



ROYAL CANADIAN MOUNTED POLICE

IN THE CONDUCT MATTER PURSUANT TO THE

ROYAL CANADIAN MOUNTED POLICE ACT

BETWEEN:

Commanding Officer, "H" Division

(Conduct Authority)

and

Constable Shawn Greene
Regimental Number 54966

(Subject Member)

Conduct Board Decision

Inspector James Robert Knopp, Conduct Board

April 9, 2018

Representatives for the Conduct Authority, "H" Division:

Staff Sergeant Caroline Drolet

Civilian Member France Saint-Denis

Representative for the Subject Member:

Staff Sergeant Colin Miller

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SUMMARY

A Notice of Conduct Hearing pursuant to Part IV of the Royal Canadian Mounted Police Act, RSC, 1985, c R-10, as amended (*RCMP Act*) was issued February 1, 2017, by the Commanding Officer and Conduct Authority for “H” Division. The Notice contains five allegations; four of discreditable conduct, and one of failure to provide complete, accurate, timely accounts as they pertain to his responsibilities, duties and investigations. The Subject Member denied the five allegations. A conduct hearing was held in Sydney, Nova Scotia, from September 6 to 8, 2017, inclusively. The five contraventions were established and the Conduct Board ordered the Subject Member’s immediate dismissal.

INTRODUCTION

[1] On April 13, 2017, the Member Representative (MR) filed the Subject Member's responses to the five allegations. For the sake of clarity and completeness, the Subject Member's responses are reproduced in full, *verbatim*, to each of the particulars one by one and providing specific responses to each particular. The Subject Member's responses are in italics.

Allegation 1

On or about January 29, 2016, at or near St. Peter's, Nova Scotia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[The Subject Member] denies Allegation 1. [The Subject Member] admits some of the particulars, but does not admit that his actions amount to discreditable conduct.

Particulars

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "H" Division, St. Peter's detachment in Nova Scotia.

Admit.

2. On September 3rd, 2015, you were charged with Mischief, section 430(4) of the *Criminal Code* and Uttering Threats to cause death or bodily harm to [Mr. W.O.], contrary to section 264.1(1) of the *Criminal Code*.

Admit.

3. On September 3rd, 2015, you signed an Undertaking given to a Justice or a Judge in which you undertook to keep the peace, to be of good behaviour, to have no direct or indirect contact or communication with [Mr. W.O.] and to not beset, watch or follow from place to place [Mr. W.O.]. You also undertook to reside at [address].

Admit.

4. On September 15th, 2015, you were arrested and charged for two counts of failing to comply with the Undertaking condition of no direct or indirect contact imposed on September 3rd, 2015.

Admit.

5. On September 18th, 2015, you signed a Recognizance given to a Justice of the Peace in which you undertook to keep the peace, to be of good behaviour, to not contact or communicate with, or attempt to contact or communicate with directly or indirectly [Mr. W.O.] and to not beset, watch

or follow from place to place [Mr. W.O.]. You also undertook to reside with your parents at [address].

Admit.

6. On or about January 29th, 2016, you were still bound by the conditions of the Undertaking signed on September 3rd, 2015 and the Recognizance signed on September 18th, 2015.

Explain: The Recognizance replaced the Undertaking, so both were not in effect.

7. The vehicle normally driven by [Mr. W.O.] is known to you.

Explain: [Mr. W.O.] operates several vehicles, all of which are generally known to the Member. However, the Member was not certain that the vehicle in question belonged to [Mr. W.O.] until he exited the store.

8. On that day, you drove to the Needs Convenience Store (the store) located at 9982 Grenville Street in St. Peter's, Nova Scotia, and as you arrived near the store you observed and recognized [Mr. W.O.]'s truck parked outside the store.

Explain: [Mr. W.O.] operates several vehicles, all of which are generally known to the Member. However, the Member was not certain that the vehicle in question belonged to [Mr. W.O.] until he exited the store. The Member only knows for sure that it is [Mr. W.O.]'s truck if he sees the firefighter plates on it. This is further evidenced by the fact that the Member uttered the words "please be you", as he was not sure that it did belong to [Mr. W.O.].

9. You then said: "Please be you. [pause] Cocksucker" or words to that effect.

Explain: The Member submits that [Mr. W.O.] had been constantly doing things to provoke him, i.e., hand gestures, taking pictures of him, driving back and forth past him. It is for this reason that the Member purchased the dash cam for his vehicle. When the Member saw the vehicle he suspected that it might be [Mr. W.O.] and believed it may be an opportunity to capture footage of his behaviour. There was a pause and upon seeing [Mr. W.O.], he uttered to himself "Cocksucker" as that is his initial reaction when he sees [Mr. W.O.].

10. You observed [Mr. W.O.] coming out of the store.

Admit.

11. You purposely caused yourself to be in direct or indirect contact with [Mr. W.O.] or attempted to contact directly or indirectly [Mr. W.O.] by choosing to park your vehicle in front of the store as [Mr. W.O.] was leaving and walking down the ramp of the store.

Deny: As evidenced by the video, [Mr. W.O.] is well down the ramp of the store when the Member pulls in. By the time the Member exits his vehicle, [Mr. W.O.] is no longer in view of the camera. The Member does not come into contact with [Mr. W.O.] nor does he communicate with him in any way.

12. You observed that [Mr. W.O.] was looking at you as he was walking down the ramp of the store.

Admit.

13. You purposely caused yourself to be in direct or indirect contact with [Mr. W.O.] or attempted to contact directly or indirectly [Mr. W.O.] by exiting your vehicle and walking towards the store.

Deny: As evidenced by the video, [Mr. W.O.] is well down the ramp of the store when the Member pulls in. By the time the Member exits his vehicle, [Mr. W.O.] is no longer in view of the camera. The Member does not come into contact with [Mr. W.O.] nor does he communicate with him in any way.

14. You engaged in discreditable conduct by breaching the conditions of the Undertaking and the Recognizance.

Deny: The Member submits that he did not breach the conditions of his Recognizance (see particular 6 in relation to the Undertaking).

Allegation 2

On or about January 30th, 2016, inclusive, at St. Peter's, Nova Scotia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[The Subject Member] denies Allegation 2. [The Subject Member] admits some of the particulars, but does not admit that his actions amount to discreditable conduct.

Particulars

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "H" Division, St. Peter's detachment in Nova Scotia.

Admit.

2. On September 3rd, 2015, you were charged with Mischief, section 430(4) of the *Criminal Code* and Uttering Threats to cause death or bodily harm to [Mr. W.O.], contrary to section 264.1(1) of the *Criminal Code*.

Admit.

3. On September 3rd, 2015, you signed an Undertaking given to a Justice or a Judge in which you undertook to keep the peace, to be of good behaviour, to have no direct or indirect contact or communication with [Mr. W.O.] and

to not beset, watch or follow from place to place [Mr. W.O.]. You also undertook to reside at [address].

Admit.

4. On September 15th, 2015, you were arrested and charged for two counts of failing to comply with the Undertaking condition of no direct or indirect contact imposed on September 3rd, 2015.

Admit.

5. On September 18th, 2015, you signed a Recognizance given to a Justice of the Peace in which you undertook to keep the peace, to be of good behaviour, to not contact or communicate with, or attempt to contact or communicate with directly or indirectly [Mr. W.O.] and to not beset, watch or follow from place to place [Mr. W.O.]. You also undertook to reside with your parents at [address].

Admit.

6. On or about January 30th, 2016, you were still bound by the conditions of the Undertaking signed on September 3rd, 2015 and the Recognizance signed on September 18th, 2015.

Explain: The Recognizance replaced the Undertaking, so both were not in effect.

7. On or about January 30th, 2016, while off duty, you attended the RCMP St. Peter's detachment and reported having been threatened on January 29th, 2016 by [Mr. W.O.] (the report).

Admit.

8. On or about January 30th, 2016, you provided a video recorded statement (the statement) to Constable Stanley Boudreau, an RCMP police officer investigating your complaint, stating that on January 29th, 2016, as you were outside the store, [Mr. W.O.] had told you: "I'm going to rip your fucking head off" (the threat).

Admit.

9. You indicated to Constable Boudreau that at the time of the threat, you had exited your vehicle, were about to walk up the stairs and that [Mr. W.O.] had walked down the ramp of the store and was by the hood of his truck.

Admit.

10. To support your complaint, you provided Constable Boudreau with a CD-R recordable compact disc (the disc) which contained a copy of the recording from your dashboard camera.

Admit.

11. On or about January 30th, 2016, a *Criminal Code* investigation for Uttering threats was initiated against [Mr. W.O.].

Admit.

12. You made the report, provided the statement and the disc knowing the information you provided was false and misleading with intent to convince, deceive or mislead Constable Boudreau into entering upon a *Criminal Code* investigation of [Mr. W.O.] for Uttering threats.

Deny: The Member maintains that [Mr. W.O.] did threaten him.

Allegation 3

On or about January 30th, 2016, at St. Peter's, Nova Scotia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[The Subject Member] denies Allegation 3. [The Subject Member] admits some of the particulars, but does not admit that his actions amount to discreditable conduct.

Particulars

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "H" Division, St. Peter's detachment in Nova Scotia.

Admit.

2. On September 3rd, 2015, you were charged with Mischief, section 430(4) of the *Criminal Code* and Uttering Threats to cause death or bodily harm to [Mr. W.O.], contrary to section 264.1(1) of the *Criminal Code*.

Admit.

3. On September 3rd, 2015, you signed an Undertaking given to a Justice or a Judge in which you undertook to keep the peace, to be of good behaviour, to have no direct or indirect contact or communication with [Mr. W.O.] and to not beset, watch or follow from place to place [Mr. W.O.]. You also undertook to reside at [address].

Admit.

4. On September 15th, 2015, you were arrested and charged for two counts of failing to comply with the Undertaking condition of no direct or indirect contact imposed on September 3rd, 2015.

Admit.

5. On September 18th, 2015, you signed a Recognizance given to a Justice of the Peace in which you undertook to keep the peace, to be of good behaviour, to not contact or communicate with, or attempt to contact or

communicate with directly or indirectly [Mr. W.O.] and to not beset, watch or follow from place to place [Mr. W.O.]. You also undertook to reside with your parents at [address].

Admit.

6. On or about January 30th, 2016, while off duty, you attended the RCMP St. Peter's detachment and reported having been threatened on January 29th, 2016 by [Mr. W.O.] (the report).

Admit.

