

Protected A

ACMT File Number: 2015-336180

Citation: 2015 RCAD 1



IN THE CONDUCT MATTER PURSUANT TO  
THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer, "E" Division

Conduct Authority

- and -

Constable Daniel Marshall, Regimental Number 57827

Subject Member

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**Conduct Board Decision**

Inspector James Robert Knopp, Conduct Board

March 14, 2016

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Ms. Julie Roy, Conduct Authority Representative

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Mr. Colin Gusikoski, Member Representative

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## Summary

The Subject Member, following a contested hearing, was found to have committed six contraventions of the Code of Conduct of the Royal Canadian Mounted Police (the “Code of Conduct”), all involving female clients. Four contraventions were relatively minor: two pertained to inappropriate and unauthorized use of police database systems and the subsequent disclosure of information to unauthorized persons; one pertained to an inappropriate comment, and one pertained to having spent an inappropriately disproportionate amount of time (two hours) on a relatively minor complaint, engaging in personal conversation and flirtatious behaviour which resulted in an invitation to return, off duty, for a consensual sexual encounter, which he did.

Two of the six contraventions were much more serious. One consisted of a breach of fiduciary duty. The Subject Member and his partner attended a call for service to the residence of a woman suspected of intending to commit suicide. They attended later that same day to check up on her, at which time they discovered her unconscious with an empty pill bottle nearby. Emergency

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Health Services were summoned and the Subject Member accompanied her to the hospital for admission. A few days later, he returned to her residence, off duty, and engaged in consensual sexual relations with her.

The second of the two serious contraventions consisted of failure to provide proper care for a seriously intoxicated woman who complained of having been sexually assaulted two hours earlier and was worried about vaginal bleeding. The Subject Member was alone with her, in a crowded parking lot in daylight hours, and he did not arrange for appropriate medical care. Instead, she pulled down her track pants, lay down on the back seat of the police vehicle and lifted her legs so the Subject Member could examine her genitalia. The Subject Member subsequently disobeyed his supervisor's instructions to follow up with her complaint of sexual assault.

No mitigating factors were argued, and a serious aggravating factor was the presence of prior and related informal discipline. The Subject Member was ordered to resign within fourteen days or be dismissed. He did not resign, and was dismissed from the Force.

**Introduction**

[1] A Notice of Conduct Hearing (the “Notice”) pursuant to Part IV of the *RCMP Act* was served upon the Subject Member July 16, 2015. The Notice, issued on June 9, 2015, by the Conduct Authority for “E” Division, contained nine allegations. A hearing was held in Vancouver, British Columbia from December 14 to 18, 2015, inclusive.

**Notice of Conduct Hearing**

[2] Following a Code of Conduct investigation, the Subject Member faced the following nine allegations:

**Allegation 1**

On or about the 25<sup>th</sup> day of September, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 1]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On September 25<sup>th</sup>, 2014, while on duty, you attended [Ms. A]’s residence in response to a complaint.
3. You transported [Ms. A] from her residence to a parking lot near the [place name] Community Hall.
4. [Ms. A] disclosed to you she had been sexually assaulted recently by her boyfriend. You asked [Ms. A] few questions about the sexual assault. [Ms. A] showed you her injuries and exposed her vaginal area to you.
5. [Ms. A] left your police vehicle. You then left the parking lot in your police vehicle.
6. Once back at the detachment you advised Cpl. Chris Robinson of [Ms. A]’s sexual assault allegation.
7. Cpl. Chris Robinson advised you that a follow-up was required with [Ms. A]. You did not conduct or cause to be conducted a follow-up with [Ms. A].
8. You authored a police report about your interaction with [Ms. A].

9. You failed to properly document and investigate [Ms. A]’s complaint of sexual assault.

**Allegation 2**

On or between the 26<sup>th</sup> day of September, 2014, and the 6<sup>th</sup> day of October, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 2]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On September 26<sup>th</sup>, 2014, while on duty, you attended [Ms. B]’s residence in response to a call for service related to P.B.’s mental health. During your intervention [Ms. B] talked with you about her mental health and her substance abuse issues.
3. You returned to [Ms. B]’s residence later that same day to conduct a follow-up. You found [Ms. B] unresponsive in her bedroom. Once [Ms. B] became responsive she advised you she had taken alcohol and medication. [Ms. B] was transported to the hospital by Emergency Health Services.
4. Between September 26<sup>th</sup>, 2014, and October 6<sup>th</sup>, 2014, you returned several times to [Ms. B]’s residence, while off duty and while on duty, and engaged in sexual and romantic conduct with [Ms. B] including, but not limited to sexual intercourse and kissing.
5. You engaged in romantic and sexual conduct with [Ms. B] that originated from your professional relationship with her.

**Allegation 3**

On or about October 5<sup>th</sup>, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 3]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On October 5<sup>th</sup>, 2014, [Ms. C] was sixteen years old and was residing in a group home. [Ms. C] operated cognitively as a child aged between 8 - 10 years old.

3. On October 5<sup>th</sup>, 2014, while on duty and in a marked police vehicle, you drove up to [Ms. C] and asked her for her name. [Ms. C] identified herself to you.
4. You then queried [Ms. C] on [Computer Aided Dispatch] CAD [Canadian Police Information Centre] CPIC and [Police Records Information Management Environment] PRIME.
5. You discussed information retrieved from an RCMP electronic information system with an unauthorized individual, namely, [Ms. C], for a non-duty-related purpose.
6. By discussing the information you made [Ms. C] feel uncomfortable. [Ms. C] requested that you stop talking about the information with her.

#### **Allegation 4**

On or about October 5<sup>th</sup>, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

#### **Particulars of [Allegation 4]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
2. On October 5<sup>th</sup>, 2014, [Ms. C] was sixteen years old and was residing in a group home. [Ms. C] operated cognitively as a child aged between 8 - 10 years old.
3. On October 5<sup>th</sup>, 2014, while on duty and in a marked police vehicle, you drove up to [Ms. C] and engaged in a conversation with her.
4. During the conversation, [Ms. C] asked you if she could ride in your police vehicle.
5. You answered that you only let people ride in the police car if they are naked, or something to that effect.
6. [Ms. C] responded that she would "pass". You laughed and drove away.

#### **Allegation 5**

On or about the 6<sup>th</sup> day of October, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

#### **Particulars of [Allegation 5]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On October 6<sup>th</sup>, 2014, [Ms. D] reported a stolen bicycle. While on duty, you attended [Ms. D]’s residence in response to her complaint.
3. While at [Ms. D]’s residence you discussed matters unrelated to your duties.
4. Later that day, while off duty, you returned to [Ms. D]’s residence uninvited, and engaged in sexual activities with [Ms. D], notably unprotected sexual intercourse.
5. You engaged in sexual conduct with [Ms. D] that originated from your professional relationship with [Ms. D].

**Allegation 6**

On or about the 6<sup>th</sup> day of October, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 6]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On October 6<sup>th</sup>, 2014, [Ms. D] reported a stolen bicycle. While on duty, you attended [Ms. D]’s residence in response to her complaint.
3. You conducted queries regarding [Ms. D] on RCMP electronic information systems available from your police vehicle.
4. You discussed information retrieved from RCMP electronic information systems with an unauthorized individual, namely [Ms. D], for a non-duty related purpose.

**Allegation 7**

On or between the 1<sup>st</sup> day of April, 2014 and the 1<sup>st</sup> day of September, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 7]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.



2. Between April 1<sup>st</sup>, 2014 and September 1<sup>st</sup>, 2014, while on duty, you attended [Ms. E]'s residence in response to a complaint.

3. You asked [Ms. E] to expose her breasts to you. [Ms. E] complied with your request and exposed her breasts to you.

**Allegation 8**

On or about October 6<sup>th</sup>, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 8]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.

2. On October 5<sup>th</sup>, 2014, [Ms. E] was arrested and brought to the Chilliwack Detachment.

3. On October 6<sup>th</sup>, 2014, [Ms. E] was released from the Detachment. While on duty and upon [Ms. E]'s release, you drove her to her residence.

4. You asked [Ms. E] to expose her breasts to you. [Ms. E] complied with your request and exposed her breasts to you.

**Allegation 9**

On or about October 10<sup>th</sup>, 2014, at or near Chilliwack, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**Particulars of [Allegation 9]**

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.

