Protected A

ACMT File Number: 20183382

2018 RCAD 20

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF A CONDUCT PROCEEDING

PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer

"K" Division

("Conduct Authority")

and

Constable Michelle Phillips

Regimental Number 61831

("Subject Member")

Protected A

ACMT File Number: 20183382

Record of Decision

Conduct Board

Assistant Commissioner Craig S. MacMillan

December 17, 2018

Mr. Brad Smallwood, Conduct Authority Representative ("CAR")

Mr. Gordon Campbell, Member Representative ("MR")

(collectively, the "Representatives")

Table of Contents

Summary

While responding to a pedestrian-motor vehicle accident on a rural highway, the Subject Member was travelling at a high rate of speed with emergency equipment activated when two civilians were struck on the roadway, injuring one and causing the death of the second, which resulted in two allegations of discreditable conduct under section 7.1 of the Code of Conduct. The Board found the conduct

proceeding was commenced after the expiration of the one year limitation period and it was statute-barred.

Record of Decision

1. Introduction[1]

[1] This decision arises from a conduct proceeding involving the Subject Member in which the Conduct Board ("Board") has rendered a preliminary decision on whether the Conduct Authority initiated a hearing within the limitation period prescribed in subsection 41(2) of the *Royal Canadian Mounted Police Ac*t, R.S.C. 1985, c. R-10 (as amended) ("*RCMP Act*").

[2] For the reasons outlined below, the Board finds that the one year limitation period was not met, and the conduct proceeding is statute-barred.

2. Allegations

[3] On or about August 21, 2016, while posted to Wood Buffalo RCMP Detachment in Fort McMurray, Alberta ("Detachment"), the Subject Member was involved in an incident where her police motor vehicle ("PMV") struck two members of the public ("Collision") on rural Highway 881 ("Highway") near Anzac, Alberta, and as a consequence she faces two allegations of discreditable conduct contrary to section 7.1 of the Code of Conduct outlined in the Notice of Conduct Hearing (dated February 26, 2018) ("Notice"), which the Board summarizes as:

> (1) failing to slow her PMV and striking a member of the public ("Mr. J") which resulted in his death ("Allegation 1); and
>
> (2) failing to slow her PMV and striking a member of the public ("Mr. C") which resulted in serious bodily harm ("Allegation 2") (collectively, the "Allegations").

---

[1] Unless otherwise stated, page number citations or references relate to the enumeration found in the Code of Conduct Investigation Report and Appendices ("Conduct Report"), or the pertinent submission, legal decision, authority, or document submitted by the Representatives and being referred to at that point in the decision.

3. Background

[4] On August 21, 2016, at 1:11 a.m., the Subject Member was dispatched by the Northern Alberta Operational Communications Centre ("NAOCC") to a complaint of a person wearing black clothing and walking down the middle of the Highway near kilometre marker 252 (or 251 depending on which record is relied upon), which is approximately 30 kilometres south of Anzac, Alberta ("First Call").

[5] The Subject Member was south of the location of the First Call, driving northbound on the Highway from Janvier to Fort McMurray (Anzac is north of Janvier and south of Fort McMurray) and operating a fully marked and equipped PMV in the form of a Chevrolet Silverado truck.

[6] In responding to the First Call, the Subject Member reports that no emergency equipment was activated on the PMV and she was travelling the speed limit as she did not want to hit the person reported to be on the Highway. The posted speed limit on the Highway is 100 kilometers an hour ("km/hr").

[7] While enroute to the First Call, the Subject Member received an update from the NAOCC that a pedestrian had been struck by a vehicle on the Highway, approximately five to ten kilometres south of Anzac, Alberta ("Second Call"), which was approximately 10-15 kilometres north of the reported location of the First Call.

[8] In other words, the reported location of the First Call was approximately 25-30 kilometres south of Anzac (marker 252) and the reported location of the Second Call was approximately five to ten kilometres south of Anzac, but in fact the location of the Second Call was inaccurately reported by the caller, as it was later determined to be 30 kilometres south of Anzac (p. 316) (i.e., the same general location as the First Call), an inaccuracy which would not have been specifically known to the Subject Member.