7. On or about January 30th, 2016, you provided a video recorded statement (the statement) to Constable Stanley Boudreau, an RCMP police officer investigating your complaint, stating that on January 29th, 2016, as you were outside the store, [Mr. W.O.] had told you: "I'm going to rip your fucking head off" (the threat).

Admit.

8. You indicated to Constable Boudreau that at the time of the threat, you had exited your vehicle, were about to walk up the stairs and that [Mr. W.O.] had walked down the ramp of the store and was by the hood of his truck.

Admit.

9. To support your complaint, you provided Constable Boudreau with a CD-R recordable compact disc (the disc) which contained a copy of the recording from your dashboard camera.

Admit.

10. On or about January 30th, 2016, a *Criminal Code* investigation for Uttering threats was initiated against [Mr. W.O.]

Admit.

11. You made the report, provided the statement and the disc knowing the information you provided was false and misleading with intent to convince, deceive or mislead Constable Boudreau into entering upon a *Criminal Code* investigation of [Mr. W.O.] for Uttering threats.

Deny: The Member maintains that [Mr. W.O.] did threaten him and that the Member was telling the truth when he made the report to Constable Boudreau.

12. You thereby engaged in discreditable conduct by breaching the conditions of the Undertaking and the Recognizance to keep the peace and be of good behaviour.

Deny: In addition to maintaining that [Mr. W.O.] threatened him, the Member reiterates that the Recognizance replaced the Undertaking, so both were not in effect.

Allegation 4

On or about December 1st, 2016, at St. Peter's, Nova Scotia, [the Subject Member] did not provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties, the conduct of investigations, contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[The Subject Member] denies Allegation 4.

Particulars

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "H" Division, St-Peter's detachment in Nova Scotia.

Admit.

2. On September 26th, 2016, Superintendent Peter Puszka signed a Code of Conduct Investigation Mandate Letter to investigate whether or not you committed the following contravention: "On or about January 30, 2016, [the Subject Member] did provide false information accusing [Mr. W.O.] of having committed the offence of uttering threats. It is therefore alleged that [the Subject Member] contravened section 8.3 of the Code of Conduct". You were served a copy of this mandate letter on October 7th, 2016.

Explain: A copy of this mandate letter was actually served on the Member on October 6th, 2016.

3. On November 23rd, 2016, Superintendent Peter Puszka signed an amended Code of Conduct Investigation mandate letter to investigate whether or not you committed the following contravention: "On or about January 30, 2016, [the Subject Member] did provide false information accusing [Mr. W.O.] of having committed the offence of uttering threats. It is therefore alleged that [the Subject Member] contravened section 8.1 of the Code of Conduct." You were served a copy of this mandate letter on December 7th, 2016.

Explain: A copy of this mandate letter was actually served on the Member on December 1st, 2016.

4. On or about December 1st, 2016, you provided a Code of Conduct subject member statement to Sergeant Gary White stating [Mr. W.O.] had threatened you on January 29th, 2016. You knew this information was false.

Deny. The Member maintains that [Mr. W.O.] did threaten him and that the Member was telling the truth when he provided the statement to Sergeant Gary White.

Allegation 5

On or about December 1st, 2016, at St. Peter's, Nova Scotia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[The Subject Member] denies Allegation 5. [The Subject Member] admits some of the particulars, but does not admit that his actions amount to discreditable conduct.

Particulars

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "H" Division, St. Peter's detachment in Nova Scotia.

Admit.

2. On September 26th, 2016, Superintendent Peter Puszka signed a Code of Conduct Investigation Mandate Letter to investigate whether or not you committed the following contravention: "On or about January 30, 2016, [the Subject Member] did provide false information accusing [Mr. W.O.] of having committed the offence of uttering threats. It is therefore alleged that [the Subject Member] contravened section 8.3 of the Code of Conduct". You were served a copy of this mandate letter on October 7th, 2016.

Explain: A copy of this mandate letter was actually served on the Member on October 6th, 2016.

3. On November 23rd, 2016, Superintendent Peter Puszka signed an amended Code of Conduct Investigation mandate letter to investigate whether or not you committed the following contravention: "On or about January 30, 2016, [the Subject Member] did provide false information accusing [Mr. W.O.] of having committed the offence of uttering threats. It is therefore alleged that [the Subject Member] contravened section 8.1 of the Code of Conduct." You were served a copy of this mandate letter on December 7th, 2016.

Explain: A copy of this mandate letter was actually served on the Member on December 1st, 2016.

4. On May 30th, 2016, you received a Probation Order in which you were ordered to comply with the following terms and conditions: To keep the peace and be of good behaviour. You acknowledged by your signature that you understood the meaning of this Probation Order.

Admit.

5. On or about December 1st, 2016, you provided a Code of Conduct subject member statement to Sergeant Gary White stating [Mr. W.O.] had threatened you on January 29th, 2016. You knew this information was false.

Deny: The Member maintains that [Mr. W.O.] did threaten him and that the Member was telling the truth when he provided the statement to Sergeant Gary White.

6. You thereby engaged in discreditable conduct by breaching the condition of your Probation Order by failing to keep the peace and be of good behaviour.

Deny: The Member maintains that [Mr. W.O.] did threaten him and that the Member was telling the truth when he provided the statement to Sergeant Gary White.

[*Sic throughout*]

TESTIMONY

[2] Three witnesses appeared at the conduct hearing, namely, the Subject Member, Constable Jeffrey MacFarlane, and Mr. W.O.

The Subject Member

[3] The Subject Member had known Mr. W.O. for several years before this incident. In the course of his duties, he had had occasion to use Mr. W.O.'s services as a tow truck driver from time to time to impound vehicles. The Subject Member joined the local volunteer firefighters at one point, where Mr. W.O. was also a volunteer, so they saw one another on these occasions as well. They were, at this point in time, on friendly terms with one another and socialized occasionally outside of their respective duties.

[4] The Subject Member came to dislike Mr. W.O. because of text messages he had seen between Mr. W.O. and the Subject Member's wife. These messages led him to believe that the two were having an affair.

[5] Reference was made on numerous occasions in this hearing to events in the summer and fall of 2015. Since these events are clearly and succinctly summarized in the *Record of Decision* dated May 3, 2016, pertaining to a Conduct Meeting held on April 22, 2016, and since the events of September 2, 2015, provide the necessary context for the events that are the subject of the

present *Notice of Conduct Hearing*, I will cite these earlier contraventions as they are particularized in the *Record of Decision* dated May 3, 2016 (references: *Code of Conduct Investigation Report* dated September 28, 2015; Conduct Meeting with the Subject Member held on April 22, 2016):

Alleged contraventions of the Code of Conduct

1. [The Subject Member], on or about the 2nd day of September 2015, at or near St. Peters in the Province of Nova Scotia, did behave in a manner that is likely to discredit the Force to wit: uttered threats to cause death or bodily harm to [Mr. W.O.], uttered with the intention of being taken seriously, contrary to section 7.1 of the RCMP Code of Conduct.
2. [The Subject Member], on or about the 12th day of July 2015, at or near St. Peters in the Province of Nova Scotia, did behave in a manner that is likely to discredit the Force to wit: did cause mischief to the property of [wife of the Subject Member, Ms. D.G.], contrary to section 7.1 of the RCMP Code of Conduct.
3. [The Subject Member], on or about the 12th day of September 2015, at or near St. Peters in the Province of Nova Scotia, did fail to comply with the condition of an undertaking imposed on him by a Provincial Court Judge on September 3, 2015 by contacting indirectly [Ms. D.G.] Thereby acting in a manner that could bring discredit to the RCMP, contrary to section 7.1 of the RCMP Code of Conduct.
4. [The Subject Member], on or about the 13th day of September, 2015, at or near St. Peters in the Province of Nova Scotia, did fail to comply with the condition of an undertaking imposed on him by a Provincial Court Judge on September 3, 2015 by contacting indirectly [Ms. D.G.]. Thereby acting in a manner that could bring discredit to the RMCP, contrary to section 7.1 of the RCMP Code of Conduct.

Particulars:

The four allegations in this matter all relate in some degree to problems within the marital relationship that [the Subject Member] had been involved in with [Ms. D.G.].

Allegation #1: [The Subject Member] became upset after reading text messages on [Ms. D.G.]’s cell phone that involved her and [Mr. W.O.] and a possible affair they may have been involved in. Upon reading these e-mails, [the Subject Member] became upset and left the residence and he confronted [Mr. W.O.] at his worksite. [Mr. W.O.] refused to get out of his vehicle as he felt he would have been assaulted based on the actions of [the Subject Member]. Later, [the Subject Member] called his wife [Ms. D.G.] and stated

“she had signed [Mr. W.O.]’s death warrant”. [Mr. W.O.] also received a phone call from his girlfriend that [the Subject Member] had been at their residence. [The Subject Member] was arrested on this matter and was released on an Undertaking by a Provincial Court Judge. In his conduct meeting, [the Subject Member] admitted to being upset with [Mr. W.O.] and drove to his worksite to confront him but [the Subject Member] denies threatening him.

Allegation #2: [The Subject Member] and his wife [Ms. D.G.] were having marital problems and on the night in question [Ms. D.G.] had been out with friends and upon her return [the Subject Member] wanted to talk about their marriage. [Ms. D.G.] did not wish to talk about their marriage and [the Subject Member] became upset and as he was leaving the bedroom he punched a hole in the wall. In his conduct meeting, [the Subject Member] admitted to being upset and punching a hole in the wall.

Allegation #3: As a result of the Criminal Code charge noted in allegation #1, [the Subject Member] was arrested and released on an Undertaking by a Provincial Court Judge and one of the conditions was not to have contact directly or indirectly with [Ms. D.G.]. On [September 12, 2015], [the Subject Member]’s mother delivered a letter to [Ms. D.G.] that was written by [the Subject Member]. In his conduct meeting, [the Subject Member] admitted to writing the letter but never asked his mother to deliver same to [Ms. D.G.].

Allegation #4: As a result of the Criminal Code charge noted in Allegation #1, [the Subject Member] was arrested and released on an Undertaking by a Provincial Court Judge and one of the conditions was not to have contact directly or indirectly with [Ms. D.G.] On [September 13, 2015], [Ms. D.G.] received an e-mail from an e-mail address she knew to be the personal e-mail address of [the Subject Member]. [Ms. D.G.] did not immediately open the message but did however open it in the presence of [Constable] MacKay during her witness interview into the Breach of Undertaking investigations. The e-mail was sent by [the Subject Member]. In his conduct meeting, [the Subject Member] admitted to sending the e-mail to [Ms. D.G.].