2. On October 9<sup>th</sup>, 2014, [Ms. E] made a complaint to the Hope RCMP detachment regarding your inappropriate conduct towards her.

3. On October 10<sup>th</sup>, 2014, you phoned [Ms. E] to discuss the complaint she made against you.

## **Preliminary Motions**

### **Withdrawal of Allegations 7, 8, and 9**

[3] At the outset of the hearing, the Conduct Authority Representative (the “CAR”) advised of the recent passing of the primary witness in Allegations 7, 8, and 9. Owing to her untimely death, those allegations were withdrawn.

### **Publication Ban and the use of Testimonial Aids**

[4] Given the nature of the allegations, the CAR requested the use of a screen preventing certain witnesses from seeing the Subject Member when testifying. In a related application, a publication ban was also sought. The Supreme Court of Canada case of *R. v. Levogiannis*, [1993] 4 S.C.R. 475 was offered in support. At paragraph 14:

The examination of whether an accused’s rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and courts’ duties to ascertain the truth. The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.

[5] The constitutionality of *Criminal Code* provisions surrounding the use of testimonial aids was confirmed by the Supreme Court of Canada in *R. v. S.(J.)*, (2008) BCCA 401, aff’d 251 C.C.C. (3d) 1 (S.C.C.), at paragraph 43:

I am satisfied that s.486.2 is merely the next step in the evolution of the rules of evidence. These rules seek to facilitate the admissibility of relevant and probative evidence from children and vulnerable witnesses while maintaining the traditional safeguards for challenging the reliability of their evidence. Rules of evidence must be construed in light of a criminal justice system that encourages the goal of “attainment of truth”. Over the years, the use of testimonial aids has been subject to ongoing procedural and evidentiary changes, which may continue to evolve. In this case, the changes are not in conflict with constitutionally guaranteed principles of fundamental justice.

[6] In support of her application for a publication ban, the CAR cited the RCMP Adjudication Board decision (2006), 31 AD (3d) 47, in which the Board held “the victim’s right

to privacy prevails over the media's freedom to inform the public of the identity of the victims. The breach is minimal, as the decision and the hearing are both public." The Supreme Court of Canada considered these principles in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at paragraph 15:

Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed by s. 442(3) is to favour the suppression of crime and to improve the administration of justice.

[7] The Member Representative (the "MR") opposed the publication ban in the absence of an overriding social objective, such as an intensely private medical diagnosis or doctor/patient confidentiality. The Supreme Court of Canada held that covertness is the exception and openness the rule in *Nova Scotia (Attorney General v. MacIntyre)*, (1982) CanLII 14 (SCC), which cited with approval the case of *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339 at page 359:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalance the inconveniences to the private persons whose conduct may be the subject of such proceedings.

[8] The cases cited by the CAR come from the criminal realm rather than the administrative, but the goal of "attainment of truth" at minimal impairment to the rights of the parties is common to both processes. The publication ban, prohibiting not only the publication of the names of the witnesses but the publication of any other information that may serve to identify them, was necessary in the present case to further the ends of justice. Similarly, I found the proposed use of a testimonial aid such as a screen in the hearing room to block the witness's view of the Subject Member to minimally impair his right to cross-examination.

## **Evidence and Testimony of Witnesses**

### **Allegation 1**

[9] Ms. A testified to having called 911 during the daylight hours of September 25, 2014, as a result of an injury she said had been sustained by her boyfriend. Emergency Health Services (EHS) was dispatched, as was the Subject Member, accompanied by another on-duty Chilliwack member, Constable McConachie. They arrived to find both Ms. A and her boyfriend extremely intoxicated. Ms. A's boyfriend was being abusive and uncooperative with EHS personnel. Ms. A, who testified to being frightened of her boyfriend, told the Subject Member, "Just get me out of here", which he did, removing her from the residence in his marked patrol car. Constable McConachie remained at the residence with EHS personnel.

[10] Ms. A told the Subject Member she wanted to be taken to a friend's residence, but she was unable to determine the precise address or the correct telephone number. In conversation with the Subject Member, she disclosed having been sexually assaulted by her boyfriend earlier that day. Apparently her boyfriend had inserted a cucumber into her vagina, and she told the Subject Member, "it hurts, it hurts, it might be bleeding".

[11] By this time, the Subject Member had arrived at a shopping mall parking lot which he described as being fairly crowded. He parked in a corner of the lot to open the rear door, as Ms. A was in the back seat of the police vehicle. The Subject Member described how she pulled down her track pants, laid on her back on the rear seat and lifted her legs in the air. The Subject Member said he looked at her vagina and could see no blood.

[12] The Subject Member testified to having offered Ms. A the opportunity to have a female RCMP member present, or the services of qualified medical personnel, or at least a referral to victim's services, all of which she refused.

[13] The Subject Member released her, having no grounds to detain her any further. He felt uncomfortable with what had transpired and returned to the detachment where he immediately relayed the foregoing to his supervisor, Corporal Robinson. The Subject Member testified to

Corporal Robinson's having told him, "we don't take complaints from drunk people", or words to that effect, and to "document the shit out of it". Corporal Robinson testified to a slightly different version of events.

[14] The Subject Member wrote a report, a matter of record in these proceedings. Occurrence Report 2014-3305, dated the same day as this occurrence, contains the following narrative:

On 2014/09/25 at approximately 1429 hours [the Subject Member] responded to an assist EHS complaint from [Ms. A] advising that her boy friend, [Mr. F], had been hit in the right arm from the blunt side of an axe. [Mr. F] was un co-operative with police and refused EHS. [The Subject Member] noted that both [Mr. F and Ms. A] were extremely intoxicated. [Ms. A] approached [the Subject Member] and whispered that she needed police to "get her out of here".

Members transported [Ms. A] from the scene to prevent a possible fight as [Ms. A] stated that she had just broke up with [Mr. F]. Members stopped a short distance from the residence and asked [Ms. A] exactly what was going on. [Ms. A] responded that she was going to her ex boyfriends and needed to get away from [Mr. F] as they had just broken up and she did not want to fight with him. [Ms. A] did not elaborate further and was Vague in her conversation.

[The Subject Member] continued to transport [Ms. A] to [location]. [The Subject Member] opened the rear of the police vehicle and was advised by [Ms. A] that she had been sexually assaulted. [The Subject Member] asked what do you mean and by whom. [Ms. A] stated it was [Mr. F]. [The Subject Member] asked when [Ms. A] paused for a period and stated yesterday. [Ms. A] was evasive when questioned further. [Ms. A] did not appear upset or distraught and appeared very casual and reluctant to speak, pausing after every few words.

[Ms. A] stated that [Mr. F] had put a cucumber in her vagina approximately two hours before police arrived at [residence]. [The Subject Member] asked what did you do when he did that? [Ms. A], after a short pause stated "I rolled over". [The Subject Member] asked [Ms. A] to elaborate as [the Subject Member] was not understanding the full version of the events. [The Subject Member] asked if [Ms. A] could prove she was assaulted in any way. [Ms. A] proceeded to remove her clothes and pants stating "my vagina hurts, can't you tell" and began pointing to bruises on her buttocks, arm and back area.

[The Subject Member] asked [Ms. A] is she would like to show a female officer [the Subject Member] offered a female officer to come to speak with

[Ms. A] on three occasions. [Ms. A] advised that she was fine and continued ignoring [the Subject Member]'s comments. [The Subject Member] advised [Ms. A] to stop removing her clothes [the Subject Member] advised [Ms. A] that he would be happy to investigate the assault allegation if [Ms. A] would come in and report it when she is sober.

[Ms. A] was satisfied with police response [Ms. A] asked for [the Subject Member]'s card and advised she would report it at a later date. [The Subject Member] documented the incident and advised his supervisor of the event.

[sic throughout]

[15] Corporal Robinson, in his testimony, agreed with the Subject Member's having advised him of the events on the day in question, but added he specifically instructed the Subject Member not only to fully document the events, but to follow up on her complaint, because any complaint of sexual assault must be properly documented and investigated.

[16] No additional steps were taken in this investigation by the Subject Member, and the file was concluded. It was eventually reopened and reassigned to a different Chilliwack member for follow-up, whereupon Ms. A was formally interviewed. No criminal charges were laid pursuant to this investigation.

