he failed to take care of his mental health and that he avoided being alone in order to avoid facing his thoughts.

[165] Constable McDonald expressed remorse for his poor judgment. He stated that he genuinely enjoyed meeting N.S. and that they connected on a personal level, but he recognized that he was in a position of authority and that she was a vulnerable person. He expressed remorse for how he failed N.S. as a client and the situation he placed her in as a result of his actions.

[166] Finally, Constable McDonald spoke about pursuing counselling in order to improve his mental health, and of his desire to continue to contribute as a member of the RCMP. He asked for the opportunity to prove to his family, the community and the RCMP that he has learned from his mistakes and encourage other members to take care of their own mental health.

[167] I note that this was unsworn evidence. I specifically advised the Subject Member Representative, in advance of this hearing, that it was Constable McDonald's choice whether to address the Conduct Board, or to give sworn testimony to which he would be subject to cross-examination. However, I also cautioned that unsworn evidence could not be given as much weight as sworn oral testimony.¹⁰¹

¹⁰¹ Summary of pre-hearing conference 2, dated April 13, 2023.

[168] Constable McDonald also provided the following documentary evidence:

- a) A medical note, dated April 5, 2023, confirming two diagnoses and prescribed medication. The note is three sentences long. The date on which the diagnoses were made is not provided. Nor is there any information about Constable McDonald's symptoms in or around August 2021 to date.
- b) A note from a counsellor, dated January 7, 2023, which is two sentences in length. It confirms that Constable McDonald has actively participated in individual counselling sessions since November 2021.
- c) Letter of support from Sergeant Jody Turpin, who served as Constable McDonald's supervisor. The note speaks to Constable McDonald's work ethic, expresses confidence in Constable McDonald's ability to learn from "this situation". Finally, Sergeant Turpin expresses their willingness to welcome Constable McDonald back to work.
- d) Constable McDonald's performance assessments for the fiscal years of 2019-2020, 2020-2021 and 2021-2022.
- e) Performance Log, dated October 12, 2020, recognizing Constable McDonald as part of a team of members who demonstrated composure in a difficult situation.
- f) Performance Log, dated March 22, 2021, recognizing a client's positive feedback. The client noted generally not having a positive view of police, but that Constable McDonald's professionalism and level of effort to resolve his complaint have changed his perspective.

Decision on conduct measures

[169] There are five principles that I must apply in assessing the appropriate conduct measures. First, it is well accepted that members are held to a higher standard of conduct, whether on- or off-duty.

[170] Second, the determination of an appropriate sanction involves, at its core, a balancing of interests: that of the public, of the RCMP as an employer, of the member to be treated fairly, and of those affected by the misconduct at issue. Fairness to the member requires, in part, for the imposed conduct measures to be proportionate.

[171] Third, I must apply the applicable authorities under the *RCMP Act*, namely subsection 45(4) and section 36.2. The latter provides, at paragraphs (b), (c) and (e), the following guiding principles:

- The conduct system is integral to maintaining the public trust in the administration of the RCMP.
- Members must be responsible and accountable for the promotion and maintenance of good conduct in the Force.
- Conduct measures are to be proportionate to the nature and circumstances of the contravention, and where appropriate, are to be educative and remedial rather than punitive.

[172] Implicit in the foregoing is the principle of parity of sanction. The *Conduct Measures Guide*, while not prescriptive, is intended to promote parity of sanction. However, the *Conduct Measures Guide* must be read in the context of evolving societal standards, as established by the jurisprudence, applicable policies and legislation.

[173] Similarly, while I am not bound by prior conduct decisions, they can provide some guidance with respect to the appropriate range of sanctions for a particular category of behaviour. A particular challenge is the weight to be given to cases that are resolved by joint proposals on conduct measures. I find that they are not as persuasive in terms of the assessment of the proportionality factors at issue.

[174] Fourth is the presumption of the lowest disposition. However, as with the principle that measures are to be educative and remedial rather than punitive, it should be noted that this presumption may be displaced where the seriousness of the misconduct or the public interest requires it.

[175] Fifth is the principle of proportionality. Counsel have identified proportionality factors (mitigating, aggravating or neutral), which I must weigh in order to determine an appropriate sanction that balances the competing interests and reflects the fundamental principles to be applied.

[176] Counsel have noted the guidance provided at pages 57 to 59 of the *Conduct Measures Guide* for various types of discreditable conduct involving sexual activity. I agree that none of the

categories of inappropriate sexual relationships examined in those sections are directly applicable to the facts of this case.