[9] However, it is not in dispute that, for a number of reasons, the NAOCC and/or the Subject Member gave some consideration to the fact that the First Call and Second Call might be related despite their reportedly different locations.

[10] Based on her assessment of a number of factors, the Subject Member reports she elevated her response by activating the emergency equipment of the PMV and increased her speed to approximately 150 km/hr, with the intention of slowing down as she got closer to the Second Call, in case the pedestrian was still on or near the Highway.

[11] While travelling northbound on the Highway the Subject Member reports she had the high beams of the PMV on and in cresting a hill she observed, at a distance, a semi-truck and two other vehicles in the southbound lane and she believed they were pulling over in response to her emergency lights.

[12] As she approached the three vehicles, the Subject Member activated the low beams on the PMV, and not seeing anyone on the Highway, continued northbound at approximately 150 km/hr.

[13] As she was passing the three vehicles, the Subject Member heard a thud and felt a bump beneath the PMV, which caused her to stop the PMV north of the vehicles, and then she turned around and stopped the PMV south of the vehicles and exited, whereupon she learned that she had struck the hand of Mr. C as he was rendering aid to Mr. J on the Highway, and ultimately that the PMV had also run over Mr. J, and who, based upon her observations, appeared deceased.

[14] For the purposes of this preliminary decision, it is not necessary to recount in detail the further actions of the Subject Member, other than to note she gathered information, requested and provided emergency assistance, and took steps to notify her supervisors, while undertaking initial investigative steps in relation to the initial collision relating to the Second Call, until such time as she was relieved and escorted to the Detachment.

[15] It is also not necessary to recount in detail the events leading up to and after the Collision with the PMV, other than to note subsequent investigation determined that Ms. D, accompanied by Mr. C, was driving southbound on the Highway when she struck Mr. J with her truck while he was standing in the middle of the Highway. They immediately reported the accident to the NAOCC, during which time Mr. C attended to Mr. J who was laying in the northbound lane of the Highway, in considerable pain.

[16] Ms. D's truck was located on the southbound shoulder of the Highway, with the four-way flashers activated.

[17] Shortly after, the driver of a semi-truck came upon the scene, and seeing the four-way flashers on Ms. D's vehicle, he slowed and observed two persons standing beside a truck, and then he saw a body on the Highway. He pulled his semi-truck over in front of the smaller truck of Ms. D, and turned on his emergency flashers, as well as his beacon lights, which are very noticeable at night.

[18] A third vehicle also came upon the scene, containing a family comprised of three persons, and, in summary, seeing the emergency flashers of the other two vehicles, and the body on the Highway, they stopped and the four-way flashers were activated on their vehicle. They spoke briefly with the driver of the semi-truck, who was wearing a reflective vest (p. 597) and had used a flashlight to wave them to a stop. They observed someone standing over a body on the Highway.

[19] Within a matter of minutes, all or most of the group now assembled at the location of the accident heard or saw the PMV coming, and it quickly became apparent that it was not slowing down, and it ran over the body of Mr. J on the Highway, and Mr. C was also struck on the hand, causing a significant injury, and it came close to hitting the semi-truck driver who was also on the Highway.

[20] At the location of the Collision, the Highway is a level, straight and undivided two lane paved roadway, with a broken yellow centreline, and white fog lines marking very narrow paved shoulders, which give way to a gentle gravel and grass slope into the ditch.

[21] On the night in question, the Highway was dry and clear, but it was very dark as the moon was fully or partially obscured by cloud cover and there was no artificial lighting.

[22] The witnesses are quite explicit about the fact that the PMV was going very fast and did not slow down as it approached the scene of the Collision, and they were understandably upset by what had transpired.

[23] There is agreement that the emergency lights of the PMV were activated, but there is some disagreement as to whether the Subject Member had the siren activated, with at least one, perhaps two witnesses reporting the siren was activated (pp. 34, 56, 172, 174, 184, 330, 516), other witnesses do

not specifically address the point (p. 631 (para. 120)), and some of the official reporting states no siren was activated (pp. 44, 539), which is also alleged in the Notice (particular 4 of Allegation 1 and Allegation 2), although it is not necessary to make a finding in this regard for purposes of the preliminary decision.

[24] At the time of the Collision, the Subject Member had approximately two years of service, but had experience as a former NAOCC telecoms operator.