## **Allegation 2**

[17] Both Constable Stewart of Chilliwack Detachment and the Subject Member testified to having been dispatched, on September 26, 2014, to the residence of Ms. B on September 26, 2014. The call for service was documented as being undertaken pursuant to the Mental Health Act. The origin of the call for service was that a mental health worker had reported to police that her client, Ms. B, had indicated she was going to kill herself.

[18] The members arrived at Ms. B's residence, where she lived alone, and spoke to her about the call for service. The Subject Member took the lead in the conversation. Ms. B suspected it was not her mental health worker but rather her ex-partner who had called, because they had recently split up. She said she was not harbouring suicidal thoughts. Constable Stewart and the Subject Member spoke to her for at least 45 minutes to ascertain whether or not they had the grounds to detain her under the provincial *Mental Health Act*. They ultimately decided they did not.

[19] Constable Stewart made particular mention of the Subject Member's compassionate approach throughout this call for service; he was impressed with the rapport the Subject Member was able to create with Ms. B on the subject of her post-traumatic stress disorder. Constable Stewart mentioned Ms. B's sense of humour, and all three of these witnesses described the mood upon leaving as being convivial. She hugged the Subject Member, who joked, "aren't you going to hug my partner, too?" Ms. B joked, "Oh, he's too cute" and hugged Constable Stewart. Later, the Subject Member joked with Constable Stewart about how he saw Ms. B try to pinch his bottom when they were leaving the room.

[20] At 3:10 p.m. that day, the Subject Member documented the occurrence as follows:

On 2014/09/26 at approximately 1500 [the Subject Member] responded to a complaint from [Ms. G] of Belwood health services out of Toronto advising that [Ms. B] of [address] had advised her that she was going to kill herself. Members attended and spoke to [Ms. B] who advised that she was in treatment for PTSD and had just returned home from Toronto to learn that her partner had left her. Members offered EHS and victim services which [Ms. B] refused. [Ms. B] advised that she was not suicidal in any way but did suffer from the effects of PTSD. Members observed no signs that [Ms. B] was going to harm herself. [Ms. B] had a written out life plan that she shared with members and advised that she was currently following it. [The Subject Member] did not apprehend [Ms. B]. mental health Act non-apprehension forms completed.

[sic throughout]

[21] Later that afternoon, the Subject Member discussed the event with Corporal Robinson, who recommended they return for a follow-up with Ms. B to ensure her well-being. At approximately 5:30 p.m., the Subject Member and Constable Stewart returned to Ms. B's residence. There was no response to their knocking on the front door. The Subject Member recalled the back door being ajar while on their earlier visit that day. They went around back and called inside. Since there was no answer, they entered and went upstairs where they discovered Ms. B on her bed, unconscious and unresponsive despite vigorous attempts to wake her. Constable Stewart discovered an empty pill bottle near Ms. B's bed. The members summoned EHS, and the Subject Member assisted in carrying Ms. B downstairs to the stretcher. EHS personnel had more success in waking her, and with the Subject Member present, she said she

had taken “a bunch of pills”. The Subject Member accompanied Ms. B in the ambulance to the hospital.

[22] The Subject Member documented his subsequent interaction with Ms. B that day as follows:

On 2014/09/26 at approximately 1730 hours [the Subject Member] attended [residence] and conducted a follow up with [Ms. B]. [The Subject Member] received no response at the door. [The Subject Member] and Cst Stewart entered the residence and located [Ms. B] in the upstairs bedroom. [Ms. B] was unresponsive and breathing. [The Subject Member] contacted EHS. [The Subject Member] administered a pain response test. [Ms. B] opened her eyes and did not speak. Members were calling out to [Ms. B] who finally advised she had taken sleeping pills and vodka. EHS arrived and transported to [Chilliwack General Hospital] CGH. [Ms. B] became more responsive. [The Subject Member] was advised by EHS that [Ms. B] was going to be admitted.

File [still under investigation] SUI to complete:

OR report

SIP entry

Mental health forms

follow up val

[sic throughout]

[23] Ms. B testified to an unannounced and uninvited return, a couple of days after the events of September 26, 2014, by the Subject Member. He was in civilian clothes and driving what appeared to be his personal vehicle. It was night time. She said she was surprised by his visit, because she had never heard of an RCMP member coming back, off duty, to check-up on things. She felt he was being very kind to go out of his way to do so.

[24] She invited him in, and they sat on the couch in the front room. They talked about many personal things, including hobbies; the Subject Member was interested in hunting and fishing. They talked about certain aspects of Ms. B’s psychological condition. They talked on the couch for approximately a half an hour or forty-five minutes. She said things got more heated; they kissed on the couch, and then went upstairs to her bedroom where they had sex. They lay in bed together afterwards for about twenty minutes. Ms. B said the Subject Member was not all that



talkative, so she played a sort of game with him where she would trace a letter on his chest and he would have to guess what the letter was. He left her residence at about 2 a.m.

[25] The Subject Member denied any such encounter and denied he ever had sex with Ms. B.

[26] On September 29, 2014, the Subject Member returned, alone, to Ms. B's residence, at approximately 11:00 p.m. He was in uniform and on duty, and remained for approximately thirty-five minutes. The Subject Member testified to having returned in order to obtain further information from Ms. B such as the name of her physician, her diagnosis and prescription, in order to complete his report. Upon his departure, he was asked by Ms. B whether or not she could hug him. He said yes, and she did. He said he hugged her back. She then asked if she could kiss him, and he said yes, so she did, once, on his cheek at the corner of his mouth. This encounter took place on her front porch, with the porch light on.

[27] Ms. B testified that within a few days she left a voice mail for the Subject Member, telling him she did not want to see him anymore. She did not report her sexual encounter with the Subject Member, and believes it may have been her former partner who reported it. She said she was angry at how the investigation took on a life of its own, as she had not initiated it.

### **Allegations 3 and 4**

[28] Ms. C is an individual with cognitive challenges who presents as a girl of perhaps ten years of age. In October of 2014, she testified to being in a parking lot waiting for a friend when the Subject Member, on duty, in uniform and alone in a marked police vehicle, drove over to her and parked beside her.

[29] Ms. C stated she was "terrified of cops" and considered running away, but did not. She recognized the Subject Member because he had attended to a residence she once lived at. This witness described how the Subject Member queried her name on the computer system in his police vehicle and began asking her questions about a sexual assault that had occurred years ago. He asked her if she had been sexually assaulted. She was very upset at hearing the Subject Member mention the name of the accused and talk to her about the incident, and she told him she

did not want to talk about it. She felt the Subject Member had no business asking her about this incident. Their conversation lasted less than half an hour.

[30] Before the subject Member left, Ms. C asked him for a ride in the back of the police vehicle, to which she states he responded, "I only let girls ride in the back who are naked." She replied "Well, O.K., I'm gonna pass on that" and he left. As he drove away, she took a picture on her iPod of the police vehicle. Later, she showed it to investigators who said it was too blurry. She therefore deleted it from her phone, but mentioned having sent it in an email message to the friend she was waiting for in the parking lot that day.

[31] Ms. H was a caregiver at the residence Ms. C was staying in at the time. Ms. H testified to a conversation she had with Ms. C about this incident, which Ms. C said had taken place "a couple of days earlier". Ms. H was very concerned about the nature of the interaction Ms. C apparently had with a police officer and phoned in a complaint on October 10, 2014. She told Constable Araki about the interaction with the Subject Member reported to her by Ms. C, described in the preceding paragraphs.

[32] Constable Araki confirmed in her testimony that Ms. H spoke to her on October 10, 2014. She also described the circumstances under which members would use a "Shriver's Test" to confirm a person's identity. If the person in question does not have reliable or acceptable identification with them, police database checks can be conducted on the name and date of birth provided. Information contained on police databases can be used for the limited purpose of confirming identity.

[33] The Subject Member, in his testimony, confirmed the October 5, 2014, meeting with Ms. C. He saw her coming around the corner of a building, and when she saw the police car she immediately turned to go the other way, which he found suspicious, so he went over to her to learn more. He confirmed he asked her name and date of birth which he ran on CPIC and PRIME. The police database checks conducted by the Subject Member on Ms. C are a matter of record, and confirm her involvement in a sexual assault investigation.