During the conduct meeting you were open and honest that at the time of these allegation you and your wife [Ms. D.G.] were having serious issues in your marriage. Also, you admitted your actions in all of the allegations except for the fact that you did not directly threaten [Mr. W.O.].

Findings:

I have carefully reviewed the information made available to me in the investigation report and the representations you provided during the conduct meeting with you on [April 22, 2016]. I find that allegations #1, #2, #3, and #4 are established on the balance of probabilities. I base my findings on the statements provided by the witnesses, confirmation provided in the

investigational report and through your admissions during the conduct meeting. I note that your actions in relation to allegations #1, #2, #3, and #4 occurred during a time of personal stress in your marriage and during a time in which you were and continue to deal with personal health issues.

Your actions in relation to uttering threats, causing mischief to property and failing to abide by an Undertaking issued by a Provincial Court Judge on two occasions are serious matters and is clearly not the actions expected of an employee of the Royal Canadian Mounted Police and will not be tolerated.

[*Sic throughout*]

[6] In the remainder of this document, the conduct authority went on to assign conduct measures on all four allegations.

[7] After the events of September 2015, the Subject Member was released on an Undertaking and later on a Recognizance dated September 18, 2015. He testified to his knowledge of being under criminal charges for mischief and for uttering threats of death or bodily harm to Mr. W.O. at the time of the events described in the *Notice of Conduct Hearing* as having occurred on January 29, 2016.

[8] The Subject Member testified that there was no confusion, ambiguity or uncertainty about the terms of the Recognizance dated September 18, 2015. He testified that he knew he was not to attempt to have any contact with Mr. W.O. He testified to having mounted a dash camera in his vehicle a day or two before the events in question on the night of January 29, 2016, because he said Mr. W.O. was constantly gesturing at him and taunting him and he said he wanted to capture video evidence of this activity.

[9] On the evening of January 29, 2016, the Subject Member was cooking dinner for his children and wanted to run out and pick up something to drink with dinner, so he went to the Needs Convenience Store to pick up some pop. He testified to this being the only convenience store in town. There was a fairly heavy snowstorm, so there were not many cars on the road. As he approached the store, there was only one truck in the parking lot, which he recognized as possibly being one of the trucks regularly driven by Mr. W.O.

[10] As he indicated in his response to the allegations, the Subject Member said “Please be you”, meaning “please be Mr. W.O.”. A couple of seconds later, as Mr. W.O. is seen walking out of the front glass door of the store, the Subject Member said “Cocksucker”, because he does not like Mr. W.O. and that is the first word that comes to mind when he sees him. He testified to this being the precise moment he knew the truck belonged to Mr. W.O. In his testimony, the Subject Member said that Mr. W.O. was “the last person he wanted to see”.

[11] Mr. W.O.’s truck was parked near the lower reaches of the handicapped ramp leading up to the front door of the store. The Subject Member parked his car directly in front of the stairs. He got out of his car and went up the stairs as Mr. W.O. walked down the handicapped ramp towards his truck. As he was walking up the stairs and as Mr. W.O. got to the front of his truck, he testified to having heard Mr. W.O. say: “I’m going to rip your fucking head off.”

[12] The Subject Member got angry when he heard this, but he said he did not react to it. He just went straight into the store and went about his business. He testified to being so angry inside the store that his fists were clenched so tightly they hurt. When he got to the cash register with his purchases he realized that he had forgotten his wallet on the front passenger seat of his car, so he left the store to go get it. That is when he saw Mr. W.O. pulling away in his truck, fishtailing up the road.

[13] The Subject Member completed his purchases and got back into his car. He drove to the Detachment to make a complaint, but it was locked and there did not appear to be anyone there. He phoned the Detachment number and got a voice mail message. He did not make any notes, not on the evening in question or at any other time.

[14] The Subject Member testified to telling a friend, Ms. E.M., about what had happened immediately after he got home that evening. He testified to not having told investigators about this conversation with Ms. E.M.

[15] The Subject Member went to the Detachment the next day and reported to Constable Stan Boudreau that Mr. W.O. had threatened him by saying: “I’m going to rip your fucking head off.” He offered to download the video from his dash-mounted camera (which he later did), and told

Constable Boudreau about the presence of the surveillance cameras at the Needs Convenience Store.

[16] After the matter became a Code of Conduct investigation, the Subject Member repeated this version of events to Sergeant Gary White on December 1, 2016.

Mr. W.O.

[17] Mr. W.O. was born in St. Peters and grew up there. He operates heavy equipment and a tow truck from time to time, which is how he came to meet the Subject Member, as he would get called out from time to time by Detachment members to assist with vehicle removal.

[18] Mr. W.O. said he was friends with the Subject Member and his wife, Ms. D.G., and socialized with them. He said that he eventually did have a brief affair with Ms. D.G., but as of September 2015, his relationship with Ms. D.G. may have been flirtatious but not intimate.

[19] Mr. W.O. testified to being aware of the criminal charges laid against the Subject Member as a result of the events of September 2015.

[20] Ms. D.G. and Mr. W.O. became sexually intimate at some point in time after the events of September 2015. This relationship did not last long and they were no longer intimate as of late January 2016, which is when the events unfolded that resulted in the present *Notice of Conduct Hearing* against the Subject Member.

[21] Mr. W.O. testified to having had feelings for Ms. D.G. and his not liking the way the Subject Member was treating her or the children of the marriage. He testified to a concern he held at the time about the possibility that Ms. D.G. might choose to go back to the Subject Member.

[22] After what happened in September 2015, Mr. W.O. tried to avoid the Subject Member at all costs. He testified to this being an unpleasant way to have to live, given this was his home town. He still had to do business here, but he now had to look around every corner to ensure that the Subject Member was not present somewhere.

[23] Mr. W.O. testified to receiving text messages from his girlfriend from time to time about the Subject Member's whereabouts. He said that this was done in an effort to alert him to the Subject Member's whereabouts so he could avoid going there. The text messages were not produced to investigators, nor were they entered into evidence at these proceedings.

[24] Mr. W.O. testified to a clear recollection of the events of the evening of January 29, 2016. He had finished some tow calls to which he had been dispatched as a result of the heavy snow. On the way home, he stopped into the Needs Convenience Store to buy a lottery ticket. He chatted with the cashier, with whom he was friends. As he was leaving the store, he saw the Subject Member drive up in his vehicle. Mr. W.O. said nothing to him and walked down the ramp towards his truck. He testified to watching the Subject Member out of the corner of his eye as he did so. Mr. W.O. did not stop walking until he got to the door of his truck and testified to saying absolutely nothing to the Subject Member. He got in his truck and drove home.

[25] Mr. W.O. soon became aware of the complaint made by the Subject Member and provided a statement when he was asked to do so. He also underwent a polygraph examination. His understanding is that he passed the polygraph exam.

[26] Mr. W.O. denied ever having made an obscene gesture in the Subject Member's direction or having goaded him or taunted him in the manner testified to by the Subject Member.

Constable Jeffrey MacFarlane

[27] Constable MacFarlane was one of the investigators assigned to the Subject Member's complaint against Mr. W.O. One of the investigative steps was to ascertain whether the various video surveillance cameras at the Needs Convenience Store captured relevant video footage. Constable MacFarlane viewed all of the footage available from all of the cameras in the store. The Subject Member's and Mr. W.O.'s presence at the store was recorded by cameras inside the store, and this footage was downloaded. There is one camera mounted on the outside of the store facing onto the entrance ramp, front stairs and parking lot. This data would have been useful as this was where the alleged incident took place, according to the Subject Member; but due to the heavy snowfall that evening, the images recorded by the camera were blank. The screen was

black because the lens of the camera was obscured by snow. Constable MacFarlane did not consider the blank data to be of any use so he did not download anything from this outside camera.

[28] Constable MacFarlane agreed that had this outside camera been able to record the activities of both the Subject Member and Mr. W.O. outside the store, the resulting video footage would likely have been useful in determining whether Mr. W.O. had threatened the Subject Member.

[29] In cross-examination, it was suggested that Constable MacFarlane was biased in his approach to this investigation, because he never believed the Subject Member's claim in the first place. Constable MacFarlane denied this and maintained that he conducted a thorough and impartial investigation. Constable MacFarlane was aware of the Subject Member's history with Mr. W.O., adding that it was common knowledge among members at the Detachment. The Detachment had received numerous complaints involving the Subject Member and Mr. W.O.

[30] Constable MacFarlane took a warned statement from Mr. W.O., in the kitchen of Mr. W.O.'s residence. He denied that there was anything untoward in this, as he had insufficient grounds to make an arrest and wanted to get Mr. W.O.'s side of the story. In the warned statement, Mr. W.O. acknowledged having seen the Subject Member pull up in front of the store and get out of his car. He saw him walk up the stairs and into the store as he walked down the ramp to get into his truck. Mr. W.O. denied having said anything at all to the Subject Member at any time throughout those several seconds.

SUBMISSIONS ON THE FIVE ALLEGATIONS

Submissions by the Conduct Authority Representative

[31] The Conduct Authority Representative (CAR) emphasized that this case came down to the credibility of the two main witnesses, Mr. W.O. and the Subject Member. The CAR submitted that the Subject Member has little credibility because of the differing versions of the story he provided to Constable Boudreau, Sergeant White and at these proceedings. To Sergeant

White, the Subject Member suggested Mr. W.O. threatened to “rip his head or neck off”, which was different from other versions in which he said Mr. W.O. said “I’m going to rip your fucking head off”.

[32] Another discrepancy surrounds the precise moment the Subject Member recognized Mr. W.O.’s truck. In his statement to Sergeant White on December 1, 2016, he said that he recognized the truck. In his response to the allegations and in his testimony at the hearing, he said that he was not certain until he saw Mr. W.O. walk out of the store.

[33] The absence of notes pertaining to the events of the evening of January 29, 2016, is indicative of the Subject Member’s state of mind and damages his credibility. This would not be what one would expect of an experienced police officer.

[34] The CAR submitted that the Subject Member’s reason for not having reported the matter as soon as it happened is nonsensical. He called but got an answering machine; instead of pressing “0”, he simply hung up. He did not call 9-1-1 and he did not report it that night. If he really did tell Ms. E.M. about what had happened on the evening in question, did he not think this information would be relevant to the investigation, to help substantiate his version of events? Why did he not share this information with investigators, and why is it that this conduct hearing is the first time this information should surface? The CAR maintained that all of this serves to damage the Subject Member’s credibility.