[25] It is also reported that within the preceding six months of the Collision, the Subject Member had two other PMV accidents, which were identified and noted through the National Early Intervention System (and these accidents would have been known to immediate supervisors and management within the Detachment).

[26] While it is not necessary to review the events and subsequent investigation in detail, based on the Conduct Report and other information, it is clear that on the night in question or by early the next morning, the Watch Commander (Staff Sergeant Horwood), Operations Officer in the Detachment (Inspector Hancock), Officer-in-Charge ("OIC") of the Detachment (then Superintendent McCloy, who it also appears was the acting Eastern Alberta District Officer ("EDO") during the early hours[2]), Inspector (now Superintendent) Dicks (a line officer[3] in the Detachment who subsequently became the OIC of the Detachment), the EDO (Chief Superintendent Mehdizadeh), Division (Criminal) Operations Officer ("CROPS"), and Commanding Officer were aware of the Collision and related details.

---

[2] The notes of the acting CROPS, Superintendent Bennett, recorded at 0518 a.m. (p. 3) on the date of the Collision indicate that the OIC of the Detachment is also the "acting DO" (i.e., Eastern Alberta District Officer).

[3] The line officer role of then Inspector Dicks is not clearly stated, or could not be found, in the Conduct Report, but for purposes of this decision, she was clearly in a line officer role within the Detachment and subsequently became the OIC of the Detachment, and any knowledge she garnered as a line officer would have come with her into the position of OIC of the Detachment.

[27] In particular, there is an email by the EDO, dated August 21, 2016, at 7:42 a.m. (approximately six hours after the Collision) forwarding a briefing note (titled: "Wood Buffalo EAD [Eastern Alberta District] – Fatal Pedestrian MVC [Motor Vehicle Collision]") from the Operations Officer of the Detachment (prepared by the Watch Commander) that shows not only Detachment management, but also District and Divisional management were all aware of the Collision, and in particular that the Alberta Serious Incident Response Team ("ASIRT") was investigating given it involved the death of Mr. J. ("Briefing Note 1").

[28] However, it is also clear there were communications much earlier than Briefing Note 1 between the Detachment and senior officers within the Division about the Collision.

[29] For example, the notes of Superintendent Bennett (acting CROPS officer), commencing at 02:16 a.m., reveal considerable knowledge of the Collision based on communications with the then OIC of the Detachment (who, as noted, at the time was also the acting EDO), information that was also communicated to Assistant Commissioner Degrand as CROPS (who it appears may have also been the acting Commanding Officer)[4] commencing at 05:35 a.m., which also appears to have eventually led to communications with senior officials responsible for national operations within Contract and Aboriginal Policing at National Headquarters.

[30] As reported in Briefing Note 1, ASIRT was first notified by the RCMP that only Mr. C had been injured as a result of the Collision, but within hours this was corrected to provide notice of the death of Mr. J as a result of being run over by the PMV, and ASIRT asserted jurisdiction and undertook a statutory investigation of the Collision.

[31] Thus, ASIRT became responsible for the statutory investigation of the Subject Member as it pertained to the Collision, and the RCMP remained responsible for the initial accident investigation

[4] The supplemental Conduct Report provided in response to the request for Further Information by the Board (see below) at p. 1 appears to indicate that the CROPs was also the acting Commanding Officer, but no specific reliance is placed on this possibility as it has not been confirmed.

where Ms. D's vehicle struck Mr. J, which was extensively documented on PROS File 2016-1101148 (attached as Appendix "E" to the Conduct Report) ("RCMP File").

[32] The Subject Member attended the Detachment on the morning of August 22, 2016, to be "designated" (i.e., the subject of a statutory investigation), and advised ASIRT investigators she was not prepared to provide a statement at that time (p. 601).

[33] In addition to ASIRT investigators, three RCMP investigators (a Forensic Collision Reconstructionist, a Forensic Identification Services Investigator, and a Serious Crime Unit Investigator) attended the autopsy of Mr. J on August 23, 2016 (p. 502) and provided written summaries of the autopsy (pp. 309, 311-12, 502) (although the subsequent report of the medical examiner was not signed until March 26, 2017) ("Autopsy Report").

