

Protected A

2019 RCAD 09



**ROYAL CANADIAN MOUNTED POLICE**

in the matter of a conduct hearing pursuant to the

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

BETWEEN:

**Commanding Officer, "H" Division**

Conduct Authority

and

**Constable Devin Pulsifer, Regimental Number 56030**

Subject Member

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**Conduct Board Decision**

John A. McKinlay

May 15, 2019

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Sergeant James Rowland, for the Conduct Authority

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Staff Sergeant Peter Hearty, for the Subject Member

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## SUMMARY

During RCMP training at a military base, an evening “team-building” function was organized at a local off-base licensed establishment. Transportation to and from the function was provided by passenger vans to address the need for sober drivers.

At the end of the evening, the Subject Member, grossly inebriated, came to be standing behind Constable 1. He put his hands under and up her shirt so as to touch Constable 1’s breasts, and she

swatted his hands away. The Subject Member then tried much the same thing on Constable 2, who also swatted his hands away. After a second attempt by the Subject Member, Constable 2 turned around and punched him in the face.

The Subject Member neither admitted nor denied the allegations, as he did not recall the events comprising his misconduct. His written responses pointed out that Constable 2's statement suggested that while he tried to touch her breasts, Constable 2's swatting of his hands apparently thwarted this attempt. The Conduct Authority Representative made a motion to obtain a further statement from Constable 2 to clarify whether touching of her breasts actually occurred. This motion was denied. A motion for a publication ban concerning the identities of Constables 1 and 2 was granted.

The Conduct Board did not find sufficient evidence to establish that the Subject Member touched Constable 2's breasts, but found that he had moved his hands upwards in an attempt to touch them. Both allegations were found established, primarily on the basis of the recorded statements from the two victims.

The Conduct Board imposed the following conduct measures: a reprimand for each allegation; ineligibility for promotion for a period of 2 years from the Board's date of decision, globally for both allegations; the forfeiture of 15 days of pay for the first episode of sexual touching and 20 days of pay for the second episode; and a direction to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer.

## INTRODUCTION

[1] I was appointed as Conduct Board for this matter on November 29, 2018. The allegation phase of this hearing was conducted by transcribed teleconference on March 1, 2019.

[2] The *Notice of Conduct Hearing* (NOCH) for this matter was signed by the Conduct Authority on December 7, 2018. I am satisfied that the Subject Member received the NOCH and the associated investigative package (package) on January 8, 2019. I received the NOCH and package on January 11, 2019. The Subject Member filed his responses under subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], on February 7, 2019.

[3] A pre-hearing conference involving the representatives took place on February 18, 2019. As a result of those discussions, the Conduct Authority Representative (CAR) filed two motions.

[4] In providing my oral decisions on these motions on March 1, 2019, I relied on the caveat that these abbreviated oral decisions might be expanded upon. Furthermore, I reserved the right to clarify and explain my reasons and findings in greater detail in the final written decision issued for this matter.

[5] During a week of training at a military base, an evening “team-building” function was organized at a local off-base licensed establishment, where the Subject Member and other members could purchase food and drink, dance and socialize in an area restricted to RCMP attendees. Transportation to and from the function was provided by passenger van to address the need for sober drivers.

[6] At the end of the evening, when members were standing in a queue to settle their bills, the Subject Member interacted with Cst. 1 and very soon after with Cst. 2. He was then escorted into one of the pre-arranged vans, where he began to vomit. Back at the base, he required assistance changing and showering before falling asleep. The next morning, the Subject Member had no recollection of his interactions with Cst. 1 and Cst. 2. The matter was immediately referred to the relevant Serious Incident Response Team (SIRT) for a criminal investigation

respecting sexual assault. Cst.1 and Cst. 2 both participated in recorded interviews, and later confirmed in writing that they did not wish the Subject Member to be charged criminally. A Code of Conduct investigation followed, in which the Subject Member participated in an investigative interview.

## **PRELIMINARY MOTIONS**

### **Publication ban**

[7] The first motion filed by the CAR concerned a publication ban respecting the RCMP constable who is first identified by name in Particular 3(b) of Allegation 1, and also, the RCMP constable first identified by name in Particular 3(b) of Allegation 2. Through an email received on February 22, 2019, the Subject Member took no position on the requested publication ban, which I understood to mean that the Subject Member was not opposed to the motion.

[8] For the purposes of my adjudication of this matter, I referred to the constable first named in Allegation 1 as “Cst. 1”, and the constable first named in Allegation 2 as “Cst. 2”. It was my decision that a publication ban was appropriate in the circumstances, given the relatively modest, but nevertheless very real, privacy interests that arose, the protection of which appeared to be a legitimate aspect of the proper administration of this Conduct Board process.

[9] Therefore, a publication ban was ordered under paragraph 45.1(7)(a) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], prohibiting the identification of the two constables first named in the aforementioned places in the NOCH. The terms of the order shall be: any information arising from this proceeding that could identify Cst. 1 and Cst. 2 shall not be published in any document, or broadcast, or transmitted in any way.

### **Ordered further investigation**

[10] The second motion filed by the CAR requested an order from the Conduct Board for further investigation. The nature of the further investigation was the seeking of an additional investigative statement from Cst. 2.

[11] In the Subject Member's responses filed under subsection 15(3) of the *CSO (Conduct)*, respecting Particular 3(d) of Allegation 2, the Subject Member stated:

The Member does not recall the specific incident. According to [Cst. 2]'s statement, when she was asked if the Member touched her breasts, she responded: "Trying to anyway" [Page 8, line 8 of the transcript]

[12] Therefore, the Subject Member pointed out an element of the statement obtained from Cst. 2 that was problematic. The terms of Allegation 2, Particular 3(b), state: "You moved your hands upwards and touched [Cst. 2]'s breasts."