[35] The CAR suggested that the Subject Member’s behaviour on the evening of January 29, 2016, is not consistent with his testimony. Contrary to his testimony, in which he stated that “Mr. W.O. was the last person I wanted to see”, he is heard to mutter “Please be you” on the footage from his dash-mounted camera. In reality, he was wishing it to be Mr. W.O. and was seeking out contact with him, notwithstanding the provisions of the Recognizance. After he realized that he had forgotten his wallet on the front seat of his car, he went back outside knowing Mr. W.O. was still in the vicinity. This, submitted the CAR, further demonstrates that he actually wanted contact with him and that he was seeking him out.

[36] The dash-mounted camera contradicted the timing of the threat the Subject Member claims Mr. W.O. made. No voices are heard. In fact, nothing is heard until what could be the starting of an engine, which would have been the sound of Mr. W.O.'s truck.

[37] The CAR submitted that Mr. W.O., on the other hand, is a credible witness. He provided convincing testimony, which was consistent throughout. There is no other indication, from any other source, that Mr. W.O. did anything other than that to which he testified. The best available source seems to be the dash-mounted camera, as it depicts Mr. W.O. noticing the Subject Member as he (Mr. W.O.) came out of the store. Mr. W.O. is seen to walk down the ramp, glancing in the Subject Member's direction. It would appear Mr. W.O. simply got into his truck and drove home. It does not appear as though Mr. W.O. said anything at all.

[38] Mr. W.O. voluntarily submitted himself to a polygraph examination and passed it. Not only does this enhance his credibility, according to the CAR, but the results of this examination, according to policy, could be received as evidence and considered proof of Mr. W.O.'s version of events.

[39] Allegation 1 has to do with a breach of the Recognizance, namely, the condition specifying he not so much as attempt to contact Mr. W.O. There have been cases decided in the criminal courts on the *mens rea* and the *actus reus* components of a breach of no-contact conditions. Once such case is *R. v Lofstrom*, 2016 ABPC 197 (CanLii cite) [*Lofstrom*].

[40] The accused, Mr. Lofstrom, was under the terms of an order made pursuant to the *Protection Against Family Violence Act*, RSA 2000, c P-27, which required him to stay 200 metres away from the complainant. He did not stay away; he attended a church service which he knew she would be attending with her children. In total, there were 30 or 40 other congregants present, which was normal. The accused sat in a pew several rows behind and across the aisle from the complainant and her family. The accused's presence upset the complainant to the point where she left the church service with her family.

[41] The Provincial Court Judge in *Lofstrom* considered the meaning of the word "contact" and held that this determination must be made in the context of all the evidence. Citing relevant

jurisprudence, the Provincial Court Judge in *Lofstrom* concluded that “contact does not require communication for the *actus reus* to be satisfied” (paragraph 54).

[42] The Provincial Court Judge in *Lofstrom* noted (paragraph 65):

[...] the case law establishes that the question of intent does not go to the alleged breach, but to the question of whether an accused intends to commit the *actus reus* of the offence. The *mens rea* component, following an accidental or incidental encounter, depends on whether or not the accused immediately ended the encounter, or instead, knowingly and voluntarily or recklessly “remained in contact” with the complainant.

[43] The CAR submitted *Lofstrom* is therefore an important case and highly instructive for the present matter. The CAR suggested that the Subject Member’s voluntary actions, as seen on the footage of the dash-mounted camera and as testified to by the Subject Member himself, are sufficient to establish his *mens rea*. Rather than simply driving by, or at least waiting in the car until Mr. W.O. had departed (which he was in the process of doing anyway), the Subject Member was so preoccupied with the presence of Mr. W.O. that he forgot his wallet on the front seat of the car and bounded up the stairs, two at a time. He even came back outside to get his wallet, knowing that Mr. W.O. was still in the vicinity. On the basis of the analysis conducted by the Provincial Court Judge in *Lofstrom*, the CAR contented that the Subject Member clearly attempted to contact Mr. W.O. and that this allegation should be established on a balance of probabilities.

[44] The evidence, combined with the credibility of Mr. W.O. and the lack of credibility of the Subject Member, serves to establish that Mr. W.O. said nothing to the Subject Member. Therefore, Allegation 2 (pertaining to the Subject Member’s complaint to Constable Boudreau), Allegation 3 (pertaining to the conditions of his Recognizance), Allegation 4 (pertaining to the false statement to Sergeant White) and Allegation 5 (pertaining to the requirements of his Probation Order to keep the peace and be of good behaviour) should all be established on a balance of probabilities.

Submissions by the Member Representative

[45] The MR contended that the Subject Member was a more credible witness than Mr. W.O. Mr. W.O. could have produced the text messages he said were transmitted to warn of the Subject Member's presence in certain areas. There was ambiguity surrounding the timing of the text message that he may or may not have received on the evening in question, contemporaneous with the Subject Member's presence at the store. Concrete proof surrounding these mysterious text messages may have helped bolster Mr. W.O.'s credibility, but he made no effort to supply them to anyone and did not produce them at the hearing. The MR suggested Mr. W.O. may have simply made up the story about the text messages to make it look as though he was the victim.

[46] There was no evidence of any need for Mr. W.O. to fear the Subject Member or to hide from him, and no evidence the Subject Member had caused any issues at all for him. Mr. W.O. admitted to being concerned about the Subject Member's wife and children, to his not liking the Subject Member, and to his worrying of losing Ms. D.G. to him.

[47] There was a discrepancy between whether Mr. W.O. merely "glanced" in the Subject Member's direction or whether he "eyeballed" him the whole way down the ramp. Also, Mr. W.O. was unsure in his testimony as to whether he saw the Subject Member at the glass window of the front door of the convenience store, looking at Mr. W.O.

[48] No one ever took the Subject Member's complaint seriously until they wanted to use it against him in a Code of Conduct setting. The investigation was biased from the start. The MR suggested that Constable MacFarlane chose not to download data from the outside camera because the data actually supported the Subject Member's claim. The MR further suggested that Constable MacFarlane's animosity towards the Subject Member biased his approach.

[49] The technician examining footage from the Subject Member's dash-mounted camera suggested the possibility of a voice, in the final five seconds of the footage. The MR submitted that there was a voice, just as the Subject Member testified, and that it was the voice of Mr. W.O. threatening him.

[50] The Supreme Court of Canada, in the case of *F.H. v MacDougall* [2008] SCC 53 [*MacDougall*] holds that there must be sufficient clear, convincing and cogent evidence to establish an allegation on a balance of probabilities. The evidence in this matter does not meet that threshold, submitted the MR. Allegations 2, 3, 4 and 5, all of which pertain to the Subject Member's statements that Mr. W.O. threatened him, should not be established.

[51] With respect to Allegation 1, the evidence does not establish any contact between the Subject Member and Mr. W.O. The Subject Member did not beset, watch or follow Mr. W.O. There was no opportunity for the Subject Member to leave the store and there was no need for him to do so. One of the inside cameras clearly shows Mr. W.O. driving away as the Subject Member leaves the store briefly to go and get his wallet; there was no opportunity for contact to be made. This allegation should not be established.

Decision on the five allegations

[52] There are four allegations of discreditable conduct, contrary to section 7.1 of the RCMP's Code of Conduct, and one of providing an inaccurate account pertaining to an investigation, contrary to section 8.1. The former are based on the objective standard of the "reasonable person", while the latter requires a subjective analysis of the member's intent to mislead.

[53] With respect to the four allegations of discreditable conduct, there exists no difference in the substantive effect of the word "discreditable" as opposed to "disgraceful" conduct. Stated succinctly, the well-established tests applicable under the previous legislation to a finding of "disgraceful" conduct continue to apply with equal vigour to the amended version of the *RCMP Act*.

[54] These tests, articulated by the RCMP's External Review Committee (ERC), have been considered and approved by higher courts and I find that they continue to provide a useful framework.

[55] The first stage of these tests involves the ascertainment of the identity of the member in question. At no point was the identity of the Subject Member in issue in these proceedings.

[56] The second stage involves a determination of whether the acts alleged did, in fact, take place. The standard of proof applicable to administrative proceedings was a central issue in *F.H. v McDougall* [2008] 3 SCR 41 [*McDougall*]. Proof must be made by way of sufficient clear, convincing and cogent evidence on a balance of probabilities.

[57] The third stage consists of an analysis of the acts found to have taken place, in the context of whether they bring the RCMP into disrepute. The applicable test for this analysis harkens back to Lord Denning's invocation of "the reasonable man on the Clapham omnibus" and has been articulated by the ERC as being whether 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.

[58] 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, is instructive. The word "disgraceful" is by no means a term of art; it 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.

[59] Since the acts are all alleged to have occurred while the Subject Member was off duty, for discreditable conduct to be established, there would have to be a sufficient link, or *nexus*, to the Subject Member's employment situation.

[60] In furtherance of my quest to determine whether the acts occurred as alleged, I have been encouraged, at different points in these proceedings, to accept the polygraph test results as hard evidence of Mr. W.O.'s truthfulness as to whether he uttered threats, or indeed any words at all, to the Subject Member on the evening in question.

[61] My answer has been the same every time. In the course of nearly forty years of law enforcement experience, I have developed a great deal of respect for the polygraph as a scientific instrument. I have even greater respect and admiration for the skilled men and women who put them to such effective use in criminal investigations. I agree that, under certain circumstances,

the polygraph can offer reliable indications of whether or not the subject of the test is telling the truth on a precisely stated topic. It must be emphasized though that courts are reluctant to accept the scientific results of these tests as hard evidence.

[62] I viewed the footage of the polygraph examination of Mr. W.O.. The polygraph operator in the present case, Sergeant Greg Vardy, exemplified the calm, professional approach I have come to expect from these highly specialized and highly skilled technicians. It is with the greatest of respect for his experience and practice as a law enforcement professional and polygraph specialist that I choose not to accept his evaluation of Mr. W.O.'s truthfulness as evidence on whether or not these allegations should be established. The credibility of witnesses is a crucial point that must be left to the trier of fact, in this case, me.

[63] However, I would be remiss in choosing to ignore the overall psychological impact of the polygraph upon Mr. W.O. To the lay person, these are still known as "lie detectors". That he was willing to undergo the test **at all** bolsters Mr. W.O.'s credibility. In addition, Mr. W.O. provided answers to Sergeant Vardy's questions that were consistent with the answers he provided on other occasions to other interviewers. This has a similarly positive impact on his credibility as a witness. Nevertheless, these two factors comprise the extent to which the polygraph impacts these proceedings.