[34] While it appears Mr. J was still alive at the time of he was struck by the PMV, the autopsy and medical evidence will likely be the subject of examination in terms of whether the first collision with the truck driven by Ms. D was life-threatening in itself, even if the Collision (with the PMV) was fatal, which does not have to be resolved for the purposes of this decision.

[35] Within a few days of the Collision, Global Positioning System/Mobile Work Station data confirmed that the PMV had not slowed when it encountered the three vehicles on the side of the Highway and was travelling at approximately 156 km/hr when it struck Mr. J and Mr. C (p. 534, see notes of then Inspector Dicks (p. 8), dated August 25, 2016, as well as the notes of the then OIC of the Detachment).

[36] The Subject Member, in the company of her legal counsel, provided a detailed voluntary and cautioned written statement to ASIRT on August 26, 2016 (pp. 602 and 606), and it appears she was completely cooperative throughout ("Statement").

[37] However, as outlined below, it later appears to be reported or understood incorrectly that the Subject Member provided the Statement on August 21, 2016, which is the date on the written Statement (p. 90), but ASIRT is quite explicit in reporting that the Subject Member declined to provide a statement on August 22, 2016, and it was provided on August 26, 2016.

[38] In addition to the fact that RCMP investigators obtained some initial statements from a number of witnesses to the Collision and first responders, there was close cooperation between the RCMP and ASIRT in the following days as they exercised their respective jurisdictions over various pre- and post-Collision investigational aspects, which included an RCMP investigator being present during a number of ASIRT interviews (pp. 406-420, 601, and 603) and the sharing of information.

[39] In particular, on August 29, 2016, ASIRT provided the Detachment with an electronic drive containing 10 witness statements, including those present at the Collision (the content of which were already known to RCMP investigators who attended the ASIRT interviews) (pp. 416-420)) and photographs it had collected as part of its initial investigation (pp. 432-3; see also supplemental Conduct Report at pp. 2-3).

[40] The Team Commander of the RCMP File, who attended a number of the ASIRT witness interviews in the preceding days, and had an extensive knowledge of the Collision and RCMP File, also met with Inspector Dicks on August 29, 2016, along with the investigative team, regarding the "fatal" (i.e. Collision) and provided a briefing ("Team Meeting").

[41] As confirmed by the notes of then Inspector Dicks (later OIC of the Detachment), she was actively involved in the RCMP File, as these notes confirm the Team Meeting, as well as getting updates commencing August 22, 2016 from the Team Commander and other investigative personnel about the Collision, as well as briefings by ASIRT (see pp. 1-27 of the notes of Inspector/Superintendent Dicks).

[42] As would also be expected, there were also ongoing updates and briefings provided to the rest of management of the Detachment, as well as their involvement in the RCMP File and discussions and meetings with ASIRT, and in particular the notes (dated August 21-25, 2016) of the former OIC of the Detachment are quite extensive in detailing certain witness accounts of the Collision and other factors (e.g., confirming speed of 156 km/hr), and the notes of the Detachment Operations Officer are also quite detailed, as are those of the Watch Commander.

[43] Based on the documentation in the RCMP File, as well as the notes of the then Detachment Commander, Operations Officer, then Inspector Dicks, as well as the Team Commander, it is clear that

they each had extensive knowledge of the Collision, including accounts and information provided by the witnesses to the Collision, the autopsy, as well as the actual speed of the PMV by, at the latest, August 29, 2016.

[44] In the normal course, on August 30, 2016, the Operations Officer of the Detachment requested an "incident review" of the Collision ("Incident Review"), which is not to be confused with, or considered to be, a Code of Conduct investigation[5].

[45] A Traffic Analyst Investigation Report (dated October 20, 2016) (p. 518) regarding the Collision ("TAI Report") subsequently found that the speed of the PMV may have been as fast as 160 km/hr at the time of the Collision (p. 534), and it also noted that although the video system in the PMV was not functioning properly (and there is no suggestion or evidence of tampering or other impropriety in this regard), some pre-Collision video was obtained (without audio), and it showed the shadow of Mr. J laying perpendicular in the northbound lane of the Highway and Mr. C who appears to crouched or kneeling near the white fog line (p. 532), just prior to the Collision.