[13] It is the second aspect of this Particular that is relevant for this motion. I have carefully compared the typed transcript with the audio recording from which the transcribed statement was made. I am satisfied with the accuracy of the transcript.

[14] At no point in Cst. 2's interview statement does she state that the hand or hands of the Subject Member actually touched her breasts. I acknowledge that there were references in the nature of "grabbed her breasts" that were attributed to Cst. 2 in the statements obtained from Constable (Cst.) Coulter and Cst. Garfield. However, these are obviously hearsay. I do not consider these utterances by two other members to support any order for a further statement from Cst. 2.

[15] At this juncture, I wish to observe that I do not consider Cst. 2 to have been in any respect uncooperative when giving her statement. Therefore, consideration of the hearsay received from Cst. Coulter and Cst. Garfield, as part of the process of determining the establishment of the latter portion of Particular 3(d), is also problematic. I will further address this aspect when determining the establishment of the allegations on merit.

[16] The Subject Member did not file any new information or evidence to contradict Cst. 2's statement. He merely pointed out what may be viewed as the important qualification that Cst. 2 herself provided in answer to what was clearly a leading question by the interviewer.

[17] The CAR provided a fuller quotation from Cst. 2's statement. I note that the CAR underlined the expression "basically the exact same thing" in Cst. 2's response. I do not view this

phrase as assisting the CAR's position as it relates to the Subject Member's **second** episode, where his hands were under Cst. 2's shirt. It is the nature of the **first** episode of touching Cst. 2 that is under examination.

[18] I note that the CAR raised Cst. 2's use of the words "around", "like", and "basically", arguing that they were more indicative of embarrassment than of failing memory. It is my view that the cause or causes that led Cst. 2 to provide the information that she did are not relevant in deciding on the CAR's request for a further statement from her to "clarify the ambiguity".

[19] I agree with the Member Representative (MR) that summaries of Cst. 2's transcribed statement were not evidence. Her statement is primary evidence.

[20] The CAR took the view that there was an "unresolved conflict" in the interpretation of Cst. 2's statement. Nothing provided by the Subject Member created this purported conflict. The CAR was seeking new or further information. It is not persuasive to try to characterize what was being requested as simply seeking a clarification by Cst. 2. The CAR was seeking to improve the sufficiency of the information on which the Conduct Authority relied to establish Particular 3(d) by obtaining information from Cst. 2, only after the insufficiency of that information had been raised by the Subject Member.

[21] The CAR argued that to proceed without an attempt to gain the "true meaning" of Cst. 2's words could lead to a factually inaccurate conclusion by the Conduct Board. What was overlooked in this argument was that the obligation rested on the Conduct Authority to conduct an adequate investigation, and to pursue any clarification of statements with witnesses, **before** the NOCH was issued.

[22] This Conduct Board being placed in the position of having received inaccurate or ambiguous, and consequently insufficient information to support a particular, rests with the Conduct Authority. It also rests with the Conduct Authority if a person who is the object of alleged misconduct provided a statement that was insufficient to establish misconduct, due to the manner in which information was elicited, or was not elicited, when that person was interviewed.



[23] Respectfully, I view what the motion was seeking to be exactly what it denied seeking: attempting to fill an evidentiary void by seeking new evidence. The fact is that the Subject Member offered no evidence to the contrary concerning Particular 3(d). What would have been appropriate, had he done so, is irrelevant given the circumstances before me.

[24] I have examined the terms of subsections 15(4) to 15(5) of the *CSO (Conduct)*. I note that subsection 15(4) indicates that a **subject member** may request that the Conduct Board cause a further investigation to be made. It is under subsection 15(5) that the Conduct Board is granted the express authority to order **a person** to provide any further information that the Board requires to perform its role under subsection 40(1) of the *RCMP Act*.

[25] Therefore, the motion requested by the CAR sought an order from me that, in my view, involved an exercise of discretion, given the use of the expression “may order”. A fundamental consideration is that this conduct hearing matter must be adjudicated as expeditiously as possible in keeping with procedural fairness principles.

[26] The Subject Member did not offer any contrary evidence concerning the other particulars under Allegation 2; even the first portion of Particular 3(d), “you moved your hands upward”, gave rise to no argument about insufficient evidence.

[27] The Subject Member did not dispute Particular 9 of Allegation 2, which references the Subject Member touching Cst. 2 for a sexual purpose without her consent.

[28] Based on the foregoing, I am not convinced that the interests of justice support the CAR’s motion, and those interests would, in fact, be compromised if I granted the CAR the opportunity to seek further information from Cst. 2.

[29] I decline to exercise my discretion as requested by the CAR; therefore, the second motion is denied.

[30] Similarly, I would not be inclined to approve Cst. 2 as a necessary witness in the allegation phase of this matter before making my decision on the establishment of Allegation 2.

[31] With respect to the information that was referenced by the MR at paragraph 5 of his written response to this second motion, I wish to add that I have excluded any and all considerations of this information when considering the circumstances relating to the CAR's motion. The information cited by the MR in his paragraph 5 was also expressly excluded from my consideration as any part of the broader evidence and information for this matter as a whole. Accordingly, it is not necessary for me to address the submissions by the MR concerning the CAR as a potential witness.

[32] I offer one observation concerning conduct authority personnel seeking further information from a potential inculpatory witness (particularly a victim or complainant), after a subject member's written responses have identified insufficiency in that witness's statement. My view is that, after receipt of a subject member's responses under subsection 15(3) of the *CSO (Conduct)*, it is not prudent to seek further information from the makers of statements contained in the disclosed investigative package without an authorizing order from the conduct board. Consistent with this view, it is not prudent for such further information to be filed with the conduct board unless it was obtained using investigative efforts that were approved by a conduct board. If a subject member's responses give rise to a legitimate entitlement to file rebuttal evidence or information, I believe this should still be addressed by the conduct board before any new material is sought or filed.