[64] While on the topic, I will add that I heard no submissions on whether the Subject Member was ever invited to undergo a polygraph test. To be thorough in my analysis, I feel compelled to add that I draw no negative inference regarding the Subject Member's credibility simply because he did not undergo a polygraph test.

[65] My analysis of credibility is confined to the demeanour of each witness and especially the extent to which their version of events has the ring of truth about it.

[66] I am aided in my analysis of witness credibility by a series of cases routinely referred to in such circumstances.

[67] The *McDougall* case is correctly cited by the MR as the definitive stance on the burden of proof in civil matters such as these. While the decision must be made on a balance of probabilities, the Supreme Court of Canada is clear that the decision maker must not be unmindful of the consequences of such a decision. I was mindful throughout the proceedings that the Commanding Officer is seeking the Subject Member's dismissal, so the stakes are the highest that they can possibly be in these proceedings.

[68] The *McDougall* decision also provides important direction on the assessment of the credibility of witnesses, especially in cases such as this one, where the positions of the respective witnesses are diametrically opposed.

[69] Rothstein J. delivered the reasons of the Supreme Court in *McDougall*. In so doing, Rothstein J. addressed the approach to be taken by the trier of fact in making such decisions under such circumstances. At paragraphs 57 and 58 of *McDougall*:

[57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

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

[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence in order to assess the impact of the

inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[70] I did find a few inconsistencies in the testimony of both Mr. W.O. and the Subject Member, but most of them are attributable to the passage of time and the fact that the events in question outside the convenience store took place in a matter of perhaps six or seven seconds. Mr. W.O. was inconsistent on whether or not the Subject Member may have looked at him through the glass of the front door of the convenience store. The Subject Member, on every occasion but one, namely, to Sergeant White, unequivocally said the words uttered to him by Mr. W.O. were “I’m going to rip your fucking head off”.

[71] My findings on credibility are not based so much on these minor inconsistencies as they are on whose version has the ring of truth to it. What is the witness’ motivation? If what the witness says is true, then are his actions consistent with what a reasonable person would expect under the circumstances?

[72] The framework for my analysis certainly includes *McDougall*, which is a relatively recent case. I also find that the test for credibility referred to by the Supreme Court in *McDougall* harkens back to a dated, but still very useful, triumvirate of cases.

[73] The test in *Wallace v Davis* (1926) 31 O.W.N. 202 is at page 203:

[...] the credibility of a witness in the proper sense does not depend solely 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.

[74] In *MacDermid v Rice* (1939) R. de Jur. 208, 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.

[75] In *Faryna v Chorney* [1952] 2 DLR 354, the 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 circumstances.

[76] The last sentence, although somewhat baroque in its style, is the most important aspect of this analysis. Stated more simply, one must determine whether a witness's story, given all of the circumstances, has the clear ring of truth to it.

[77] With respect to Mr. W.O., how would the reasonable person expect him to react when he sees the Subject Member drive up to the convenience store just as he is walking out of it? I carefully examined Mr. W.O.'s situation to arrive at a finding as to his motivation under all of the circumstances. Scarcely four or five months earlier, he had direct experience of how the Subject Member reacted when the Subject Member only **suspected** Mr. W.O. was sleeping with Ms. D.G.. As he testified to the Subject Member's behaviour that day, Mr. W.O.'s fear was tangible and I believe him when he said that he feared for his safety. That particular incident resulted in calls to 9-1-1, the arrest of the Subject Member, criminal charges and, ultimately, the Subject Member's release, conditional on several clear no-contact provisions, which the Subject Member violated after only a couple of weeks.

[78] To further complicate matters, it is around this time (that is, late September 2015) that Mr. W.O. does, in fact, enter into a romantic relationship with Ms. D.G. All this was happening while Mr. W.O. was still living in the same house with his girlfriend, although he says the relationship was effectively over.

[79] Under these circumstances, would the reasonable person expect Mr. W.O. to now start making a public display, now that he has well and truly cuckolded the Subject Member? To make faces at him, to flip him the finger, and to try and goad him into a fight, in broad daylight on the street in front of a grocery store? This is an unrealistic proposition. The reasonable person, with full knowledge of the rage of which the Subject Member had demonstrated he was capable, would take steps to conspicuously avoid him. The reasonable person would be lying low. This is what Mr. W.O., up to and including January 29, 2016, said he had been doing. This sounds like a reasonable (and prudent) course of action.

[80] No direct evidence was tendered on the existence of the text messages Mr. W.O. said he received about the Subject Member's whereabouts. It does not sound far-fetched to think Mr. W.O., who grew up in the small town of St. Peters and still does business there, would make full use of the "coconut telegraph" to warn him about where the Subject Member happened to be, so he could make every effort to avoid him. This pattern of behaviour also sounds reasonable and this is the pattern of behaviour to which Mr. W.O. testified.

[81] What, on the other hand, would the reasonable person expect of the Subject Member? He has been charged criminally with uttering threats of death or bodily harm. Soon after his release from custody (a release conditional on staying away from certain people involved in the events), the Subject Member violates those conditions. He was re-arrested and re-released, on a Recognizance with even stricter conditions. So what does he do then? He buys a dash camera. The reason he bought it, if you believe him, was to catch Mr. W.O. in the act of engaging in the aforementioned behaviour ("flipping the bird", calling the Subject Member out to a fistfight, leering at him, photographing him), which I have already determined was an unreasonable expectation of Mr. W.O.. If one believes the theory of the CAR, one of the reasons the Subject Member bought the dash camera was simply to frame Mr. W.O. I do not find the Subject Member's explanations for his behaviour to be reasonable given all of the circumstances of this case.

[82] Allegation 1 is different from the other four because it has nothing to do with whether Mr. W.O. uttered any threat. The gravamen of Allegation 1 is the breach of a condition first

imposed by an Undertaking and later strengthened in a Recognizance. At issue is whether the Subject Member contacted or communicated with Mr. W.O., or attempted to contact or communicate with him, either directly or indirectly, in the course of the events which transpired the evening of January 29, 2016, outside the Needs Convenience Store.

[83] Almost five months earlier, on September 3, 2015, the Subject Member was released from custody on an Undertaking. Among the conditions was the provision that he “[h]ave no direct or indirect contact or communication with [Mr. W.O.] or [S.L.]”.

[84] The Subject Member did not honour this condition. A couple of weeks later, on September 18, 2015, after he had been released from custody (this time on the strength of a Recognizance), the no-contact conditions were expanded to include three other people and fortified with the inclusion of the term “attempt”. The wording on the Recognizance was as follows:

Not contact or communicate with, or attempt to contact or communicate with, directly or indirectly, [Ms. D.G.], [Mr. W.O.], [Ms. S.L.], [Ms. M.S.] [and one other name, [Ms. E.M.], which according to the handwriting was amended by way of exclusion from the conditions on September 22, 2015] except as follows:

Indirect contact through a lawyer

Indirect contact with [Ms. D.G.] through a third party only for the purposes of arranging and effecting access and visitation with my child/children

[85] In her submissions, the CAR encouraged me to accept and adopt the analysis of the Alberta Provincial Court Judge in the case of *Lofstrom*. This case is instructive in that it provides a good summary of the case law, featuring competing interpretations on the word “contact”.

[86] The case of *H.B.T. v Her Majesty the Queen* (also known as *R. v Timmons*), 2004 NSSC 56 (CanLii) [*H.B.T.*] is referred to in *Lofstrom*. At paragraph 44 of *H.B.T.*:

[44] In *H.B.T.*, the accused was bound by a “no-contact” provision of a probation order which prohibited him from any contact with R.W.T., his victim in a sexual assault. The accused was subsequently charged and convicted of a breach after he sat for some period of time in the court gallery through R.W.T.’s testimony against his (H.B.T.’s) brother who was

facing similar charges. In addressing whether there had been prohibited contact, the trial judge held that:

. . . if a person puts themselves physically in a position where they are observable by another and they are observed by another and the first person maintains that position, then there's contact . . . They may not have exchanged any words or gestures, but there's contact there . . .
[*H.B.T.* at para. 21]

[87] I agree with the Alberta Provincial Court Judge in *Lofstrom*, at paragraph (54): “I conclude that “contact” does not require direct verbal communication for the actus reus to be satisfied.”

[88] With respect to the *mens rea* component of a breach of no-contact order, I accept the analysis occurring at paragraphs 55 to 65 of *Lofstrom*, and the Court's confirmation, at paragraph 65, as follows:

[...] the critical difference between “culpable” and “non-culpable” contact is whether there is evidence upon which the Crown is able to prove, beyond a reasonable doubt, the essential mental element of the offence after an accidental encounter; that is, once “contact” is established, does the accused immediately end the encounter; or instead, knowingly and voluntarily or recklessly “remain in contact” with the complainant.

[89] To determine *mens rea*, the trier of fact rarely has the luxury of a window into subjective thought. Usually, the analysis has to be made of someone's actions and the subjective intent must be inferred. In the present case, though, we have the benefit of a dash-mounted camera, with audio as well as video recording, and one has to wonder whether the Subject Member was new to the technology (or forgot the camera was there or forgot it was turned on) when he approached the convenience store. He saw the only pickup truck in the parking lot and uttered the fateful phrase: “Please be you.”

[90] I listened to this many, many times over, paying particular attention to the Subject Member's inflection and tone of voice to capture the full importance of these words, “Please be you”. His anger is palpable, he sounds like a predator. What would a reasonable person expect of a nine-year constable, under a court order to avoid a certain person? Not “Please be you”; rather,

“Oh, please, don’t be you, anybody but you. I only need to pick up some pop for my kids. Why does it have to be you, of all people?”

[91] This one phrase, clearly audible, but muttered almost under his breath by the Subject Member as he closed in on Mr. W.O., is the most glaring inconsistency in this hearing. When the Subject Member testifies that “[Mr. W.O.] was the last person I wanted to see”, his credibility suffers a fatal blow, because nothing could be further from the truth. From the sound of his voice, the Subject Member seems to have been delighted to have come across Mr. W.O. at the Needs Convenience store.

[92] Meanwhile, the camera is still rolling. After he utters “Please be you”, the Subject Member almost immediately sees Mr. W.O. come out of the store and he utters the profanity “Cocksucker”. As he states in his response to the allegations, this is simply his gut reaction whenever he sees this person. He truly hates him. The viewer knows just from the tone of voice that there is no way the Subject Member is going to simply stay inside his car and wait the six or seven seconds it would take for Mr. W.O. to make his way down the ramp and into his own truck. No, the Subject Member literally bounds up the stairs, taking them two at a time. He is so impassioned at the sight of Mr. W.O. that he even forgets his wallet on the front seat of his car.