[34] The Subject Member said he asked her about the sexual assault in order to confirm her identity and for no other reason. As far as his response to her request for a ride in the back seat of the police car, he said it is his common practice, when people make such a request, to try and dissuade them by saying something like, “Oh, you wouldn’t want to ride back there. The only people who end up back there are drunks and naked people”. The Subject Member delivers these comments in jest, as a humorous way of deflecting such requests. He did not specifically recall having stated words to this effect to Ms. C when she asked for a ride in the back of his police vehicle.

### **Allegations 5 and 6**

[35] Ms. D reported her bicycle stolen, and the Subject Member responded to this call for service by self-dispatching himself to her residence at 4:44 p.m. on October 6, 2014. Ms. D showed him the place near her house where the bike had been stolen as well as the lock which had been broken. In their lengthy conversation, she also spoke to him about other complaints she had, some of which concerned the behaviour of neighbours.

[36] The Subject Member remained at Ms. D’s residence for over two hours. They talked about many things unrelated to her complaint or to his duties, including personal matters.

[37] In the course of this conversation, Ms. D expressed a curiosity as to whether or not information about her was contained on police databanks. The Subject Member, using the computers installed in his police vehicle, searched CPIC and PRIME. The database checks conducted by the Subject Member are a matter of record in these proceedings.

[38] The Subject Member showed Ms. D the computer. She did not read the computer screen herself. An independent witness confirmed she waited outside the police vehicle while the Subject Member sat in the driver’s seat conducting the checks. The Subject Member scrolled past and read out information on the screen to Ms. D verifying whether or not the database entries pertained to her. The checks were conducted using both Ms. D’s current surname as well as her maiden name, and as a result, Ms. D learned that her sister’s name was entered on the

database. At the conclusion of his dealings with Ms. D, the Subject Member gave her his business card containing an RCMP cell phone number she could reach him at.

[39] Ms. D testified to being flattered by the Subject Member's attentions; at one point he said she was beautiful. After he left, she called him at the number indicated on his business card. She invited him back to her residence later that same evening. He returned, off duty and in civilian attire, at approximately 11 p.m. Ms. D invited him inside, they talked for a while on the living room couch, and at some point had sexual intercourse on the couch. The Subject Member confirmed this version of events in his testimony with the only significant point of departure being he did not recall telling Ms. D she was beautiful.

### **Motion for non-suit**

[40] The MR brought a motion for non-suit with respect to Allegation 5.

[41] Paragraph 4 of the particulars specifically alleges the Subject Member's uninvited return to Ms. D's residence, which is clearly contradicted by Ms. D's testimony. Her invitation was clear, and the Subject Member accepted it, returning to her residence in civilian attire long after he was off duty. This does not amount to a violation of the Code of Conduct. The RCMP, in alleging misconduct, is engaging in moralization of off-duty behaviour. Had the Subject Member returned and simply enjoyed a cup of tea with Ms. D, it is doubtful the RCMP would have taken any interest.

[42] The Subject Member, in attending a call for service, acts in a fiduciary capacity, but the present circumstances do not indicate his having taken advantage of the situation, or used information to his own advantage. Taking a principled approach, there is no basis for an allegation of a violation of the Code of Conduct.

[43] The RCMP Adjudication Board decisions (2011), 8 A.D. (4th) 351 and (2012), 10 A.D. (4th) 237 both clearly articulate the requirement for a nexus to the employment situation. The interests of the Force are not engaged otherwise. The Alberta Law Enforcement Review Board, in *Lingl and Calgary Police* (1993) 2 ALERBJ 128 at 141, summarized its approach as follows:

In our free and democratic society it has long been recognized that employees (in public or private occupations) are entitled to a private life while off duty. During that time period people are at liberty to choose their activities and regulate their lawful conduct as they see fit so long as their employer is not damaged or harmed in some fashion. A *prima facie* presumption exists in favour of the off duty right to privacy, non-interference, and the absence of surveillance.

[44] The MR contended there is no nexus between the engagement of the Subject Member in a romantic encounter, off duty and in the privacy of Ms. D's home and the interests and responsibilities of the Force.

[45] The CAR disagreed with the Subject Member's position, citing as authority on the issue of nexus the Federal Court case of *Gordon v. Canada (Solicitor General)*, 2003 FC 1250 ("*Gordon*"). The facts of that case were similar to the present situation: a female approached a police officer and did not make a sexual assault complaint, but rather discussed her situation with him. She attended the police officer's house later that evening, whereupon the two had sexual intercourse. The member was ordered to resign. Similarly, the Subject Member, as a result of his duties, was in a position of trust towards Ms. D because she was a complainant in an ongoing investigation.

### **Decision on the motion for non-suit**

[46] A motion for non-suit is narrow, and in the present circumstances is based on the premise that the RCMP is moralizing about the sexual encounter, and in its essence, maintains there is no nexus between the sexual or romantic encounter and the Subject Member's employment situation.

[47] I disagree. There is an implicit fiduciary relationship between an on-duty police officer and a complainant, in this case, the victim of a theft. The notice of hearing does not have to be precise about the aspects of the fiduciary relationship alleged to have been compromised. I find Allegation 5 to be clear in alleging misconduct arising out of the Subject Member's attendance at a call for service and his subsequent actions. Particular 3 alleges "while at [Ms. D's] residence, you discussed matters unrelated to your duties" and Particular 5 alleges sexual conduct

originating out of a professional relationship. The testimony of Ms. D and the Subject Member provide a clear account of what happened on October 6, 2014, and why it happened. I am not making a ruling on the merits of the allegation at this stage. It remains to be argued whether or not the acts in question amount to professional misconduct.

[48] The motion for non-suit is therefore denied.

### **Submissions of the Conduct Authority Representative**

[49] The CAR opened her submissions by calling the Subject Member's credibility into question by virtue of both internal and external inconsistencies. Some of his explanations were far fetched. For example, he said the reason he spent so long at Ms. D's residence on a stolen bicycle complaint was that she kept talking in order to keep him there, and he wanted to provide good service to the client. Other explanations, such as his returning to Ms. B's residence at 11 p.m., alone and on duty to obtain medical information for his file was not reasonable. He knew she lived alone, he knew she was vulnerable, and this is simply not appropriate behaviour. The information he claimed to be seeking could have been obtained in a couple of minutes, yet he stayed for half an hour. A hug and a kiss ensued. His behaviour is more consistent with a romantic encounter. His credibility is compromised because his explanations are implausible.

### **The CAR's Submissions on Allegation 1**

[50] The Subject Member admitted many of the particulars pertaining to his interaction with Ms. A, and those particulars which were not admitted were proven by way of the testimony of witnesses. Corporal Robinson was clear with his instructions to follow up on her sexual assault complaint.

[51] The Subject Member knew the policy requirements surrounding sexual assault and domestic violence investigations, but showed blatant disregard for them. RCMP Policy dictates, among other things:

- Police intervention and action must address the victim's safety

- Victims must be encouraged to seek support from a Victim Service program
- Members have the responsibility to conduct a complete and thorough investigation, even when the victim is reluctant to cooperate
- The domestic violence risk summary template must be used
- Conduct neighbourhood inquiries
- Seize evidence, clothing, weapons
- Photograph the victim's injuries
- Ensure that a safety plan is in place for the victim and that you document steps taken
- In circumstances where the victim must leave the home, ensure the victim is provided transportation to a transition house or other safe location

[52] The Subject Member did none of these things. He may have briefly documented her bruising in his report, but caused no pictures to be taken of her injuries. Policy requires investigation of such complaints “promptly, thoroughly, and with sensitivity”, yet he left an extremely intoxicated sexual assault victim by herself in the middle of a parking lot.

[53] The third paragraph on page four of RCMP Adjudication Board decision (2003), 20 AD (3d) 230, contains commentary which is equally applicable the present circumstances:

The mandate of the Force consists in the enforcement of the laws of Canada, more specifically the Criminal Code of Canada. The Board considers that sexual assault is one of the most serious offences and it is the Force's duty to ensure that complaints in relation to such a serious crime must be diligently investigated in order to ensure public safety, as part of our mission, vision and values. By not acting properly, Constable Northrup has jeopardized the success of the investigation and neglected to provide proper response to the complainant. The conduct goes beyond the mere error in judgment that would have made the incident a performance issue. We are of the view that the conduct was sufficiently neglectful to constitute a discipline issue. Constable Northrup had several years of service and ought to have known what his duties were in the circumstances.