## **ALLEGATIONS**

[33] Subsection 20(1) of the *CSO (Conduct)* requires that the allegations in a notice of conduct hearing first to be read to a subject member and for the subject member to admit, or deny, each allegation.

[34] The Subject Member was represented throughout this process by his MR, and he filed written responses under subsection 15(3) of the *CSO (Conduct)*. For both allegations, the Subject Member stated in writing that he could not admit to the allegations as he did not remember the events comprising the allegations. However, the Subject Member stated that, except respecting

the one element of Particular 3(d) in Allegation 2, he did not contest the particulars supporting both of the allegations.

[35] Given the written submissions filed, the Subject Member waived the reading of the allegations contained in the NOCH, and he did not admit or deny Allegations 1 and 2.

[36] Subsection 20(2) of the *CSO (Conduct)* states: “If a member does not admit or deny an allegation, the member is deemed to have denied the allegation.” Therefore, the Subject Member was deemed to have denied Allegations 1 and 2.

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

### **Allegation 1**

On or about April 17, 2018, at or near Port Williams, in the Province of Nova Scotia, while off duty, [Subject Member] did engage in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

### **Particulars**

1. At all material times, you were a member of the Royal Canadian Mounted Police (“RCMP”) and were posted to Liverpool Detachment in Queen’s District, in the province of Nova Scotia.
2. During the week of April 16, 2018 to April 20, 2018 you were scheduled to attend the H&L Division Tactical Troop training at Canadian Forces Base (“CFB”) Aldershot.
3. After training on April 17, 2018 you attended a Tactical Troop social gathering at the Wayfarer’s Ale Society, a licenced establishment in Port Williams, Nova Scotia, where the following events occurred:
  - a) You consumed alcohol to the point of rendering yourself intoxicated.
  - b) You approached [Cst. 1] from behind and placed your hands under her shirt.
  - c) You moved your hands up and grabbed [Cst. 1]’s breasts.
  - d) [Cst. 1] pushed your hands away.
  - e) Cpl. Berger, another member of the tactical troop who observed your actions, pulled [Cst. 1] away from you.
4. [Cst. 1] had never met you prior to this incident.

5. [Cst. 1] did not consent to being touched in this manner.
6. You touched [Cst. 1] in plain view of other Tactical Troop members.
7. You were later removed from the bar and brought back to CFB Aldershot by other Tactical Troop members.
8. You touched [Cst. 1] for a sexual purpose without her consent, in front of coworkers, thereby conducting yourself in a manner that discredits the Force contrary to section 7.1. of the *Code of Conduct of the Royal Canadian Mounted Police*.

### **Allegation 2**

On or about April 17, 2018, at or near Port Williams, in the Province of Nova Scotia, while off duty, [Subject Member] did engage in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

### **Particulars**

1. At all material times, you were a member of the Royal Canadian Mounted Police (“RCMP”) and were posted to Liverpool Detachment in Queen’s District, in the province of Nova Scotia.
2. During the week of April 16, 2018 to April 20, 2018 you were scheduled to attend the H&L Division Tactical Troop training at CFB Aldershot.
3. After training on April 17, 2018 you attended a Tactical Troop social gathering at the Wayfarer’s Ale Society, a licenced establishment in Port Williams, Nova Scotia, where the following events occurred:
  - a) You consumed alcohol to the point of rendering yourself intoxicated.
  - b) You approached [Cst. 2] from behind while she was standing at the bar.
  - c) You placed your hand underneath [Cst.2]’s shirt and moved it across her bare stomach.
  - d) You moved your hand upwards and touched [Cst. 2]’s breasts.
  - e) [Cst. 2] swatted your hand away and continued the conversation she was having with another member.
  - f) Despite [Cst. 2] swatting your hand away, you again placed your hand underneath her shirt and began moving up towards her breasts.
  - g) [Cst. 2] turned around to face you and struck you in the face.
4. [Cst. 2] recognized you as a member of the Tactical Troop but had never spoken with you before.
5. [Cst. 2] did not consent to being touched in this manner.

6. You touched [Cst. 2] in plain view of other Tactical Troop members.
7. In fact, you touched [Cst. 2] a short time after touching [Cst. 1] in the manner described in allegation 1.
8. You were later removed from the bar and brought back to CFB Aldershot by other Tactical Troop members.
9. You touched [Cst. 2] for a sexual purpose without her consent, in front of coworkers, thereby conducting yourself in a manner that discredits the Force contrary to section 7.1. of the *Code of Conduct of the Royal Canadian Mounted Police*.

### **Findings on the Allegations**

[38] Subsection 40(1) of the *RCMP Act* requires the application of the balance of probabilities standard of proof when adjudicating alleged contraventions of the RCMP Code of Conduct. Therefore, I refer to the decision from the Supreme Court of Canada in *F.H. v McDougall*, [2008] 3 SCR 41. I am guided by the Court's commentary at paragraphs 44 to 46, with paragraph 46 providing: "Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency."

[39] Both allegations assert a contravention of section 7.1 of the Code of Conduct. My interpretation of section 7.1 is guided by the commentary provided by the RCMP External Review Committee in recommendation C-008, in particular paragraph 93:

[...] [D]iscreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general, and the RCMP in particular, would view the behaviour. [...]

#### *Allegation 1*

[40] With respect to Allegation 1, I find that there is sufficient evidence to find established, on a balance of probabilities, each of the particulars. I rely on the information provided in the statement of Cst. 1, the statements of other members present at the pub (in particular the statement of Corporal (Cpl.) Berger), and the Subject Member's admitted inability to recall any contrary account of his behaviour.

[41] Particular 3(c) indicates to the Subject Member that “you moved your hands up and grabbed [Cst. 1]’s breasts”. The wording of this Particular brings under examination some imprecision in the questioning of Cst. 1 and Cst. 2.