[93] What is his explanation for this behaviour? Is his explanation a reasonable one? The Subject Member told Sergeant White:

I was ready to go over there and pound the shit out of him and I said, Fuck it, no, and I, you can see me, I took two stairs at a time, right in the store, because I knew that if I started beating on him I wouldn’t stop.

[94] The reasonable person might be forgiven for wondering exactly what the Subject Member meant by the words he used with Sergeant White when speaking about his reaction to encountering Mr. W.O.: “Fuck it”. Is this truly how he feels about having to stay clear of Mr. W.O.? Is this his attitude towards the Recognizance? His attitude towards the administration of justice generally? This is not a reasonable reaction. The Subject Member was obviously spoiling for a fight as soon as he saw Mr. W.O.

[95] The presence of the dash-mounted camera is counter-intuitive. How could he hope to ever get video footage of Mr. W.O. without, first of all, seeing him and then getting closer for a good camera angle on him? If this camera was mounted in the interests of self-protection, as the Subject Member claims it was, it was an ill-conceived plan.

[96] The Subject Member is a police officer, sworn to uphold the law and to maintain, respect and support the administration of justice. Members of the Royal Canadian Mounted Police have voluntarily agreed to abide by a higher standard of conduct than that of the ordinary citizen. However, this standard does not call for perfection, as articulated by the Supreme Court of Canada in *The Queen and Archer v White* (1956), SCR 154 at 158. Nowhere is this more applicable than in those standards of conduct having to do with the administration of justice. Especially after being found in violation of the Undertaking, the Subject Member should have been hyper-vigilant in his adherence to the terms of the Recognizance. It seems as though he took the opposite approach.

[97] I find that the Subject Member attempted contact or communication with Mr. W.O. the evening of January 29, 2016, outside the Needs Convenience store. He saw the truck and offered up a not-so-silent prayer that it would be Mr. W.O.'s truck. He did not do the prudent thing and simply drive on by in case it actually was Mr. W.O.'s truck. Nor did he simply wait until Mr. W.O. departed. Rather, once he saw Mr. W.O. coming out of the store, he finished parking his car, got out while Mr. W.O. was still on the ramp, bounded up the stairs two at a time, and made eye contact with him. He even came out, knowing Mr. W.O. was still in the vicinity, to retrieve the wallet he'd left behind in his excitement. The contact was limited to eye contact, and it was fleeting, but it was actively and eagerly sought out by the Subject Member. Therefore, Allegation 1 is established on a balance of probabilities.

[98] The remainder of the allegations revolve around whether Mr. W.O. uttered the words, "I'm going to rip your fucking head off", as alleged.

[99] To return to the analysis of credibility and how actions must be seen to be in harmony with the preponderance of probabilities that the ordinary person would find reasonable under the

circumstances, I will now examine what the Subject Member did after the alleged threats were made to him. He went directly inside the store, knowing there were video cameras everywhere. He did not mention the occurrence to the clerk, but he testified that this was because he knew the clerk was a friend of Mr. W.O.'s (as it happens, she is). He could at least have instructed her to make sure that the footage from the surveillance cameras was retained since it will form crucial evidence in a criminal case. The Subject Member said no such thing to the clerk. He took no steps to ensure the retention of any of the footage, from the inside or the outside cameras. It is significant that the Subject Member took no steps to obtain crucial evidence which, if he is telling the truth, will back his story up. By the same token, the CAR notes that he took no steps to ensure the retention of the footage from the outside camera which, if he is lying, would have proven this once and for all.

[100] Rather, his approach to this camera-footage situation is to cast aspersions on those tasked with carrying out the investigation. I have seen the investigation reports and I do not find them suspiciously lacking in substance. On the contrary, Constable Boudreau heard him out in full and Constable MacFarlane wrote two full pages, single-spaced. If either member was sloughing off this investigation, it certainly was not apparent from their initial response.

[101] Since the Subject Member has raised the issue of shoddy police practice, it is appropriate to note that the Subject Member made no notes of the occurrence after the fact, which I also found rather odd.

[102] If an overtly criminal act occurs in plain sight of an off-duty member, one might expect that at the first reasonable opportunity, notes would be made. What, after all, is the time-honoured test of the legitimacy of police notes? Were they made at the time of the events, and were they made in your own handwriting (or at least electronically)?

[103] Would the reasonable off-duty police officer try and alert the on-duty members to a death threat? True, the Subject Member said he tried, but he just hung up when it went to voicemail. Would he have done that if he had witnessed an armed robbery, a fatal motor vehicle accident, or

even an impaired driver? There is always a way of getting through to the police. Call 9-1-1. Someone will answer. Tell them what happened.

[104] Moreover, if you were the subject of this criminal activity, would alerting the police to these actions not seem even more compelling?

[105] It came out in the Subject Member's testimony that he told his girlfriend what had happened, as soon as he arrived back at the house. The doctrine of recent complaint can serve as a reliable indicator of legitimacy. This is how reasonable people behave when something bad happens to them. Does it not also seem reasonable that he would at least mention this important conversation with his girlfriend to the investigators? Why is it that the first time this information is made public is at this hearing, after the case for the Conduct Authority has been concluded?

[106] There are a few explanations for the Subject Member's behaviour. One of them is that these threats were never made in the first place.

[107] Mr. W.O. had no motivation whatsoever for threatening the Subject Member. He admitted in his testimony to wanting to look out for Ms. D.G. and the children, but how would he be doing that by threatening to "rip their dad's fucking head off"? This would make no sense at all.

[108] The Subject Member, on the other hand, was demonstrably motivated by pure hatred. He certainly had the necessary motivation to breach his order and also to fabricate the utterance of threats by Mr. W.O.

[109] This, on a balance of probabilities, by virtue of the clear, convincing and cogent evidence brought forward at this hearing, is what I find he did.

[110] On the basis of this analysis, I find that Allegation 2 is established by means of clear, convincing and cogent evidence. The Subject Member's fabrication of the threats was false and misleading, and resulted in the initiation of a criminal investigation against his nemesis, Mr. W.O.

[111] Allegation 3 is similarly established. Fabrication of threats in making a complaint to Constable Boudreau is not consistent with keeping the peace and being of good behaviour, which was one of the terms of his Recognizance.

[112] Allegation 4 has to do with not having provided accurate accounts pertaining to the carrying out of his responsibilities. The gravamen of Allegation 4 is that he provided false or misleading information to Sergeant Gary White, who was carrying out a Code of Conduct investigation into his activities. The Subject Member told Sergeant White that he had been threatened by Mr. W.O., which was false and misleading because it was simply not true. For the reasons I have stated, I find Allegation 4 to be established on a balance of probabilities.

[113] The gravamen of Allegation 5 is the breach of his Probation Order, which contained a provision to keep the peace and be of good behaviour. The continued fabrication of Mr. W.O.'s threat, this time to Sergeant White, is not consistent with such a provision. Thus, I find that he breached his Probation Order in that regard. Therefore, Allegation 5 is established on a balance of probabilities.

[114] These acts all occurred off duty, but the nexus to the employment situation is clear. Allegations 1, 3 and 5 pertain to the administration of justice, which is clearly related to the Subject Member's employment situation. Allegations 2 and 4 involve misrepresentations to fellow members of the Force.

[115] It is incumbent upon all members, at all times, on or off duty, to uphold the administration of justice and to treat all people with respect. In his blatant disregard for the terms of the court orders to which he was subject and in his fabrication of serious criminal activity on the part of Mr. W.O., the nexus to the Subject Member's employment situation is clearly established.

CONDUCT MEASURES

[116] All five contraventions of the Code of Conduct arise out of the same series of events; most occurred within a day of one another. Therefore, it is appropriate to assign conduct measures globally rather than separately.

Submissions of the Conduct Authority Representative

[117] The CAR maintained that dismissal was appropriate and supplied cases, which included dismissal in the range of sanctions applicable to misconduct touching upon issues of honesty and integrity.

- (2007) 1 A.D. (4th) 145. This was the Commissioner's decision in which he agreed with the ERC's recommendation to uphold the Board's decision to dismiss the member for having forged two prescriptions for anabolic steroids.
- 2010 FC 20. This Federal Court decision pertains to a member's dismissal for insurance fraud, but also provides guidance on the parameters within which expert medical evidence must be treated.
- 2017 RCAD 3. This RCMP conduct hearing resulted in the dismissal of the member for insurance fraud. This case is currently under appeal.

[118] The CAR also entered into evidence three instances of prior discipline, arguing that they act as aggravating factors which must be taken into account in assessing the appropriate conduct measures. The three instances of discipline are as follows:

- On March 19, 2014, the Subject Member received counselling for neglect of duty. He did not conduct a proper and timely criminal harassment investigation.
- On April 22, 2016, a conduct meeting was held with the Subject Member in which he was assessed conduct measures for the four contraventions of the Code of Conduct referred to in paragraphs 5 and 6 of this decision.

- On April 18, 2017, a conduct meeting was held with the Subject Member in which he was assessed conduct measures for one contravention of the Code of Conduct, as follows: Between December 22, 2015, and June 2, 2016, at or near St. Peters in the Province of Nova Scotia, the Subject Member did fail to comply with a Court Order made by the Honourable Justice Moira Legere-Sers, a Justice of the Supreme Court of Nova Scotia (Family Division), by failing to make full support payments as directed.

[119] A further aggravating factor is the difficulty faced by the Force in considering deployment of the Subject Member following the Supreme Court of Canada's ruling in *R. v McNeil* [2009], SCC 3 [*McNeil*]. This case imposes a positive duty on the Force to disclose to the defence, in the first instance, the relevant disciplinary history of any member implicated in the prosecution of a criminal matter.

[120] Another aggravating factor is the Subject Member's absence of remorse or acceptance of responsibility for his actions.

[121] The CAR also argued as an aggravating factor the serious nature of the contraventions, namely, the breach of the no-contact order and the fabrication of a story designed to initiate a serious criminal investigation where none was warranted.

[122] The circumstances under which an employer can dismiss an employee (including consideration of medical factors) were the subject of several cases submitted for consideration, including the following:

- *Ennis v The Canadian Imperial Bank of Commerce*, 1986 CanLii 208, (1986) BCJ 1742
- *Cadbury Adams Canada and United Food and Commercial Workers Union, Local 175* (no citation provided)
- *Cambridge Memorial Hospital and Ontario Nurses' Association* 2017 CanLii 2305 (Ontario Labour Arbitration)
- *McKinley v British Columbia Telephone Company*, [2001] 2 SCR, 2001 SCC 38

- *Stewart v Elk Valley Coal Corp.*, [2017] SCC 30.