### **The CAR's Submissions on Allegation 2**

[54] The Subject Member explicitly adopted the testimony of Constable Stewart, and thus the only paragraphs of the particulars not admitted were those alleging sexual contact with Ms. B.

[55] On this point, submitted the CAR, the evidence of Ms. B is to be preferred over that of the Subject Member. She was a credible witness, and recalled intimate details of the sexual encounter. Furthermore, the Subject Member's having attended her residence a couple of days after the incidents, where he knows she lives alone, for the stated purpose of obtaining medical information is more consistent with a romantic encounter than with a follow-up investigation. The kissing and hugging on her front porch, acts which were admitted by the Subject Member, only serve to reinforce this theory.

[56] The breach of trust is clear in that the Subject Member used information about Ms. B, gained in the course of his calls for service on September 26, 2014, and used it to his personal advantage. He knew of her vulnerability and therefore had no business pursuing a romantic or sexual relationship with her.

#### **The CAR's Submissions on Allegations 3 and 4**

[57] There was not a great deal of discrepancy between the various witnesses. Ms. C provided a consistent account of events every time she was asked about them, which enhances her credibility as a witness. She had no business being interrogated by the Subject Member in the first place, and his having raised the matter of a sexual assault with her was completely unprofessional and inappropriate. It clearly made her feel uncomfortable, and rightly so. Even if the Subject Member were to be believed that his having mentioned the name of the alleged perpetrator of the sexual assault was a mistake, his statements to her regarding the sexual assault file were so careless and insensitive it amounts to discreditable conduct. In summary, the Subject Member's having made such inappropriate use of the police database systems amounts to discreditable conduct.

[58] With respect to the Subject Member's comment about naked people riding in police cars, he said his recollection of precisely what he said to Ms. C was unclear. Ms. C, on the other hand, recalled with clarity what he said to her, and her version of what was said never varied, every time she had occasion to repeat it. Her version is therefore to be believed. Saying such things to a young woman, when on duty and in uniform, is clearly discreditable conduct.



**The CAR's Submissions on Allegations 5 and 6**

[59] Ms. D's evidence on what transpired the afternoon and evening of October 6, 2014 was not contradicted. The CAR submitted Ms. D was a credible witness, and should be believed on all aspects of her testimony.

[60] The Subject Member attended her residence pursuant to her complaint of a stolen bicycle, and while the first portion of his stay was related to this and other complaints, he ended up spending a considerable amount of time discussing matters that were highly personal and unrelated to his duties.

[61] His return later that evening was not "uninvited" as alleged in particular 4 of Allegation 5. Ms. D clearly testified to her having invited him to return. She called him at the cell phone number he had given her on his RCMP business card. The Subject Member's having provided her with his cell phone number, and not just the file number of the stolen bicycle complaint, is more consistent with flirtation than with provided service to a client. He was "grooming" her for a further purpose, in this case, sex. His actions in this regard must be considered discreditable.

[62] There was no legitimate operational reason to perform the police database checks on Ms. D, and certainly no reason to share with her any of the information he obtained from conducting these searches. The Subject Member's having done so amounts to discreditable conduct.

[63] The CAR drew attention to the similarity between the various allegations. All interactions arose while the Subject Member was on duty and dealing with vulnerable women. The five women mentioned in Allegations 1 through 9 do not know one another, and all occurred within a couple of weeks in the Fall of 2014. The three allegations concerning Ms. E, although withdrawn owing to her untimely demise, form an important part of the pattern, and Ms. E's complaints of inappropriate behaviour should be considered, as they reinforce the remaining allegations. It is not a coincidence that all of these women are vulnerable to varying degrees, often owing to cognitive, psychological, or addiction issues.

**Submissions of the Member Representative**

[64] The MR submitted that the biased, unfair and incompetent manner in which the Subject Member's investigation was conducted prevented him from getting a fair hearing. The investigation report cannot be relied upon because of the inappropriate manner in which witness interviews were conducted. The investigators from the Professional Standards Unit, in questioning witnesses, discussed bad character and spread rumours and innuendos about the Subject Member. The word "predator" was used. In some cases, not only were the interviewers leading the witnesses, they were actually putting words in their mouths. They were telling the witnesses, essentially, "everyone believes this has happened". This was a witch hunt, not an investigation.

[65] Witnesses were being "cross-pollinated" with information from other witnesses. For example, Ms. C, in her testimony, recalled being told that the Subject Member's investigation included complaints from five other women. Ms. C was led to believe the Subject Member was a bad person, a "pervert". For the CAR to suggest this should not impact upon her credibility is outrageous.

[66] With respect to similar fact evidence, the case law is clear that there must be "strikingly similar" details as between the various incidents for the doctrine to apply. In the present case, the mere fact that the witnesses met the Subject Member while he was on duty is more coincidental than anything else.

[67] The burden of proof must be satisfied by way of sufficient clear, convincing and cogent evidence. The credibility of witnesses is key, and the Subject Member demonstrated he was credible and reliable. He had a far better memory of the events, and unlike the witnesses, could recall the events in detail. The discrepancies pointed out by the CAR are minor and irrelevant.

[68] With respect to the allegations pertaining to queries of individuals on RCMP electronic information systems, these queries were done because the Subject Member needed to confirm the identity of the individual. Discussing the information obtained with that individual is an

important part of what was referred to as a “Shriver’s Test”, conducted to confirm identity. This is a standard practice in policing, and not a breach of the Code of Conduct.

### **The MR’s Submissions on Allegation 1**

[69] Allegation 1 was engineered by investigators going over every minute detail of the Subject Member’s interactions with the public and expecting absolute perfection. Upon analysis, though, the Subject Member acted reasonably: when he learned of the sexual assault, he asked further questions. He repeatedly asked Ms. A if she wanted a female member present, or Emergency Health Services, all of which were declined. He knew he could not detain her. It was a warm, sunny day, so he let her out of the car, in her own community. The Subject Member assessed the situation appropriately. The file he wrote up was closed, which corroborates his view that he was under no direction to follow the matter up. It was only after the fact, when the Code of Conduct investigation was under way, that Corporal Robinson conveniently remembers he gave specific direction to follow it up with Ms. A. Corporal Robinson closed the file, even though it was his job to closely supervise the Subject Member at this point in time. It is therefore not credible that Corporal Robinson would have provided him with the direction he said he did, and Corporal Robinson is not to be believed on that point.

[70] The attending police officer must be satisfied there is a *prima facie* case of sexual assault before the applicable policy instruments are engaged. Constable Jeffries, who took the sexual assault investigation over, did not follow all of the components of the various policies either. In fact, at the conclusion of her interview with Ms. A, no further action is taken because the matter is not viewed as a sexual assault. This is no different from what the Subject Member did; he was alive to the possibility of a sexual assault, but was satisfied there was no sexual assault to be investigated.

### **The MR’s Submissions on Allegation 2**

[71] With respect to Allegation 2 concerning Ms. B, the investigation is so problematic that this entire allegation should be dismissed on that basis alone. Ms. B did not complain; the matter was brought forward by someone else, whom the investigators taint by painting the Subject

Member as a predator. By the time Ms. B is interviewed, Ms. B is talking the same way as the investigators, saying the Subject Member is a “predator”.

[72] In addition, Ms. B has a history of altering the truth when it suits her. For example, she once called the police to say her partner was being held at gunpoint by “some Hispanic person”. This was not true and had to do with problems in her relationship with her partner. Similarly, when her partner was leaving her, Ms. B called the police again, stating that her partner was stealing their dogs, which she admitted was also a fabrication of the truth. Other people interviewed stated “you never know when you can believe her”. As soon as her partner left her, Ms. B began inventing a story she told her family and her neighbours, a story about an RCMP constable who was interested in her. She was fabricating this relationship.

[73] The Subject Member testified to his many very obvious and distinctive tattoos, yet Ms. B, who was supposedly drawing on his chest for 20 minutes after sex, did not even notice them. This damaged her credibility, and calls into question the entirety of the story she concocted. This does not meet the threshold of clear, convincing and cogent evidence.