[177] However, these sections from the *Conduct Measures Guide* do identify a number of factors that are indicative of the seriousness of the behaviour. Many of them are present in this case, and include:

- a) N.S. was a member of the public.
- b) N.S. was a vulnerable person for reasons that included an addiction to alcohol. Her status as such was also known to Constable McDonald.
- c) Constable McDonald came to know N.S. as a result of his duties. In particular, following her apprehension under the *Mental Health Act* when, in an intoxicated and emotionally distraught state, she expressed an intent to commit suicide.
- d) Constable McDonald was in a position of trust and authority vis-à-vis N.S. As reflected in the evidence and in T.L.'s impact statement, N.S. held a particular admiration for, and trust in, first responders.
- e) Constable McDonald was in this position of trust and authority when he established a connection with N.S. as she was recovering in hospital.
- f) That relationship of trust and authority was still in place when he provided N.S. with his personal cell phone number, sent her a Facebook friend request, attended N.S.'s residence and engaged in sexual acts with her.

[178] Everything in Constable McDonald's interactions with N.S. was predicated on this relationship of trust and authority. As a result, there was an imbalance of power in their interactions.

[179] In light of the context in which their relationship was established and pursued, I do not find the fact that N.S. flirted with Constable McDonald, that she may have invited him over or her assertions that she consented to the sexual activity to be mitigating.

[180] Constable McDonald had a duty to remain professional in his interactions with N.S., a duty which was further heightened in the face of her status as a vulnerable person. He failed in this duty.

[181] His actions, by virtue of his position of trust and authority, were exploitive of a vulnerable person. By their nature, his actions are incredibly damaging to the public's confidence in the RCMP. They constitute a fundamental violation of the public interest.

[182] I agree with the Subject Member Representative that Constable McDonald had every right to defend himself against the allegation. I have not drawn any negative inference from a lack of admissions at any stage of the conduct process, or from the manner in which he has presented his evidence in this hearing.

[183] However, Constable McDonald took certain steps in the course of the events at issue that are indicative of an intent to conceal his actions. Notwithstanding his position that his attendance at N.S.'s residence was intended as a follow-up per RCMP Service Standards, or to check on her well-being, he did not tell anyone of his intent to do so. He did not make notes of his interactions with her. He unfriended her on Facebook shortly after leaving her residence and he deleted the record of the calls that he made to her in the early hours of August 15, 2021, from his personal phone.

[184] The profound impact of the misconduct, and the ensuing investigation, on N.S. was evident in her August 25, 2021, statement and in T.L.'s impact statement. N.S. was re-traumatized and it contributed to her despair prior to her death.

[185] I unequivocally reject the Subject Member Representative's suggestion that it is somehow possible to distinguish the misconduct from the investigation and that it was not the sexual activity itself, but rather the participation in the conduct process that re-traumatized N.S. The actions of Constable McDonald are the reason why N.S. was required at all to be engaged in this process and, in particular, the investigation of sexual misconduct.

[186] Having considered these factors in conjunction with the cases provided by the parties, I find that Constable McDonald's misconduct falls in the most aggravated range, namely that of dismissal. The question then is whether there are any factors that are sufficiently mitigating to warrant a lesser sanction that would, as submitted by the Subject Member Representative, meet the objectives of the conduct process, including specific and general deterrence.

[187] I accept that Constable McDonald has some remorse for his actions. However, I did not get the sense that he has an appreciation of the egregious nature of his actions. For example, he refers to having built a genuine connection with N.S., that he genuinely liked her. This is not in any way mitigating. Rather, as noted by the Conduct Authority Representative, it further exacerbates the breach of the trust on which this connection was based.

[188] I acknowledge that Constable McDonald has experienced challenges to his mental health and I recognize his continued efforts to take care of himself. However, I cannot ascribe significant weight to his unsworn evidence. I do not have any evidence before me, medical or otherwise, that establishes a diagnosis or even confirms that Constable McDonald was experiencing symptoms of a health condition in August 2021. Nor is there any medical evidence that would allow me to draw a nexus between the two diagnoses identified and his misconduct. Finally, while the note from the counsellor serves to confirm that Constable McDonald has engaged in counselling, it does not provide any indication of the reason for this treatment, his progress or his rehabilitative potential.