[46] The TAI Report found that the Collision (in terms of running over Mr. J and striking Mr. C) was "unavoidable" based on the speed (156-160 km/hr) of the PMV and other factors.

[47] Assuming a speed of 100 km/hr, the TAI Report also found the initial collision with the truck of Ms. D was also unavoidable (which, although not stated, seems to imply that even if the PMV had been travelling at 100 km/hr the Collision was unavoidable).

[48] However, the TAI Report does not examine or address what may have happened if the PMV had been travelling at speeds lower than 100 km/hr, and indeed, this factor and other considerations were the subject of some comment in a subsequent peer review of the TAI Report obtained by ASIRT from an Edmonton Police Service Collision Reconstructionist ("Peer Report"), shortly after the TAI Report was completed.

---

[5] See, generally, "K" Operational Manual 25.100. (Operational Reviews, Incident Reviews and Administrative Reviews).

[49] In brief, the Peer Report found there were a number of indicators or warnings prior to the Collision that ought to have prompted the Subject Member to reduce speed considerably, including the nature and general location of the First Call and Second Call, being a secluded- rural area, few vehicles on the Highway (as confirmed by video from the PMV), encountering several vehicles on the Highway in one location with emergency flashers or beacon lights activated, reduced visibility, among others, and notes that two other civilian vehicles unaware of the initial accident managed to slow down and stop safely.

[50] Ultimately, the Peer Report finds the conclusion in the TAI Report that the Collision was "unavoidable" to be "misleading."

[51] The exact date that the TAI Report became available to the RCMP is unclear, but there is evidence that it was disclosed early on given it is expressly indicated that it was examined on February 2, 2017, as part of the Incident Review (p. 14), and ASIRT indicated it formed part of the RCMP File (p. 652).

[52] It is not clear when the RCMP became aware of the Peer Report, but it is likely after ASIRT completed its investigation.

[53] With the exception of a brief period of medical leave after the Collision, the Subject Member remained operational, and was eventually transferred to Leduc Detachment, which forms part of Central Alberta District.

[54] In the normal course, ASIRT sent update letters to the Commanding Officer regarding investigations, and three were sent to the Commanding Officer between September 2, 2016 and December 20, 2016, one of which dealt with the designation of the Subject Member as a "subject officer" and the other two simply indicating that the ASIRT investigation into the Collision was ongoing.

[55] A fourth ASIRT letter (dated January 20, 2017) ("ASIRT Letter") was received by the Commanding Officer's office on January 27, 2017 (date-stamped), and it was reviewed by the

Commanding Officer on January 30, 2017[6] (handwritten date, signature block stamp, and signature) (p. 504).

[56] The ASIRT Letter was subsequently forwarded "FYI" (for your information) to the CROPS (received January 30, 2017), and as an "update" to the Eastern District Office (received February 18, 2017) (p. 504).

[57] The ASIRT Letter informs the Commanding Officer that ASIRT has forward its file to Crown Counsel for review and an opinion, and upon reviewing that opinion, the Executive Director of ASIRT will make a decision in relation to the statutory investigation of the Collision.

[58] There is no evidence that the Commanding Officer or anyone else took any steps or gave any direction as a consequence of receiving the ASIRT Letter, other than sending it "FYI" to CROPS, which subsequently requested that a copy be sent to the EDO.

[59] On May 14, 2017, a report was completed pursuant to the Incident Review which provided a detailed review of the Collision, witness statements, member reports, the TAI Report, video, and autopsy, among other information (i.e., primarily based on information in the RCMP File).

[60] The Incident Review will not be examined in detail, but it does provide a number of observations, including that the speed of the PMV was an identified area of elevated risk, noting there "is not a tremendous amount of policy pertaining to emergency vehicle operations outside the scope of pursuits", but as "aggravating circumstances":

> It was an extremely dark night and the speed that [the Subject Member] was operating her police vehicle at did not allow her proper reaction time should the need to take any kind of action to avoid a hazard.
>
> [Subject Member] was operating a police truck. Trucks tend to be less stable than cars and speeds should be reduced as compared to car when responding to emergencies.

---

[6] The month is not entirely legible in the handwritten notation of the Commanding Officer, but the day is clear, which is corroborated by the date stamp of January 30, 2017, of Criminal Operations.