#### **The MR’s Submissions on Allegations 3 and 4**

[74] With respect to the allegations involving Ms. C, it is noteworthy she said she took a picture of the police vehicle, but this was never produced, bringing the veracity of her complaint into doubt. She contradicted herself quite plainly by stating how she hates cops and is terrified of them, but then she asks for a ride in the police car, which seems incredible. Concerning what might or might not have been said to her, the Subject Member was clear in describing the manner in which he dissuades people who ask for a ride.

#### **The MR’s Submissions on Allegations 5 and 6**

[75] The MR adopted his arguments on the motion for non-suit with respect to Allegation 5. Simply put, there is no nexus between the sexual contact with Ms. D and the Subject Member’s duties as a member of the RCMP to establish or even allege a Code of Conduct violation.

[76] With respect to Allegation 6, the MR submitted police database checks are a part of normal police duties. Discussing information obtained as a result of those checks is a normal part of what is referred to as a “Shriver’s Test”. The Subject Member cannot be disciplined for engaging in normal police practices.

### **Decision on the Allegations**

[77] The CAR and MR agreed with me on the difference, or lack thereof, in the substantive effect of the word “discreditable” as opposed to “disgraceful” conduct. Stated more precisely, the tests which used to be applicable to a finding of “disgraceful” conduct apply with equal vigour to the amended version of the *RCMP Act*.

[78] These tests, articulated by the RCMP’s External Review Committee (the “ERC”), have been considered and approved by higher courts and I find they continue to provide a useful framework. The first aspect of the test involves ascertainment of the identity of the member in question. At no point was the identity of the Subject Member in issue in these proceedings.

[79] The second aspect involves a determination of whether or not the facts alleged actually took place. The standard of proof applicable to administrative proceedings was a central issue in *F.H. v. McDougall* [2008] 3 S.C.R. 41 (“*McDougall*”). Proof must be made by way of sufficient clear, convincing and cogent evidence on the balance of probabilities.

[80] The third aspect consists of analysis of the acts found to have taken place, in the context of whether or not they bring the RCMP into disrepute. The applicable test for this analysis hearkens back to Lord Bowen’s invocation of “the reasonable man on the Clapham omnibus” and has been articulated by the ERC as being whether or not the reasonable person, with knowledge of all of the facts of the case, as well as knowledge not only of policing in general but policing in the RCMP in particular, would find the conduct in question to be disgraceful, and bring the reputation of the RCMP into disrepute.

[81] Both parties referred to Lord Devlin’s treatment of the word “disgraceful” in the case of *Hughes v. Architects Registration Council of the United Kingdom*, [1957], 2 All ER 436. I agree,

the word “disgraceful” is by no means a term of art, and must be given its natural and popular meaning. The acts must be seen, by the reasonable person, to be such as to disgrace the Subject Member in his capacity as a police officer.

[82] The reliability and credibility of witnesses was a central issue in this case. In my experience, the cases referred to by both representatives have proven to be a useful framework for analysis of witness credibility, namely, *Wallace v. Davis* [1926] 31 O.W.N. 202 (Ont. HC), (“*Wallace*”), *MacDermid v. Rice* (1939) 45 R. de Jur. 208 (“*MacDermid*”), and *Faryna v. Chorney* [1952] 2 D.L.R. 354 (BCCA) (“*Faryna*”).

The test in *Wallace v. Davis* is found at page 203:

[...] the credibility of a witness in the proper sense does not depend sole upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the firmness of his memory to carry in his mind the facts observed, his ability to resist influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind—all these are to be considered in determining what effect to give to the evidence of any witness.

In *MacDermid v. Rice*, Archambault, J. said at page 210:

[...] when the evidence of an important fact is contradictory....the Court must weigh the motives of the witnesses, their relationship or friendship with the parties, their attitude and demeanour in the witness box, the way in which they gave evidence, the probability of the facts sworn to, and come to a conclusion regarding the version which should be taken as the true one.

In *Faryna v. Chorney* the following test was set out by the court at page 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[83] The Supreme Court of Canada in *McDougall* had occasion to consider issues of witness credibility and reliability which were very relevant to the present proceedings. At paragraph 86:

[...] in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case.

[84] This is the case with Allegation 2, wherein Ms. B testified to a sexual encounter with the Subject Member which he vigorously denied ever took place. In *McDougall*, the Supreme Court of Canada understood the difficulties associated with assessing the credibility and reliability of witnesses in such circumstances. At paragraph 100:

100. An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. V. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeano[u]r. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization [para. 49].

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

[85] With respect to the manner in which the internal investigation was conducted and the manner in which witnesses were approached and interviewed, I am in partial agreement with the MR. It is unacceptable to “cross-pollinate” certain witnesses by feeding them information obtained from other witnesses.

[86] The MR quite rightly pointed out several instances of inappropriate conduct by the interviewer in the transcripts of the statements. Use of the word “predator”, for example, creates an impression in the mind of the witness and may colour their perception of events. This is a dangerous practice.

[87] My main concern, which I articulated in the course of the hearing, was the tendency for the internal investigators to tell witnesses about the existence of other complaints against the Subject Member. Ms. E, who unfortunately passed away only weeks before this hearing began, apparently said she was “told by the officer who interviewed her that [the Subject Member] had raped six women.” In her testimony, Ms. C made reference to having been told by the female police officer who interviewed her that she was not the only girl the Subject Member “had pulled over and profiled: in fact she was the fifth.”

[88] One of the reasons I summoned the witnesses to attend and provide oral testimony before me was to allow me the opportunity to evaluate the extent to which the witnesses were able to overcome whatever negative effect the internal investigators might have had. In every case, I am satisfied that each provided a frank and honest account of their respective interactions with the Subject Member. The things internal investigators may have told them about the Subject Member, including the fact that their complaints were not unique, did not adversely affect their credibility or reliability.

### **Decision on Allegation 1**

[89] I agree with the CAR in that the Subject Member admitted many of the particulars pertaining to his interaction with Ms. A. I also agree that those particulars which were not admitted were proven by way of the testimony of witnesses. I found Ms. A to be a credible and reliable witness, taking into account her state of intoxication at the time. By her own admission,



she had “about four beers” before the Subject Member arrived on the scene. This, coupled with the length of time this matter took to come to a hearing, offer satisfactory explanation for the few minor discrepancies which did occur. Her version of events did not change; every time she was asked, throughout the investigation and throughout her testimony, she was consistent in providing her version of what had happened and what was said.

[90] I preferred the evidence of Corporal Robinson over the evidence of the Subject Member on the issue of whether or not there were clear instructions to follow up on Ms. A’s sexual assault complaint. While it may be true that the degree of documented supervision may not have been what one might have expected in a situation such as this, namely, with the Subject Member operating under a Letter of Expectations, it is also true that major crimes such as sexual assaults need no explicit written instruction for a follow-up. The Subject Member testified to Corporal Robinson’s having told him, “we don’t take complaints from drunks”. I do not believe Corporal Robinson said anything of the sort, because where complaints of sexual assault are concerned, intoxicated victims are a distressingly recurrent fact. Such complaints must be taken seriously and appropriate care must be provided. I find likely that some form of verbal instruction was given to the Subject Member by Corporal Robinson, as per the latter’s testimony.

[91] The Subject Member does not have to be told about the policy requirements surrounding sexual assault and domestic violence investigations. He was aware of what had to be done, but instead he did nothing. The bruises Ms. A showed him supported her claim to having been assaulted. More to the point, she was prepared to and did in fact show the Subject Member her genitalia: she told him her vagina hurt, and was concerned she may be bleeding. She must have been serious about this to want to take down her pants in broad daylight in the middle of a crowded parking lot, but not even this bizarre turn of events was sufficient to propel the Subject Member along an appropriate course of action. It was highly improper of the Subject Member to conduct such an examination. By his own admission, only a doctor would be able to discover internal bleeding, and to a doctor is where the Subject Member should have taken her.

[92] The Subject Member made a cursory note of her bruising in his report, but caused no pictures to be taken of her injuries. Policy requires investigation of such complaints “promptly,

thoroughly, and with sensitivity”, yet almost completely to the contrary, he simply drove away from an extremely intoxicated woman who had complained of sexual assault occurring only two hours earlier, leaving her to her own devices in the middle of a parking lot.

[93] I agree with the CAR on the applicability of commentary contained in the RCMP Adjudication Board decision (2003), 20 AD (3d) 230. The Subject Member’s negligence cannot be construed as merely a performance issue. His insensitivity was such that the reputation of the Force was severely compromised, and I find it clearly a matter of professional misconduct rather than poor performance. As a result, I find Allegation 1 established in its entirety.