[42] In the statement of Cst. 1, she described being grabbed. There was a reference to her being grabbed by the breasts or her breasts being grabbed. But there is no evidence whether that means that the Subject Member’s hand, or hands, came in contact with the skin in that area of Cst. 1’s chest, or whether pressure was applied to her chest, but with some sort of intervening undergarment (such as a brassiere) still covering Cst. 1.

[43] Notwithstanding this imprecision, I find that the evidence establishes what is alleged under Particular 3(c). The Subject Member moved his hands up and grabbed Cst. 1’s breasts. I cannot go so far as to find that there was direct contact with her body rather than with some undergarment covering that area of her body. Nevertheless, on the basis of the established particulars, I find that there is a contravention of section 7.1 of the Code of Conduct as alleged under Allegation 1.

#### *Allegation 2*

[44] With respect to Allegation 2, I acknowledge the CAR’s reference to the statements of Cst. Coulter and Cst. Garfield, and their recollections of what they may have been told by Cst. 2 regarding the touching she experienced.

[45] But on a point as important as this, the fact that Cst. 2 was directly questioned certainly makes reliance on hearsay from these two other members a tenuous approach. Moreover, in law, there does not appear to be a strong necessity consideration that supports my reliance on this hearsay in adjudicating Allegation 2.

[46] Just as important, a leading question was put to Cst. 2 concerning a grab of her breast by the Subject Member, yet Cst. 2 responded by introducing an important qualification: “Trying to anyway”. Whatever Cst. 2 might have told others earlier, she herself introduced that qualification when interviewed.

[47] Therefore, I am not prepared on a balance of probabilities to find that the Subject Member touched Cst. 2's breasts, the second element under Particular 3(d) of Allegation 2.

[48] However, I find the remainder of Particular 3(d), "you moved your hands upward", to be established. This is particularly the case where, under established Particular 3(f), it asserts that the Subject Member "again placed [his] hand underneath her shirt and began moving up towards her breasts".

[49] While it was initially alleged that the Subject Member's hands not only moved up but also touched Cst. 2's breasts, I find that there is insufficient evidence of the touching of Cst. 2's breasts under Particular 3(c).

[50] However, there is sufficient evidence that his hand or hands were across Cst. 2's bare stomach, and that his hands then moved up towards her breasts. I further find that there was then an intervening action by Cst. 2, in which she successfully swatted the Subject Member's hands away. I also find that the Subject Member then tried a second time to touch her breasts in a similar manner, as described under Particular 3(f).

[51] Accordingly, I find that there is sufficient evidence to establish all of the particulars for Allegation 2, except under 3(d), the portion that states "and touched [Cst. 2]'s breasts".

[52] The Subject Member does not dispute under Particular 9 that he touched Cst. 2 for a sexual purpose without her consent. It is my view that, without sufficient evidence of touching Cst. 2's breasts under the second portion of Particular 3(c), the established particulars nevertheless support a contravention of section 7.1 of the RCMP Code of Conduct. Without Cst. 2's consent, the Subject Member placed his hands under her shirt, had them on her bare stomach, moved them towards her breasts, had his hands swatted away by Cst 2, and then he tried a second time to touch her breasts in a similar manner.

[53] I find that the established elements constitute a contravention of section 7.1, even if I do not find an actual touching of Cst. 2's breasts took place. Based on the foregoing, I find Allegation 2 to be established.

[54] It is noteworthy that, after the Subject Member's second attempt to touch Cst. 2's breasts, Cst. 2 turned around and punched him in the face. Cst. 2 did not strike the Subject Member with maximum force, but nevertheless delivered an unambiguous message about his unwanted and offensive behaviour.

## **CONDUCT MEASURES**

### **Parties' positions**

[55] The CAR seeks an order that the Subject Member resign within 14 days or be dismissed. The MR submits that it is appropriate for the Conduct Board to impose a financial penalty of 10 days' pay for Allegation 1, a penalty of 5 days' pay for Allegation 2, and globally an order that the Subject Member undergo any treatment directed by the Health Services Officer for "H" Division.

### **Materials and authorities**

[56] On March 1, 2019, the CAR filed documentation with the Conduct Board:

- Victim impact statement from Cst. 1 (previously disclosed to the MR)
- Report on Allegations of Harassment and Sexual Misconduct at the RCMP's Canadian Police College Explosives Training Unit (July 2016)
- *Rendell v Canada (Attorney General)*, 2001 FCT 710 (CanLII) (FCC) [*Rendell*]
- *Appropriate Officer for "K" Division and Cst. Jiminez* (2010), 6 A.D. (4th) 172 [*Jiminez*]
- *Carewest v Mendoza*, 2016 CanLii 30015 (Arb. Bd.) [*Carewest*]
- *Conduct Authority for "E" Division and Cst. Caram*, 2017 RCAD 8 Corrected [*Caram*]
- *Conduct Authority for "NHQ" Division and Civilian Member Calandrini*, 2018 RCAD 10 [*Calandrini*]



[57] On March 4, 2019, the MR filed a number of documents to rely on for the conduct measures phase of the hearing:

- Documentation on a bravery award and a Commanding Officer's Commendation Certificate received by the Subject Member; and
- Performance assessments

[58] Also included in the MR's filing on March 4, 2019, were nine adjudication board decisions, and the *Caram* decision:

- *Appropriate Officer of "K" Division and Cst. Hanson* (1998), 3 A.D. (3d) 60 [*Hanson*]
- *Appropriate Officer of "K" Division and Cst. Chruchley* (1998), 7 A.D. (3d) 63 [*Chruchley*]
- *Appropriate Officer of "O" Division and Cpl. MacDonald* (2001), 6 A.D. (4th) 340 [*MacDonald*]
- *Appropriate Officer of "F" Division and Cst. Giesinger* (2003), 18 A.D. (3d) 64 [*Giesinger*]
- *Appropriate Officer of "J" Division and Insp. Heon* (2006), 29 A.D. (3d) 165 [*Heon*]
- *Appropriate Officer of "F" Division and Cst. Rice* (2009), 3 A.D. (4th) 377 [*Rice*]
- *Appropriate Officer of "F" Division and Cst. McLean* (2012), 11 A.D. (4th) 427 [*MacLean*]
- *Appropriate Officer of "C" Division and Cst. Lebrasseur* (2014), 14 A.D. (4th) 520 [*Lebrasseur*]
- *Appropriate Officer of "K" Division and Cst. Glasier* (2016), 16 A.D. (4th) 178 [*Glasier*]