[189] I do not accept that the fact that witnesses were not required to testify as a result of the process jointly proposed by the parties is significantly mitigating. It was a strategic decision that benefited both parties. Furthermore, it cannot be assumed that the witnesses were not willing and able to testify.

[190] I recognize that Constable McDonald has had a good performance record in his two years of active service with the RCMP, that he has no prior discipline in that short time and that, on some level, he has the support of his supervisor. However, as acknowledged by the Subject Member Representative, it is not clear that Sergeant Turpin was fully aware of the nature of the allegation before me. Consequently, I do not find the performance evaluations and letter of support, even when considered with the fact that Constable McDonald has engaged in counselling, are particularly compelling evidence of Constable McDonald's rehabilitative potential.

[191] The Subject Member Representative drew my attention to conduct cases in which the subject members had engaged in repeated sexual misconduct, and suggested that, by contrast, this was an isolated and less egregious incident. However, I find that to be an oversimplification of what transpired. The misconduct at issue involved a progression of inappropriate engagement with

N.S. over the course of approximately 12 hours. As noted by the Conduct Authority Representative, there was ample time for Constable McDonald to reflect and “course correct” in the five to six hours between when he left N.S. outside the liquor store and when he called her after his shift. Even if I consider this an isolated incident, it involves such serious misconduct that it is, at best, a neutral factor.

[192] The Subject Member Representative has proposed alternate conduct measures:

- a) A transfer;
- b) Close supervision for a period of one year;
- c) A direction to undergo counselling as specified by a Health Services Officer;
- d) Ineligibility for promotion for a period of two years;
- e) A forfeiture of 40 days of pay;
- f) A forfeiture of 15 days of annual leave;
- g) A written apology to N.S.’s family; and
- h) A reprimand.

[193] While the proposed measures include several serious conduct measures, including a transfer and the forfeiture of pay, I do not find that the ineligibility for promotion is of much consequence. Constable McDonald has only two years of service. It is unlikely that he would be promoted in the next two years. While I recognize that the proposed forfeiture of leave constitutes a serious conduct measure under section 5 of the *CSO (Conduct)*, its impact is inevitably tempered by the fact that Constable McDonald has continued to accumulate leave while suspended from duty.

[194] The balance of the conduct measures proposed are remedial in nature. In the absence of medical evidence that establishes a link between the misconduct and a health condition, I cannot ascribe significant weight to a direction to undergo medical treatment. I also note that an apology only has significance if the family is open to receiving it and it is presented in a manner that is respectful of the family’s wishes. I do not have any indication that this is the case. Finally, I find the proposed reprimand to be of little effect given that this written decision will be available on-line.

[195] The Subject Member Representative submits that Constable McDonald has demonstrated an openness and ability to learn from his mistakes, and that he should be given the opportunity to do so.

[196] Even if I were to find that Constable McDonald has demonstrated rehabilitative potential, which I do not, I find that the Subject Member Representative's submissions and the proposed conduct measures undercut the seriousness of the misconduct, which is wholly incompatible with the execution of a member's duties and the position of trust that members hold. Consequently, they do not reflect the need for specific and general deterrence of such serious sexual misconduct. When considered in the totality of the circumstances, their acceptance would result in an inappropriate prioritization of Constable McDonald's interests over those of the RCMP as an employer, the affected persons and the public to such an extent that it is untenable. The public cannot be asked to bear the risk of this behaviour repeating itself.

[197] Consequently, in accordance with subsection 45(4) of the *RCMP Act*, I order Constable McDonald to be dismissed from the Force.

CONCLUSION

[198] I have found that Constable McDonald engaged in sexual acts with N.S., a vulnerable person whom he met in the course of his duties, wherein he held a position of trust and authority. A reasonable person, 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. Consequently, Allegation 1 is established.

[199] Constable McDonald's misconduct is egregious and had a profoundly negative impact on N.S. and her family. It is wholly incompatible with the execution of a member's duties and the position of trust that members hold. Public confidence in the Force would be undermined by Constable McDonald's continued employment. As such, his misconduct falls in the most aggravated range. The conduct measures proposed by the Subject Member Representative do not reflect the seriousness of the misconduct at issue. Nor are there sufficiently mitigating factors that would support conduct measures less than dismissal in this case. Consequently, I order Constable McDonald to be dismissed from the Force.

[200] Either party may appeal this decision by filing a statement of appeal with the Commissioner in accordance with section 45.11 of the *RCMP Act*.

Christine Sakiris
Conduct Board

October 16, 2023
Date