[61] Among other findings, the Incident Review found:

1. [Subject Member] demonstrated knowledge of ongoing risk assessment and policy as it pertains to emergency vehicle operation. That said, she was unable to make appropriate decisions as a result of this risk assessment when speaking of the speed at which she was operating her police vehicle at. It appears that [Subject Member] was acting in good faith and executing her duties in a manner that she felt was appropriate at the time. The circumstances she faced were unique and could not be anticipated without the benefit of hindsight.

[62] In terms of recommendations, the Incident Review indicates that the Subject Member should "…debrief this incident with an experienced NCO or member with a view to ensure that all possible lessons that can be learned by her are learned" and that a "review" be undertaken of her previous and subsequent driving history "to ensure there are no systemic driving issues…"

[63] On or about June 9, 2017, ASIRT apparently informed the OIC of Leduc Detachment and the Central Alberta District Officer ("CDO"), Chief Superintendent Scott, that charges were being recommended against the Subject Member, which would be communicated to her on June 15, 2017 (with her arrest and processing on June 16, 2017), and it is specifically indicated that the OIC of Leduc Detachment will be consulting with the "K" Division Conduct Advisory Unit ("KCAU") in order to prepare a Code of Conduct investigation and review her duty status (briefing note dated June 12, 2017) ("Briefing Note 2").

[64] Briefing Note 2 confirms that the respective CDO and EDO have been notified of this development, as well as the OIC of the Detachment (i.e., now Superintendent Dicks) and "The C.O. was notified by ASIRT at the end of last week" (although it is not clear if that means June 8-9, 2017 or June 1-2, 2017).

[65] Until this point, there is no indication that any action was undertaken by anyone in "K" Division relative to the Collision in terms of considering whether it constituted a conduct matter, and indeed, despite certain claims in Briefing Note 2, as of June 13, 2017 (at 14:05 hours), the notes of Superintendent Dicks (p. 21) (now OIC of the Detachment), record that the CDO, Chief Superintendent Mehdizadeh, indicated during a phone call:

> [Subject Member] – Driving not conduct issue in this case. Performance. Doesn't bring discredit to the Force. In lawful execution of duties. [emphasis added]

[66] Nevertheless, as a consequence of the apparent notification from ASIRT (on June 9, 2017), between June 12, 2017 (11:46 a.m.) and June 13, 2017 (1:21 p.m.), the KCAU and the National Conduct Management Section (at National Headquarters) ("NCMS") exchanged a number of emails regarding the Subject Member and the Collision, and in particular the issue of the limitation period, and in summary they reveal that:

- KCAU initially provides basic information around the circumstances of the Collision, the ASIRT investigation, confirms "the organization was aware of the situation" (i.e., Collision), but only just became aware of ASIRT's decision to initiate criminal charges against the Subject Member, and specifically asks what the "prescription date" would be in terms of when the Collision happened or when ASIRT made the decision to charge;

- In response, NCMS requested further detailed information, including what was the RCMP doing between August, 2016 and June, 2017, whether there was a formal review, and whether someone made a decision not to proceed with conduct;

- KCAU replied by providing Briefing Note 2 and advised that once ASIRT took the file there does not appear to have been a review, speculates it was to avoid interfering in the ASIRT investigation and to avoid duplicating material that ASIRT would obtain, and then states the Conduct Authority [i.e., CDO] only became aware of the outcome of the ASIRT investigation on June 9, 2017;

- In final reply, NCMS addressed the "prescription date" by noting it may be difficult to pin down (noting it "boils down to 'who knew what and when and what they did do [sic] with the information'"), but ultimately states that the date of the Collision would "be the safest and most procedurally fair thing to do at this time given all the unknowns", and specifically notes that a time extension request would likely be required ("and most procedurally fair approach") based on the date of the Collision. [collectively, the "KCAU/NCMS Emails"]

[67] Following NCMS advice, the KCAU contacted the Director of the Conduct Authority Representative Directorate ("CARD") at National Headquarters on June 14, 2017, noting the Collision "has garnered significant attention at the Senior Management level."