### **Decision on Allegation 2**

[94] I agree with the CAR, the Subject Member explicitly adopted the testimony of Constable Stewart. The only paragraphs of the particulars not admitted were those alleging sexual contact with Ms. B, which he vigorously denied.

[95] I prefer the evidence of Ms. B over that of the Subject Member. In finding her to be a credible witness. I took into account not only the steadfast manner in which she delivered her testimony from the witness stand, but also whether or not her story had the ring of truth to it. She recalled intimate details of the sexual encounter, and those details she could not recall, or other instances of minor discrepancy between her statements and her testimony are easily explained by both the passage of time and her medical condition. Her failure to recall his tattoos does not convince me she fabricated the story about her sexual encounter with the Subject Member.

[96] Ms. B was candid in her explanation of her current medical and psychological condition as well as her condition at the time of these events. Although it was argued she had a motive to lie (namely, either to lash out at her departed spouse or to attempt to kindle reconciliation), I do not find she lied. The motivation of the Subject Member to deny sexual contact was clear, and was brought into sharp relief with his frank assessment on the witness stand of why romantic or sexual involvement with such a vulnerable woman would be so ill-advised. I find, on this basis, that he clearly knew what he was doing was wrong when he engaged in a romantic pursuit of

her, culminating in a sexual encounter. She was vulnerable, and he was in a position of trust as a result of his duties.

[97] The Subject Member agreed he attended her residence a couple of days after the incidents, where he knew she lived alone, for the stated purpose of obtaining medical information for the file. Independent evidence confirms his attendance shortly before midnight, a visit lasting approximately half an hour. However, if medical information was indeed obtained by him, I did not see it documented anywhere, nor was his subsequent documentation of this supposedly important information referred to at any point in his testimony. The Subject Member's attendance, in uniform at her residence, late at night, is more consistent with romantic pursuit than with a follow-up investigation, especially when the visit concludes with kissing and hugging on her front porch.

[98] I agree with the CAR, the Subject Member used information about Ms. B, gained in the course of his calls for service on September 26, 2014, to his personal advantage. Ms. B was clearly moved by the Subject Member's attentions. The Subject Member knew of her vulnerability and had an obligation to respect this relationship of trust. His pursuit of a romantic or sexual relationship with her was highly inappropriate under the circumstances, and amounts to a breach of trust, a very serious violation of the Code of Conduct. Allegation 2 is established in its entirety.

### **Decision on Allegation 3**

[99] I found no great discrepancy between the various witnesses on these allegations. Ms. C's testimony regarding what she heard the Subject Member say and what she saw him do did not differ from the various accounts she provided other people at various points in time. This enhanced her credibility greatly. I agree with the uncontested suggestion she presents as an eight to ten year old, but I do not find these quite obvious cognitive challenges to have affected her credibility or reliability. She gave her evidence in a clear and forthright manner, and her story was not shaken on cross-examination. On the contrary, she was guileless and quite expansive on

cross examination about the various aspects of the encounter, such as the iPod photo she took, and the things said to her by internal investigators.

[100] There was some indication the Subject Member already knew Ms. C, from previous dealings with her. If this is true, then the only reason he would have had to conduct database checks would be to determine whether or not she was a runaway or to check for warrants, not to confirm identity.

[101] Even if I do allow for the need to conduct a “Shriver’s Test”, the Subject Member’s having chosen to raise the matter of the sexual assault was completely unprofessional and inappropriate, and amounts to discreditable conduct. This was unauthorized and inappropriate use of the police database system and Allegation 3 is established in its entirety.

#### **Decision on Allegation 4**

[102] I did find it somewhat odd that Ms. C initially said she was “terrified of cops” but still asked the Subject Member for a ride in the back of the police car, especially after he upset her so much by raising the sexual assault file with her. The Subject Member’s admission, though, that he may well have said something of at least passing similarity convinced me that Ms. C was telling the truth about what she thought she heard the Subject Member say.

[103] The phrase “I only let people ride back there who are naked” makes no sense whatsoever, and it is highly unlikely the Subject Member said these precise words. It is highly likely, on the other hand, that he did try to discourage her from wanting a ride by saying something along the lines of “Oh, you wouldn’t want to ride back there, the only people I put back there are drunks or naked people”. He said his recollection was unclear as to whether or not he said this, but I find he must have, otherwise she would not have come away from this encounter with a recollection of a phrase involving naked people in a police car.

[104] The Subject Member’s choice of words he sometimes uses to discourage free riders is a fairly salty turn of phrase, and reflects a certain dark humour associated with some of the less pleasant aspects of policing. There is a time and a place for colourful language and one must

gauge one's audience carefully. Ms. C is obviously of limited capacity; this is immediately apparent to any observer. I doubt the Subject Member would have chosen to use that particular turn of phrase with a ten year old child, and he should not have used it with Ms. C. The chances of his true meaning being misconstrued are significant, as I believe they certainly were in the present situation. His choice of words under the circumstances was unprofessional, and amounts to a violation of the Code of Conduct. Allegation 4 is established on this basis.

### **Decision on Allegation 5**

[105] Ms. D's evidence on what transpired the afternoon and evening of October 6, 2014 was not contradicted. I find Ms. D to be a credible witness, but certainly did not exhibit the same vulnerability as Ms. A, B or C. She is a very strong and proud woman. Her status, though, as a complainant, a victim of theft of property from her residence, places her in a somewhat vulnerable situation.

[106] The Subject Member attended her residence pursuant to her complaint of a stolen bicycle, and for the first few minutes, executed his duties properly in attending to her complaint. After this was accomplished, however, he spent almost the next two hours discussing matters that were highly personal and unrelated to his duties.

[107] Ms. D clearly testified to her having invited the Subject Member to return. His arrival at her residence later that same evening was not uninvited, as alleged in particular 4 of Allegation 5. She called him at the cell phone number he had given her on his RCMP business card. The Subject Member's having provided her with his cell phone number, and not just the file number of the stolen bicycle complaint, is more consistent with flirtation than with providing service to a client. This would have been more powerful had the conduct authority been able to prove the Subject Member wrote his cell phone number down on his business card, as opposed to simply handing over a card with his cell phone number already written on it. The evidence of Ms. D was somewhat ambiguous as to whether or not she saw him write it down for her, and insufficiently convincing for me to make a finding of fact on this particular point.

[108] Regardless, I agree with the theory of the CAR that the Subject Member was, in fact, spending his time grooming Ms. D for a romantic tryst, and I agree that this amounts to discreditable conduct. He was certainly not investigating a bicycle theft, at least not after the first five or ten minutes. I find he did, in fact, tell her she was beautiful, as per her testimony. This is purely flirtatious and had nothing to do with his duties. His actions in this regard bring the reputation of the Force into disrepute, and thus Allegation 5 is established.

[109] I find I must address the matter of the sexual contact, since it was the subject of much discourse in the hearing room and formed the basis for a motion for non-suit. Independent of every other fact, I do not find that responding to a romantic invitation off duty amounts to discreditable conduct. However, this event cannot be considered in a vacuum. It is a highly relevant aspect of the allegation, because it is proof that the Subject Member's efforts were rewarded. To be clear, the effort expended while on duty to establish and develop a personal relationship with Ms. D formed the gravamen of the misconduct alleged in Allegation 5, not the intimate encounter itself.

### **Decision on Allegation 6**

[110] I can find no legitimate operational reason for the Subject Member to have performed any police database checks on Ms. D, and certainly no reason to share with her any of the information he obtained from conducting these searches. Ms. D testified to discovering, in this fashion, that her sister's name appears in a police database. This is an unnecessary violation of privacy, and brings the Force into disrepute. Allegation 6 is therefore established in its entirety.

### **Decision on Conduct Measures**

[111] Having established contraventions of the Code of Conduct, I am statutorily obliged to impose appropriate conduct measures.

[112] Although these proceedings arise under recent amendments to the *RCMP Act*, the test for the imposition of an appropriate conduct measure remains unchanged from the test which applied to appropriate sanctions. First, the range must be considered, and then aggravating and

mitigating factors must be taken into account. The range of sanctions applicable to the misconduct involving Ms. A and Ms. B most certainly includes dismissal.