[59] On April 12, 2019, the MR also filed two documents that would be referred to in the Subject Member's testimony before the Conduct Board on April 15, 2019, as part of a video conference hearing. One of these documents was comprised of a series of reference letters, provided by:

- G.D. Smith (Staff Sergeant, retired), the Non-Commissioned Officer in Charge of the District Office to which the Subject Member was transferred in August 2017. Noting the Subject Member's exemplary leadership traits, personal attributes, investigatory skill sets and flexibility, he placed him in an Acting Corporal role despite his lack of seniority. With full knowledge of the Subject Member's misconduct and the benefit of over 36 years of service, he would welcome commanding the Subject Member again, and rated him in the "top percentage of solid members". He stated with confidence that the Subject Member had retained the support of his fellow members and District Office staff.
- Cst. T. Smith, who worked with the Subject Member in the District for eight months, ending in April 2018. Aware of the Subject Member's current situation, her view of him was unchanged: he was a gentleman, kind, polite and courteous. She looked forward to working with him again.
- Sgt. T.R. Greening, the Subject Member's immediate supervisor for three years before his transfer to "H" Division in 2017. With 16 years of experience and now serving as a District Operations Non-Commissioned Officer, he described the Subject Member as one of his top performers, who on several occasions served as Acting Detachment Commander in his absence. He was genuinely shocked to hear of the allegations, and they "certainly do not represent the man that I know and worked with". He would not hesitate to work with the Subject Member again.
- Cpl. J. Lyall, now a Firearms Instructor at Depot, who worked with the Subject Member for three years at Bonavista Detachment. He observed the Subject Member's ability to adapt coming from a federal section, his work was beyond reproach, and he became one

of the strongest performers in the unit. The Subject Member was one of the best members he had ever worked with, and one of the best people he knew.

- Cpl. M. Fowler, now Detachment Commander at Cartwright Detachment in “B” Division. He offered many of the same positive observations noted in previous reference letters. The Subject Member was the type of person you could depend on when something needed to be done right, and the writer would trust the Subject Member with his life and welcome working with him again.
- Guard F. Russell, who served in Bonavista as an Auxiliary Constable and then Detention Guard for a total period of 20 years. She offered a very positive assessment of the Subject Member’s hardworking, cheerful personality and noted that he left a very positive lasting impression after his departure.
- Ms. W. Butler-Tremblett, who offered a short note in which she indicated that she had known the Subject Member for six years, with four years as a co-worker. She noted his honesty, reliability, great integrity, dedication to family and work, kindness and generosity. She would highly recommend working with him and she would work with him again.
- Cst. D. Thorne, now posted to St. Stephen, “J” Division, who worked for two years on the same shift as the Subject Member in Bonavista until 2015. He offered many positive observations and described specific operational experiences where the Subject Member maintained his cool and was in control during volatile situations. He noted that the Subject Member was known in the community as an engaging, kind and polite police officer. He had maintained his friendship with the Subject Member. He thought so highly of him, the Subject Member and his wife now served as godparents to his youngest child.
- Cst. D. Foster, whose first posting in 2015 was to Liverpool Detachment in “H” Division. He noted the positive mentorship he received from the Subject Member, as well as his leadership and willingness to lend a hand.

- Cst. D. Cowan, who began working with the Subject Member at Liverpool Detachment in the summer of 2017. He described specific files in which the Subject Member exhibited calm and respect, and also professional firmness, dealing with clients. Of note, he had observed the Subject Member in social situations, where he was friendly and respectful at all times. He would not hesitate to work with the Subject Member again.
- Cst. T. Dunderdale, who met the Subject Member in Bonavista in 2015, when the writer had three years of service. He described him as “a good friend and former detachment teammate of mine”. He offered quite an eloquent summary of his view of the Subject Member:

In the years that I have known and worked with [the Subject Member], I have developed enduring respect for his work ethic and abilities. While I am aware of the reason he is requesting a reference letter, I believe he has been and will hopefully continue to be an asset to the RCMP for a long time, a member who I would be proud to work with. More importantly, I believe the compassion, humility, thoughtfulness and kindness that make him one of my very close friends are also the characteristics that will ensure a successful and enduring career that the RCMP would be proud of.

- Cst. M. Kenny, who worked with the Subject Member in Bonavista for two years starting in 2015, often on the same shift. He offered positive observations about the Subject Member’s character, willingness to help co-workers, and respectful attitude to co-workers and the public. He appreciated the Subject Member’s support when dealing with personal family matters. He would not hesitate to work with him again.
- Cst. T. Oxner, who worked with the Subject Member for just over one month in the early fall of 2010, when the Subject Member provided relief at Arctic Bay, Nunavut. This was a two-member post, and they spent on average 16 hours a day together. He emphasized:

I found [the Subject Member] to be an outstanding example of a police officer and his personal character to be beyond reproach. When I say outstanding I do, in fact, mean that he stood out. I worked with no less than 7 relief members in my 2 years in Arctic Bay and received many invitations to maintain contact with and visit the homes of these members. Of these 7, [the Subject Member] is the only member I have regular contact with to this day.