[123] The CAR took issue with the letter submitted by the Subject Member's treating physician, Dr. J.G., a clinical psychologist, dated July 6, 2017. This letter reads as follows:

Further to our telephone conversation and your correspondence dated July 5, 2017, [the Subject Member] was seen on referral from RCMP Health Services in Halifax. His initial appointment was on August 4, 2015. He has been seen regularly since that time and is scheduled for ongoing appointments. His diagnosis includes posttraumatic stress disorder (PTSD) with major depression anxiety. The PTSD is a confirmed diagnosis and was service related, resulting primarily from an incident in September, 2013 in which [the Subject Member] was attempting to arrest an individual who was resisting arrest and described as "high on pills". In the course of a relatively extended altercation with this individual, [the Subject Member] was pushed onto a highway and narrowly missed being struck by vehicles on three or four different occasions. The resulting symptoms included flashbacks, nightmares, ruminative anxieties, panic attacks, hypervigilance, emotional numbing, exaggerated startle response, feelings of apprehension and foreboding, reduced frustration tolerance, irritability, persistent insomnia with fatigue and daytime somnolence, depressed mood and patterns of phobic avoidance.

As you are aware, [the Subject Member] has encountered a number of significant stressors including criminal charges, charges of professional misconduct and an extended marital separation. These factors contributed significantly to the persistence and intensification of his primary symptoms.

[The Subject Member] has also consulted with [Dr. I.S.] for psychiatric review and pharmacotherapy.

[The Subject Member] has been fully compliant with all treatment recommendations. He has made significant clinical improvement.

I hope that this provides sufficient detail in response to your specific questions. I will be out of the country until early August but would be pleased to provide any further information or clarification.

[Sic throughout]

[124] The CAR questioned whether the PTSD was in fact Dr. J.G.'s diagnosis and pointed out the absence of a causal link between the symptoms and the nature of the underlying misconduct. Specifically, dishonesty or fabrication is absent from the symptomatology. For these reasons, the CAR submitted that little to no weight should be given to Dr. J.G.'s observations.

[125] The CAR suggested that there was no evidence of the Subject Member's rehabilitative potential. Therefore, there is no reason to believe that he would not engage in similar or other serious misconduct in the future.

[126] Taking all of the above factors into account, the CAR argued that the Subject Member should be dismissed from the Force.

Submissions from the Member Representative

[127] The Subject Member once again took the witness stand and related details of his life and history in the RCMP, as well as the extent of his community involvement.

[128] The Subject Member testified to seeing Dr. J.G. regularly. At the beginning, he saw him once a week, then, after a year or so, once every two weeks. Recently, he has been attending every month or so. The current medication he is on seems to be addressing some of his symptoms more effectively.

[129] On May 30, 2016, the Subject Member pled guilty in criminal court to mischief and to one of the breaches arising out of the incidents in the summer and fall of 2015 that were the subject of the Code of Conduct contraventions. Upon his guilty plea to those two charges, the rest of the charges were withdrawn.

[130] The MR pointed to the narrative from one of the Subject Member's assessments, which makes it clear that the incident giving rise to his PTSD was duty-related. These same assessments are the source of several passages praising the Subject Member's flexibility, his work ethic, his handling of sources and job knowledge.

[131] A letter of reference was also tendered, which concluded with the sentence:

[The Subject Member] is a solid man of character and integrity. He is the example of what this organization needs to be successful in the future. I would take him to work with me at any time.

[132] Citing the principle codified in the *RCMP Act* that conduct measures must be proportional to the misconduct at issue, the MR suggested that forfeitures of pay would be more suitable than dismissal.

[133] The case law submitted by the MR in support of conduct measures falling short of dismissal and consisting rather of forfeitures of pay, are as follows:

- *The Appropriate Officer "D" Division and Constable "E"* (2007) 1 A.D. (4th) 246, in which the member faced two allegations of having used a police vehicle without authorization, and for having made false or misleading statements. The Board in this case accepted a joint submission on sanction and imposed a global sanction consisting of a reprimand and the forfeiture of five days' pay on the first (unauthorized use of the police vehicle) and a reprimand and the forfeiture of four days' pay on the second (false or misleading statements).
- *The Appropriate Officer "E" Division and Constable "H"* (2008) 1 A.D. (4th) 382, in which the member admitted to an allegation to the effect that he, in his capacity as the exhibit custodian for his detachment, improperly advised a fellow member that an exhibit, a shotgun, had been destroyed. He also falsified a police database entry to that effect. The Board accepted a joint submission and imposed a global sanction consisting of a reprimand plus the forfeiture of five days' pay.
- *The Appropriate Officer "D" Division and Constable "R"* (2008) 3 A.D. (4th) 257, in which the member, in her capacity as an Ident specialist attending the scene of a double homicide, admitted to one allegation of having falsified her notebook to reflect the presence of live ammunition in a weapon found at the scene. When the member was challenged on her notebook, she said her first notebook had been contaminated at the scene, and smeared red paint on the notes, saying it was bloodstained. The Board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of one day's pay because, as a consequence of her actions, the member had accepted a

voluntary demotion from corporal to constable and transferred from the specialized Ident unit.

- *The Appropriate Officer “C” Division and Constable “L”* (2009) 4 A.D. (4th) 322, in which the member admitted to four allegations. A female passer-by saw the member masturbating in a parked car and reported the incident to the municipal police. The member was on duty, in plain clothes in an unmarked car, and on a surveillance operation at the time. The member then attempted to mislead officers from the municipal police force by making false, misleading and inaccurate statements. He also requested checks in a police databank and obtained information for inappropriate reasons. The Board accepted a joint submission and imposed a sanction consisting of a reprimand plus the forfeiture of ten days’ pay and recommended professional counselling.
- *The Appropriate Officer “F” Division and Constable “M”* (2010) 5 A.D. (4th) 69. Following a contested hearing, the member was found to have accessed child pornography on a laptop seized in the course of a search of a suspected paedophile’s residence. The member had been the designated exhibit custodian in the search. In accepting a joint submission on sanction, the Board imposed a sanction consisting of a reprimand plus the forfeiture of ten days’ pay, noting from the joint submission that the images had not been viewed for reasons of personal gratification.
- *The Appropriate Officer “O” Division and Constable “B”* (2010) 7 A.D. (4th) 202, in which the member admitted to one allegation to the effect she had, on three separate occasions, offered false, misleading or inaccurate statements to internal investigators from both the RCMP and from the Ottawa Police Service. The Board accepted a joint submission on sanction and imposed a reprimand plus the forfeiture of five days’ pay.
- *The Appropriate Officer “HQ” Division and Constable “N”* (2012) 13 A.D. (4th) 246, in which two allegations were admitted in having made false, misleading or inaccurate statements to a member investigating her Code of Conduct matter. Following a contested

hearing on sanction, the Board imposed a sanction consisting of a reprimand and the forfeiture of six days' pay.

- *The Appropriate Officer "H" Division and Constable "E"* (2014) 15 A.D. (4th) 331. This was a contested hearing in which the member was found to have made false, misleading or inaccurate statements about his hours of work and about his unauthorized use of a police vehicle in which he was involved in a motor vehicle accident. The six contraventions of the Code of Conduct were the subject of a joint submission on sanction, accepted by the Board, consisting of a reprimand plus the forfeiture of two, ten, two, ten, ten, and ten days' pay respectively. The Appropriate Officer was not seeking the member's dismissal in this case and took positive steps to support and accommodate him throughout the disciplinary process.
- *The Appropriate Officer "F" Division and Constable "B"* (2005) 28 A.D. (3d) 283, in which the member faced two separate and distinct Notices of Disciplinary Hearing. The first contained one allegation of a false, misleading or inaccurate statement to his detachment commander designed to cover up an extra-marital affair. The second contained two allegations; the first concerned a falsified report on the disposition of property; and the second, a false, misleading or inaccurate statement to his detachment commander about that same property. These three allegations were established following a contested hearing. On sanction, the Appropriate Officer sought dismissal. The Board imposed a reprimand as a sanction on the first Notice of Disciplinary Hearing. On the second, a global sanction was imposed consisting of a reprimand plus the forfeiture of ten days' pay.

[134] In conclusion, the MR submitted that the Subject Member's solid record of community service, his work ethic, and the steps he has taken to address the sources of stress in his life all speak to his rehabilitative potential. Significant forfeitures of pay should be considered as a reasonable alternative to dismissal.

Rebuttal by the Conduct Authority Representative

[135] Contrary to the opinion of the MR, the performance assessments reveal the Subject Member to be an average employee at best. Page 2 of the assessment from April 2010 to March 2011, while commending the Subject Member for certain aspects of his work, suggests that there is “room for improvement”.

[136] In the assessment from April 2011 to October 2011, on page 2, “written documentation on file is a great necessity, has taken steps to improve”. However, on page 3 of this same assessment, it is noted that “written court documents are an area where he needs to improve”.

[137] Most recently, in the assessment from September 2013 to April 2014, at page 3, it is noted that the Subject Member “is good at preliminary work but sometimes struggles with ensuring his reports have enough detail”.

[138] The CAR also pointed out that none of the cases submitted in support of conduct measures falling short of dismissal dealt with misconduct as serious as that which is before the Board in the present case. Also, most were decided on the basis of *Agreed Statements of Fact* and joint submissions on sanction.

Decision on conduct measures

[139] The ERC has articulated the definitive test for the imposition of conduct measures. This test has withstood the scrutiny of higher courts and holds that the first consideration must be the appropriate range of conduct measures applicable to the misconduct at issue. Then, the aggravating and mitigating factors must be considered. Finally, conduct measures which accurately and fairly reflect the gravity of the misconduct at issue, keeping in mind the principle of parity of sanction.

[140] The cases submitted for consideration by the parties accurately reflect the range of sanctions (now referred to as conduct measures) applicable to misconduct involving issues of honesty and integrity, and the range does include dismissal. This must be the case, as these are

among the core values of the Force and they are essential elements in the contract of employment.

[141] Upon careful consideration of the aggravating factors, as submitted by the CAR, I find that I cannot agree with many of them.