[113] The CAR did not offer a range of sanction on each and every contravention, and advised her client was seeking the Subject Member's dismissal from the Force as a global sanction, to be imposed on all six contraventions. She did not make submissions on each allegation other than to suggest that Allegations 1, 2 and 5 were worthy of dismissal on their own. I agree that dismissal is an appropriate conduct measure on Allegations 1 and 2. I disagree that dismissal is appropriate with respect to Allegation 5. Allegations 3 and 6, having to do with inappropriate and unauthorized use of police database systems, are not worthy of dismissal on their own, nor is the inappropriate comment to Ms. C forming the basis for Allegation 4.

[114] In support of dismissal, the CAR provided a series of cases to consider, including the Federal Court decision in *Gordon*. The Federal Court upheld the Commissioner's findings on the issue of personal relationships arising out of a duty-related fiduciary relationship. The CAR argued Allegations 2 and 5 both gave rise to a fiduciary duty, which the Subject Member exploited to his personal advantage. For the reasons I have provided above, the fiduciary duty is very strong in Allegation 2, and much less in Allegation 5.

[115] In the *Gordon* case, the Federal Court did not interfere with the Commissioner's analysis and findings of fact. The Commissioner's reasoning appears at paragraph 17:

I have found that the Appellant engaged in disgraceful conduct when he had sexual intercourse with Angela Thrasher at a time when he was in a position of trust with her as a result of his duties. Regardless of whether Ms. Thrasher consented to the sexual activity, the Appellant had an obligation to avoid becoming intimately involved with a person who had recently disclosed to him that she had been sexually assaulted in the past and had turned to the Appellant for advice on how best to handle this very difficult situation. At the time of the incident the Appellant knew that Ms. Thrasher was still trying to decide on how best to deal with the sexual assault. He should have known Ms. Thrasher could be in a vulnerable, confused position and that having sex with her would be inappropriate and would be a conflict of interest at the very least.

[...]

I agree with the position of the Respondent that the test for dismissal outlined in *Ennis v. Canadian Imperial Bank of Commerce* applies in this case. [...]

[116] The reference by the Commissioner to *Ennis v. Canadian Imperial Bank of Commerce* is cited at (1986) 13 CCEL 25 and referred to in the *Gordon* case. This is the passage in question:

The exact standard of misbehaviour to be shown varies with the nature of the business engaged in by the employer, and with the position of responsibility and trust held by the employee. Real misconduct or incompetence must be demonstrated. The employee's conduct and the character it reveals, must be such as to undermine or seriously impair the essential trust and confidence the employer is entitled to place in an employee in the circumstances of their particular relationship. The employee's behaviour must show that he is repudiating the contract of employment, or one of its essential ingredients.

[117] The Subject Member's full and frank acknowledgement on the witness stand of Ms. B's vulnerability, and how inappropriate sexual or romantic interaction would be as a result of her vulnerability, and further, his having lied about having had sex with her, are indicative of a fundamental character flaw, from which rehabilitation is impossible. His relationship with her under these circumstances, together with his having lied about it, are a fundamental breach of the Subject Member's contract of employment with the RCMP, and dismissal is warranted.

[118] Similarly, the Subject Member's callous and insensitive treatment of Ms. A reveals a degree of cognitive dissonance amounting to a breach of his contract of employment. He knew what had to be done when he received Ms. A's complaint of sexual assault, but he not only made a conscious decision not to follow the appropriate procedure, he made a conscious decision to do something bizarre and inexplicable, namely, examine the woman's genitalia in a crowded parking lot, in full daylight, in the back seat of his marked police vehicle. He knew he needed to follow up on her complaint of sexual assault but he did not. These actions were not the result of a one-time error in judgement. I find they are indicative of a fundamental character flaw so serious as remove rehabilitation from consideration.



[119] Dismissal can only be considered in the most serious of cases. The Ontario Court of Appeal had occasion to consider the circumstances under which dismissal is warranted in the case of *Trumbley and Fleming*, 1986, 29 DLR (4th) 557:

[...]A police discipline matter is a purely administrative internal process. Its most serious possible consequence makes it analogous to a discipline matter in ordinary employer/employee relationships, even though the procedure governing it is clearly more formal. The basic object in dismissing an employee is not to punish him or her in the usual sense of this word (to deter or reform or, possibly to extract some form of modern retribution) but rather, to rid the employer of an employee who has shown that he or she is not fit to remain an employee. [...]

[120] Considered on their own, the Subject Member's contraventions in Allegations 1 and 2 demonstrate he is not fit to remain an employee of the Force. The CAR argued for global sanction, an argument unopposed by the MR. I agree global consideration of all six allegations is appropriate because all six arose in a very short period of time: September 25, 2014 to October 6, 2014 is only a period of approximately two weeks. All six allegations involved female clients of varying degrees of vulnerability.

[121] Therefore, I will not consider the range of sanction applicable to each and every contravention, nor will I consider conduct measures applicable to those contraventions not calling for dismissal.

[122] No mitigating factors were argued, and indeed, I could find none. One aggravating factor was argued, and I agree it should be taken into account. The Subject Member has a prior record of discipline which is both recent and related to the misconduct forming the basis for this Notice. On August 8, 2011, the Subject Member received informal discipline consisting of a reprimand for two incidents of misconduct which took place in August of 2009. I feel these two incidents are worthy of a more fulsome description because of their distressing similarity to the events which gave rise to the present Notice.

[123] According to the written record of appeal of the informal discipline which was imposed, the Subject Member first of all "harassed [Ms. H] by, among other things, stopping her while driving and suggesting they meet at a hotel room after he completed his shift, as well as making

phone calls”. The second incident consisted of attending this same female client’s residence for a “non-duty related purpose”.

[124] In dismissing the Subject Member’s appeal, the adjudicator noted, in paragraph 9:

There is no issue with the facts that the Appellant called [Ms. H] on two occasions utilizing a RCMP telecommunications device signed out to him for duty related purposes. The Appellant failed to explain how he knew [Ms. H]’s cellular phone number and why he would make two phone calls to [Ms. H]. Although [Ms. H] did not speak with [the Subject Member] the contact was made to her personal property for no duty related purpose while he was on shift. Two calls are repetitive in nature and constitute harassing behaviour from an unwanted telephone caller. Further, additional contact was made after an original traffic stop for no police related reason. Further, following a citizen home, when unrequested and without justification other than some vague claim of being a danger to herself or from some other unknown person, is not a normal police duty nor appropriate.

[sic throughout]

[125] The second incident which resulted in the imposition of informal discipline was described on the record of appeal as having “attended [Ms. H]’s residence for non-duty related purpose”, and is elaborated upon in paragraph 10:

Regarding [this allegation], attending the residence of [Ms. H], no plausible explanation has been given by the Appellant to justify his actions. [Ms. H] and her spouse have indicated the Appellant wanted to speak to her regarding “a police matter” and there is no reason to challenge their credibility on this point. The fact remains the Appellant was there and has been unable to credibly justify his presence.

[sic throughout]

[126] The circumstances surrounding imposition of informal discipline sound familiar because they involve inappropriate behaviour with female clients. These events took place some five years before the events which gave rise to the present Notice, which is not a long period of time, especially when one considers the Subject Member only has seven years of service. The similarity of the Subject Member’s inappropriate interactions with a female client to his interactions with Ms. B and Ms. D lead me to consider his disciplinary record, although informal in nature, as being a serious aggravating factor in the present case.

[127] In the Subject Member's brief seven-year career he has put together a distressing disciplinary track record of inappropriate conduct involving female clients. To retain him as a member of the RCMP would be placing the public at risk. It would only be a matter of time before his inappropriate approach to dealing with female clients would result in additional violations of the Code of Conduct.

[128] The MR's only submission was to ask me to consider issuing an order to resign, rather than dismissing the Subject Member outright, which the CAR did not oppose. I therefore considered an order to resign as being tantamount to a joint submission, and I must stress that in its absence I would most certainly have dismissed the Subject Member.

### **Conduct Measure Imposed**

[129] The conduct measure globally imposed for all six contraventions of the Code of Conduct is an order to resign from the Force within fourteen days, in default of which the Subject Member will be dismissed.



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Inspector James Robert Knopp

March 14, 2016

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Date

Conduct Board