[60] The second attachment to the MR's email of April 12, 2019, contained:

- an award receipt for a Commanding Officer's Certificate of Appreciation dated October 1, 2009;
- Commanding Officer's Commendation for Bravery dated May 2, 2014;
- Director General (Operational Readiness and Response) Certificate of Appreciation (undated) for preparing and facilitating an Obstruction Removal Team Course in May 2014;
- positive performance logs, dated December 5, 2013, February 3, 2015, and September 14, 2015;
- Commanding Officer's Letter of Appreciation dated May 27, 2016; and
- Alberta Premier's Certificate of Appreciation and Medallion dated October 24, 2016

[61] On April 15, 2019, the Subject Member testified, having given his solemn affirmation. He briefly described his postings in "O" Division (Federal Enforcement Section, Toronto North Detachment) and "B" Division (General Duty Investigator, Bonavista Detachment), before his transfer in the summer of 2017 to Liverpool Detachment, in "H" Division.

[62] The Subject Member received the Commanding Officer's Commendation for Bravery for his part in the rescue of a suicidal individual from ice-packed waters on the night of March 25, 2014, in Bonavista.

[63] By the time the Subject Member arrived in "H" Division, he had participated in various deployments as a tactical troop member, and had become a course trainer with respect to tactical and more specialized obstruction removal team matters. His participation in earlier deployments arising from wildfires and remote demonstrations had been appreciated and formally recognized.

[64] The Atlantic Region's Obstruction Removal Team had been comprised of members from "B", "L" and "J" Divisions. On September 11, 2017, the Subject Member learned that one

member of the team, with whom he had worked for four years in “B” Division, had committed suicide. When the Subject Member attended the training week at CFB Aldershot in April 2018, this was the first time the team had been together since the loss of their colleague.

[65] The Subject Member testified that, throughout high school and university, even when completing his RCMP training, he had not consumed alcohol. His first drink was in April 2009 at his second tactical troop recertification. From his testimony, I understand that the frequency and intensity of his alcohol consumption then increased markedly, with the Subject Member drinking to the point of intoxication at the close of his deployment at the Vancouver Olympics in February 2010. He further testified: “My drinking continued up until the point where it would be two to three times a week.”

[66] The Subject Member was asked to describe the stressors in his life on the night of April 17, 2018. Two days before training began, his grandmother had been injured in a fall and required surgery. She was hospitalized in the same town where training would take place, and he planned to visit her. Also, on April 17, 2018, he had missed a call, while training, from the social worker who was handling the portfolio for the adoption process he was pursuing with his wife. These two circumstances do not seem grave or acutely troubling. In my view, it is possible (but not objectively likely) that these circumstances would constitute significant individual stressors or combine to cause the Subject Member significant stress on the night of April 17, 2018. Moreover, it is not established that these stressors contributed to the Subject Member’s consumption of alcohol on the night in question.

[67] The Subject Member provided his recollection of the night. Based on the Subject Member’s significant level of inebriation, noted by other members in attendance at the pub, I accept the Subject Member’s account as credible:

From the night, I remember having one drink of alcohol before I had left the barracks at Camp Aldershot. I remember taking a shuttle to the Wayfarer’s Ale Society in Port Williams. I remember waiting in line as they were assigning us all numbers to keep our drink orders in queue for the night. I remember eating two pounds of wings. I remember sitting at a table with the other Members of the Atlantic Region Obstruction Removal team. I

remember having approximately four to five drinks at the location. At 9:30 I remember going downstairs to the washroom, coming back upstairs, getting another drink and sitting down at the table, and I do not remember anything after that.

[68] The Subject Member testified that he has not consumed alcohol since that night and that he will not do so in the future. Immediately after the incident, he obtained a referral for counselling from an RCMP-sanctioned program (Employee Assistance Program). The registered counselling therapist's letter, dated February 1, 2019, and filed by the MR after the conclusion of the video hearing, referred to counselling for "personal stress and life management" and developing "personal stress and anxiety management strategies". The counsellor advised that the Subject Member received short-term counselling and was not subject to any psychological assessment.

[69] With respect to mental health assistance, I find that the Subject Member did what he understood he should do to address his behaviour: he fully participated in the type of counselling that was provided to him. This finding is supported by his answer to a question posed by the Conduct Board: "That was the person who when I asked for a referral, they put me in touch with."

[70] In his testimony, the Subject Member spoke of how his counselling sessions confirmed that alcohol should "have no part in [his] life". I find this realization by the Subject Member genuine, and one that he takes very seriously; he will be conscientious about abstaining from alcohol. I accept that he has now learned how to identify, manage and cope with stress, including ways to seek out effective assistance if he feels overwhelmed by stress and anxiety.

[71] The Subject Member's direct-examination ended with simply apologizing to Cst. 1 and Cst. 2, to his home unit for the burden of being even more short-staffed as a result of his unavailability, and to the RCMP for the shame and embarrassment resulting from his misconduct.

[72] In cross-examination, the Subject Member was asked if he considered himself an alcoholic. He replied: "I consider myself to have issues with alcohol, yes." Displaying a fairly

sophisticated understanding of his potential for alcohol abuse, he testified that he did not consider his problem with alcohol to be “solved”, stating: “No. I recognize that I have an issue with alcohol, and I have acquired the tools to monitor that issue.” He acknowledged that he had not sought guidance specifically concerning “remission prevention”. With the birth of his daughter in February 2019, counselling had been paused pending the outcome of this conduct process.

### **Range of sanctions**

[73] Under the previous RCMP disciplinary system, where a final written decision was issued by an adjudication board, it was an accepted practice, when determining the appropriate sanction for established misconduct, for the adjudication board to begin by identifying the sanction range for similar acts of misconduct. This practice has been continued by conduct boards adjudicating allegations brought under the conduct management system operating since November 28, 2014. In the present matter, after a review of the relevant authorities and the RCMP *Conduct Measures Guide*, the range of conduct measures for acts of non-consensual sexual touching appears to range from significant financial penalties up to the loss of employment, depending on the nature of the act committed as well as the mitigating and aggravating factors.