[142] I cannot accept the gravity of the misconduct as an aggravating factor. These are serious contraventions, to be sure, but to characterize the gravity of the misconduct as an aggravating factor is a tautology. Aggravating factors, by definition, are factors external to the misconduct which oblige consideration of a harsher sanction. The gravity of the misconduct is not an aggravating factor.

[143] Nor can I accept an absence of remorse, under the present set of circumstances, as an aggravating factor. Every person accused of wrongdoing has the right to put his or her accuser to the test of proving the allegations. Expressions of regret or remorse, when one denies the allegations outright, are impossible. At best, this can be characterized as the absence of a mitigating factor. I cannot consider the absence of remorse to be an aggravating factor.

[144] Instances of prior discipline can be a serious aggravating factor, but the instance of prior discipline must be well and truly decided, and on the member's conscience, to be considered aggravating. To risk overstating the obvious, at the time the actions entered into which resulted in the *Notice of Conduct Hearing*, the member in question must already be aware that he has a formal record of prior contraventions.

[145] At the time of the events on January 29, 2016, and January 30, 2016, only one instance of formal discipline met this definition, namely, the instance of informal discipline rendered on March 19, 2014, for neglect of duty. I accept the presence of this instance of prior discipline as an aggravating factor in the present matter.

[146] As of January 29 and 30, 2016, the events of the summer and fall of 2015 were still outstanding Code of Conduct matters, but they had not yet resulted in disciplinary action. Therefore, the disciplinary action rendered on April 22, 2016, for the four Code of Conduct

contraventions (which are highly relevant to the present proceedings) cannot be considered an aggravating factor for the first three of the present set of Code of Conduct contraventions.

[147] By the time the Subject Member sat down in front of Sergeant White on December 1, 2016, though, he had been face to face with a conduct authority and had been the recipient of conduct measures, imposed on April 22, 2016, which are directly related to the set of circumstances he was about to relate to Sergeant White. Therefore, I must draw a distinction between the first three contraventions and the last two.

[148] On December 1, 2016, the Subject Member deliberately related to Sergeant White a story he knew to be false; a story whose central character, Mr. W.O., was also one of the central characters in the conduct measures imposed on April 22, 2016. I find the Subject Member's decision to maintain this falsehood under such circumstances to be an aggravating factor which must be taken into account in assessing appropriate conduct measures. The Subject Member either has little regard for the conduct process as a whole (as per Allegation 4) or for the terms of his Probation Order (Allegation 5), or perhaps such processes are of secondary importance to his continuing vendetta against Mr. W.O.

[149] The third instance of prior discipline sought to be introduced as an aggravating factor, namely, for non-payment of support imposed in the calendar year 2017, occurred well after the range of dates appearing in the present *Notice of Conduct Hearing* and cannot be taken into account at all.

[150] I find as an aggravating factor the serial nature of the wrongdoing. Although the events described by the allegations in the *Notice of Conduct Hearing* all arise out of a common set of circumstances, this cannot be characterized as a one-time lapse in judgment, because there were several contraventions over a period of many months.

[151] The implications of the *McNeil* case are an aggravating factor. The Subject Member now has a disciplinary record for the fabrication of evidence of a serious criminal offence, as well as a disciplinary record for contraventions touching on the violation of court orders. The *McNeil* case only obliges disclosure of **relevant** information, but it is difficult to imagine any criminal court

proceedings for which such information would **not** be relevant. The Subject Member's disciplinary history creates a significant impediment to deployment in any operational capacity, in this Division or in any other.

[152] In considering the mitigating factors, I must first take issue with the Subject Member's performance record. It is a well-established principle in sanctioning professional misconduct that a consistent pattern of above-average performance can be accepted as a mitigating factor. The Force has a right to expect at least average performance. Therefore, I must conclude that, despite a few shining examples, the Subject Member's record of performance over the years can be described as average at best. There was a recurring theme of insufficient attention to detail, which was brought into sharp view by in the CAR's rebuttal, who read several passages from his performance assessments.

[153] The prior disciplinary record for neglect of duty is a further reflection of the Subject Member's less than satisfactory approach to good police work.

[154] However, there are positive comments about his work ethic, his ability to act as a team player, and his strong commitment to the community contained within these performance assessments. It is noteworthy that these sentiments are echoed in the letter of reference. These are all qualities which will serve the Subject Member well in the future.

[155] I agree with the MR that the PTSD diagnosis is supported in the narrative of the performance assessments, but without a direct causal link to the misconduct at issue, the extent to which I can accept this diagnosis as a strong mitigating factor is limited.

[156] The symptoms of the diagnosis of PTSD are many and varied, but none of them explain, excuse or are even causally linked to the underlying misconduct.

[157] One of the diagnosed symptoms, namely, "reduced frustration tolerance", does resonate, though, because there seems to be a disproportionate and lingering hostility towards Mr. W.O. Perhaps it was a reduced frustration tolerance that put the Subject Member over the edge, but to

accept this as a significant mitigating factor without expert evidence linking it to the misconduct at issue would be pure speculation on my part.

[158] Parity of sanction is an important principle in self-regulatory matters. Cases that are alike should be decided in like fashion. Without parity of sanction, there would be no stability, consistency or predictability, and the administration of justice would suffer. Therefore, I carefully considered the cases brought forward.

[159] As a preliminary observation, I agree with the CAR on a singular point of departure between the misconduct described in the various cases brought forward for consideration by the MR and the circumstances of the present matter. Each of those cases featured misconduct that was less serious. The cases involved members who were making false, misleading or inaccurate statements or the fabrication of evidence, the purpose of which was to get themselves **out of** hot water. The present matter involves the Subject Member's fabrication of evidence designed to get someone else **into** hot water. This is much different and much more serious.

[160] I also agree with the CAR when it comes to the precedential value of expedited cases, by which I mean cases involving an admission of the allegations and a joint submission on sanction, tendered by the parties and accepted by the Board.

[161] Joint submissions place a hearing in a unique context. The Saskatchewan Court of Appeal, in the case of *Rault v The Law Society of Saskatchewan* 2009, SKCA 81 (CanLII), unanimously held that joint submissions must be seriously considered by a discipline committee in a principled way. Great deference must be paid, and a decision maker can only interfere with a joint submission if it is unreasonable. Given the many intangible variables inherent in the negotiation process and given that these variables are rarely ever disclosed to the decision maker, the precedential value of decisions arising out of cases settled by way of joint submission is limited.

[162] Many of the cases submitted by the CAR dealt with the viability of medical issues when dismissal is being considered. Given my findings, I do not consider these cases to be applicable to the present situation.

[163] The circumstances under which an employer can consider the dismissal of an employee are addressed in the case of *Ennis v The Canadian Imperial Bank of Commerce*, (1986) BCJ 1742:

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 behavior must show that he is repudiating the contract of employment or one of its essential ingredients.

[164] The "essential ingredients" of an RCMP member's contract of employment are reflected in the RCMP's core values of honesty, integrity, professionalism, compassion, accountability, and respect. The Subject Member's behaviour in these five contraventions amounted to a violation of most of them.

[165] Failure to honour the "no-contact" provisions of the Recognizance, as per Allegation 1, and the closely related breach of the terms of the Recognizance, as per Allegation 3, along with the failure to "keep the peace and be of good behaviour", as per the terms of his Probation Order (Allegation 5), demonstrate an absence of professionalism. It is incumbent upon every member to uphold the administration of justice, and this includes respecting the terms and conditions of documents such as those referred to in Allegations 1, 3 and 5.

[166] The Subject Member's fabrication of evidence, as per Allegations 2 and 4, demonstrates a lack of honesty and integrity in addition to an absence of professionalism. Reference was made to cases under the amended *RCMP Act* I had previously decided, cited at 2016 RCAD 3 and 2017 RCAD 3. Both of these cases make reference to an earlier case, cited at 2016 RCAD 2. A fundamental point of analysis in these cases, which involve issues of honesty and integrity, is whether or not some form of personal gain accrued to the member as a result.

[167] This test was very capably articulated by my colleague Mr. John McKinlay, who in his decision cited at 2016 RCAD 2, considered much of the same case law brought to my attention here. The relevant paragraphs of 2016 RCAD 2 are 109 and 110:

[109] It is important to emphasize, however, that in all of the cases submitted by the parties, the act or acts of dishonesty involved some sort of gain or advantage being sought or accruing to the member. Dishonesty was used in order for the member to obtain personal financial gain or benefit, to conceal the member's work-related deficiencies, to thwart investigation of the member, or to alter deficient documents to further an investigation. Self-benefitting dishonesty was at the root of misconduct matters where:

- .the RCMP was defrauded of gas,
- .operational funds were converted for personal use and accompanied by a forged loan application,
- .forged prescriptions were uttered to obtain anabolic steroids,
- .numerous and repeated false and deceptive statements were given to supervisors and investigators that were ultimately rejected after a contested hearing,
- .one day of imprisonment was imposed for an attempted defrauding of a provincial vehicle insurance system,
- .a finding of guilt was imposed for a false statement to a provincial vehicle insurance system,
- .a Continuation Report was created two years after the fact differing from the original used for a search warrant, to respond to allegations warrants were obtained by misrepresentation,
- .homicide crime scene notes were concealed, and false notes disclosed,
- .numerous and repeated false statements were made to conceal willful investigative neglect, and
- .after being observed masturbating in a surveillance vehicle, efforts were made to influence another police force's treatment of the complaint, misleading and false statements were made, and inappropriate data bank checks were requested.

[110] However, where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors are absent.

[168] In the present matter, there was no financial incentive for the Subject Member's behaviour. There was, however, furtherance of his personal agenda. I find that the "personal gain" sought by the Subject Member was his revenge against Mr. W.O. The Subject Member's false statements were designed to implicate Mr. W.O. in very serious criminal behaviour. These very serious contraventions are worthy of dismissal especially in the absence of significant

mitigating factors. I do not find the mitigating factors strong enough to overcome the gravity of such misconduct in the present case.

[169] Although the five contraventions are to be treated globally in the assessment of conduct measures, it bears mentioning that Allegations 1, 3 and 5, having to do with the breach of the terms of the Recognizance and Probation Order, would be as worthy of dismissal as Allegations 2 and 4.

[170] I cannot find significant evidence of rehabilitative potential in the material submitted for consideration. In particular, there is nothing to indicate the Subject Member feels at all differently toward Mr. W.O..

[171] On the basis of my consideration of the aggravating and mitigating factors, taking into account the gravity of the misconduct at issue, I hereby dismiss the Subject Member from the Force, effective immediately.

<hr/>	April 9, 2018
James R. Knopp, Inspector	Date

Conduct Board