[74] As I observed in *Caram*, at paragraphs 94 and 95:

[94] The range of sanction for matters involving off-duty, inappropriate and sexual touching, based on decisions rendered by past RCMP adjudication boards (constrained by a legal maximum of 10 days’ forfeiture of pay), spans from moderate to maximum forfeitures of pay. [...]

[95] It is apparent from the RCMP case law submitted by the parties that the kind of sexual misconduct established against the Subject Member under section 7.1 of the Code of Conduct has often attracted sanctions from RCMP adjudication boards short of ordered resignation or dismissal, but the range of sanctions has included loss of employment where, for example, violence, a criminal conviction or a record of prior discipline exists. The *Conduct Measures Guide* certainly supports a range which includes loss of employment.

[75] The adjudication board decisions filed by the MR are dominated by cases where an agreed statement of facts was relied upon, and either a joint proposal on sanction was made by



the parties (*Rice, MacDonald, McLean, Lebrasseur, Glasier, Heon*), or the Appropriate Officer did not seek the loss of employment (*Hanson, Crutchley, Giesinger*). While parity of sanction must be part of any assessment of proportionate measures, it is apparent that the range of conduct measures available under the conduct system instituted on November 28, 2014, permits a range of more serious measures short of dismissal and there plainly is no longer any legislated cap at 10 days' forfeiture of pay. In addition, the deference to be afforded joint proposals on sanction reduces the precedential value of cases involving such proposals.

[76] On the other hand, some of the dismissal decisions filed by the CAR include situations that differ markedly from the present matter, such as:

- a troubling physical assault in which the victim's nose was bitten by the drunken member (*Rendell*). [I acknowledge that the CAR filed this case primarily to address the issue of parity.];
- after prior discipline and an unsuccessful attempt at rehabilitation concerning alcohol issues, the member again exhibited aggressive behaviour before sexually assaulting a further victim (*Jimenez*); and
- in a private arbitration matter, the grievor denied the allegations, a full-testimonial hearing was required to find inappropriate sexual touching of a number of co-workers, and yet it remained unclear that the grievor understood and accepted that her conduct was profoundly inappropriate (*Carewest*).

[77] There are two decisions issued by conduct boards that are clearly relevant to the present matter, *Caram* and *Calandrini*. The board in *Calandrini* began by noting how counsel had distinguished *Caram*, at paragraph 108: “[...] [T]his case involved one drunken party that took place outside the workplace.” The board in *Calandrini*, at paragraph 182, went on to differentiate circumstances where there are a series of repeated incidents directed at the same person (*Calandrini*), and circumstances where there are transgressions of a drunken party-goer involving a number of unfortunate recipients (*Caram*).

[78] Notwithstanding the emphasis that is properly placed on general deterrence in *Calandrini* to address continuing workplace harassment in the RCMP, I believe one must not lose sight of the fact that the circumstances of the Subject Member are those of a drunken pub night patron, and not of a persistent and deliberate office workplace harasser.

### **Proportionality**

[79] Subsection 24(2) of the *CSO (Conduct)* states: “A Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct.” The *RCMP Administration Manual*, Chapter XII.I “Conduct”, section 11.15, indicates that aggravating and mitigating circumstances must be considered in determining the appropriate conduct measures in relation to a subject member’s contravention of the Code of Conduct.

[80] The *Administration Manual* includes Appendix XII 1.20, which provides a fairly exhaustive list of potential aggravating and mitigating circumstances, and a definition for each:

Mitigating Circumstances: “A fact or situation that does not bear on the question of a defendant’s guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence” (*Black’s Law Dictionary, 8th ed.*). Mitigating circumstances do not constitute a justification or an excuse for the offence, but in fairness, these factors may be taken into consideration to reduce the severity of the sanction to be imposed, in order to appropriately deal with the misconduct.

Aggravation: “Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself” (*Black’s Law Dictionary, 6th ed.*).

### **Mitigating circumstances**

[81] I have identified the following mitigating circumstances:

- The Subject Member has accepted responsibility, in the sense that (except with respect to a discrete element of Particular 3(d) for Allegation 2) he admitted or did not dispute the particulars for both allegations. He agreed to be interviewed as part of the Code of

Conduct investigation. He has responded to the formal allegations in a manner that showed a clear desire to resolve matters quickly and at the earliest opportunity;

- Both in writing and in his testimony, the Subject Member provided apologies to Cst. 1 and Cst. 2, and I accept that he is genuinely remorseful for his actions;
- The Subject Member has no prior discipline, and in answer to cross-examination, further testified that he has never been the subject of a public complaint;
- The Subject Member has performed his policing duties at an above-average level, and has consistently demonstrated an impressive work ethic and commitment to additional roles with the ceremonial troop and tactical team. His personal bravery in the performance of his duties has been formally commended;
- The Subject Member has maintained the support of his District Commander and other members who have worked with him, and letters of reference confirm his dependability and usual good character;
- While involving two victims, who were sexually touched in quick succession, the Subject Member's misconduct was clearly an isolated incident, and out of character;
- While it is possible that stressors in his personal life contributed to his over-consumption of alcohol, there is insufficient evidence to find that these stressors materially contributed to his abuse of alcohol that night. The suicide of a team member, since the last gathering of the regional obstruction removal team, potentially contributed to the Subject Member's level of inebriation that night, but no direct nexus was established, and negligible weight is given to this factor. (I cannot rule out that the Subject Member's severe degree of intoxication was somehow partly the result of his naïveté, and resulted from his drinking not fewer than five beer glasses of "craft" cider, with the strength of the cider unknown, but no evidence was offered on this possibility and it amounts to speculation of no weight.);

- The Subject Member immediately sought and has actively participated in counselling;
- I accept that the Subject Member has remained abstinent from alcohol since the incident, and he presents as deeply committed to remaining abstinent;
- Given the Subject Member's willingness to accept whatever further assessment and treatment is identified as necessary, I consider there to be a minimal likelihood that the Subject Member will ever be grossly intoxicated again, and further that there is a minimal likelihood that he will ever engage in similar misconduct again. I consider the Subject Member's potential for successful rehabilitation to be strong.

### **Aggravating circumstances**

[82] I find the following aggravating circumstances to be present in this matter:

- The degree of seriousness of the misconduct is high in and of itself. As emphasized in the *Calandrini* decision, the RCMP has, through repeated messaging to its employees, communicated that workplace harassment, including sexual harassment, and off-duty non-consensual sexual misconduct, are all unacceptable and will not be ignored nor tolerated.
- In the absence of any diagnosis of alcohol addiction, or a substance abuse condition, or some other mental health issue that contributed to excessive consumption of alcohol, I view it as aggravating that the Subject Member would render himself so intoxicated as to become disinhibited and sexually touch two co-workers. While the Subject Member did not face an allegation that he rendered himself unfit for duty, and while it is apparent that a number of attendees at the pub were intoxicated by the end of the evening (putting in doubt the overall benefit of a so-called "team building" social event while training continued), drinking to the point of being unable to account for one's actions at an off-duty but work-related social event constitutes an episode where personal responsibility was clearly lacking.

- The impact of the Subject Member's misconduct on the two constables who were subjected to his unwanted sexual touching must be considered aggravating, even if only Cst. 1 provided a formal statement as a victim. There is an undeniable element here: the misconduct violated the important trust that should exist between fellow police officers and co-workers. In addition, a number of other members observed some aspect of the Subject Member's misconduct. However, at the oral conduct measures phase of the hearing, I questioned the representatives on the fact that no harassment process, including a harassment investigation, was performed in this matter, and it was from its inception treated internally as a Code of Conduct matter, mainly because of the nature of the alleged misconduct, but possibly because Cst. 1 and Cst. 2 provided statements to the initial criminal investigation, but did not "complain" of harassment by formally filing the applicable form. In my view, some of the frustrations recently expressed by Cst. 1 may have been avoided had some of the processes contemplated by the harassment process at least been entertained, even if ultimately the matter was pursued as a Code of Conduct matter.

### **Measures imposed**

[83] Having considered the parties' submissions, the materials filed for the conduct measures phased of the hearing, the nature and circumstances of the contraventions, including the aggravating and mitigating circumstances, I do not find that the loss of employment is a proportionate response to the Subject Member's episode of misconduct. In the present case, significant measures short of dismissal can adequately denounce, punish and correct the Subject Member's misconduct, as well as identify and monitor any necessary rehabilitative therapy. Moreover, measures short of dismissal can also adequately address the respectful workplace and public trust interests that were eloquently discussed in RCMP Conduct Board decision 2018 RCAD 16 [*Turner*], at paragraphs 308 and 314.

[84] Notwithstanding the mitigating circumstances that are present, I view the contravention under Allegation 1 as deserving of a financial penalty of 15 days' forfeiture of pay, and under Allegation 2 as warranting 20 days' forfeiture of pay. I agree with the CAR that there is a

negligible difference in severity between the acts perpetrated against Cst. 1 and Cst. 2. However, the misconduct under Allegation 2 contains an element of persistence or repetition that is aggravating, even if it did occur very soon after Allegation 1.

[85] The severity of these pay forfeitures reflects two primary aggravating features: the invasive nature of the sexual touching; and the prior messaging by the Force to all employees about the unacceptability of sexual harassment and sexual misconduct.

[86] I believe that it is proportionate to impose, as a further punitive and serious measure, a period of ineligibility for promotion of 2 years, to start from the date of this written decision. Given that the Subject Member is an effective investigator, has consistently received positive performance evaluations, and has demonstrated that he is capable of successfully assuming a supervisory role, I recognize that promotion in the near term may have been a real possibility for the Subject Member. But to emphasize to the Subject Member the abject unacceptability of his behaviour, and to make it equally clear to members of the public and employees of the Force just how seriously this type of misconduct is treated by Canada's national police service, both financial penalty and ineligibility for promotion are justified proportionate measures.

[87] Overall, I view the aforementioned selected conduct measures as sufficient to achieve both specific deterrence for the Subject Member, and general deterrence for all members whose behaviour (on- and off-duty) is subject to the provisions of the *RCMP Act*.

[88] It is apparent that the Subject Member's misconduct, involving tactical troop members drawn from "H" Division, including Cst. 1 and Cst. 2, may make his continued participation in training sessions and deployments awkward or even untenable. The Subject Member is posted to a Detachment, and his work on tactical team matters is independent of that posting; therefore, I see no role for directing a transfer or workplace relocation. But I do see the Subject Member's involvement in tactical team activities to be a matter for careful review by the appropriate personnel in "H" Division. It would be a squandering of the Subject Member's training to date, and acquired instructing capabilities, if he took no part in future obstruction removal activities, but the maintenance of a respectful workplace must be considered a greater priority. The

concerns expressed in the victim impact statement of Cst. 1 should be considered as part of any review of the Subject Member's additional tactical troop activities.

[89] Globally, I also direct the Subject Member to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer for "H" Division, or their delegate. I do not question the Subject Member's level of commitment to his sobriety, but he must be given all reasonable tools to maintain a healthy lifestyle, and to ensure that he never again abuses alcohol.

## **CONCLUSION**

[90] The Conduct Board imposes the following conduct measures:

- a reprimand for each allegation, which this written decision shall constitute;
- the forfeiture of 15 days of pay for Allegation 1;
- the forfeiture of 20 days of pay for Allegation 2;
- ineligibility for promotion for a period of 2 years from the date of this written decision;  
and
- a direction to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer for "H" Division, or their delegate.

[91] The parties may each file an appeal of this decision to the Commissioner, as provided for under the RCMP Act.

May 15, 2019

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John A. McKinlay

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Date

Conduct Board