[68] However, despite the reported position of the EDO recorded by Superintendent Dicks on June 13, 2017 (i.e., that the Subject Member's conduct was not in issue, as it was a performance matter), upon being informed by ASIRT that the Subject Member was going to be arrested and charged criminally, "K" Division in the form of the CDO, was taking steps to initiate a Code of Conduct investigation and suspended the Subject Member with pay.

[69] The memorandum initiating the Code of Conduct investigation was signed by the CDO on June 16, 2017 (pp. 4-5) ("Memo"), apparently in the role of a conduct authority, and two things are notable.

[70] First, the CDO states "It has been brought to my attention that [the Subject Member]… is alleged to have conducted herself in a manner that, if established, would be in contravention of the Code of Conduct", but no clarification is provided regarding the form/basis of that information.

[71] However, in the Order of Suspension (dated June 16, 2017) ("Suspension"), the CDO expressly states that he "…received information on June 9th, 2017, of an incident that has now placed you [Subject Member] as the subject of a Code of Conduct investigation" (p. 7).

[72] Second, the CDO further states in the Memo "I was made aware that these [A]llegations were brought forward to the Commanding Officer by ASIRT on January 20th, 2017." However, the Conduct Report states that CDO became aware of the Allegations on January 20, 2017, but perhaps meant the Commanding Officer.

[73] The Code of Conduct investigation was completed on October 4, 2017, and it was essentially comprised of collating the material already held in the RCMP File, and indeed, ASIRT specifically advised the conduct investigator (on August 29, 2017) that a lot of the material he was seeking was already on the RCMP File (p. 643).

[74] The Conduct Report was sent to Chief Superintendent Mehdizadeh (who, in the interim, had moved from the position of EDO to CDO) for review (p. 675).

[75] On January 8, 2018, the Conduct Authority (in the form of the Commanding Officer) sent the Notice to the Designated Officer, and the Board was appointed on January 16, 2018.

[76] There is no information provided on why or how the Conduct Report went from the CDO to the Commanding Officer.

[77] The Notice was signed on February 26, 2018, and the Conduct Report was made available to the Board on March 1, 2018, and the Board requested that the CAR provide an update when the Subject Member was served.

[78] On March 12, 2018, at the request of the CAR, the Board provided direction to delay service of the Notice on the Subject Member who had just been released from the hospital after the birth of her child.

[79] The Notice was subsequently served on the Subject Member on March 27, 2018, and on March 29, 2018, the Board requested that the Designated Officer advise whether an objection was filed to the appointment of Board, and concurrently that the Director of the Member Representative Directorate ("MRD") advise if a member representative was retained by the Subject Member.

[80] The Director of the MRD advised the Board on April 3, 2018, that the MR had been assigned to represent the Subject Member, and the Board forwarded a brief email to the Representatives dealing with a number of procedural matters and expectations, proposed a preliminary meeting, and also provided notice that a request for further information was being contemplated after reading the Conduct Report.

[81] On April 24, 2018, a preliminary meeting was held between the Board and Representatives ("Meeting"), the key items of which were captured in an email from the Board on April 25, 2018, but for purposes of this preliminary decision, only the following summarized points are relevant:

- The Board raised the issue of the limitation period, and the MR advised it had also been raised by the Subject Member, and after a brief discussion, the Board indicated a request for further information relating to that issue was being issued, including:
    - all briefing notes and updates;
    - a list of who occupied the positions of Watch Commander, Detachment Commander, District Officer and/or Commanding Officer and timeframes;
    - notes of the Watch Commander(s), Detachment Commander(s), District Officers, Operations Officer(s), and Commanding Officer(s);
    - an inventory/list of all information, documents, reports, records, statements etc. on the thumb drive provided by ASIRT to the Detachment on or about August 29, 2016; and
    - An inventory/list specifying all information/documents on the RCMP File, when it was added, as well as who reviewed the file and when ("Further Information").
- The CAR request for two weeks to obtain the Further Information was approved;
- Based on the fact that the CAR confirmed the ASIRT Letter is the basis upon which it is asserted the Commanding Officer (as the Conduct Authority) became aware of the Allegations on January 20, 2017, the Board is not requesting any further information relative to her knowledge; and
- Based on discussions, the Board would not request submissions from the Representatives on the limitation period until the Further Information was provided by the CAR and/or the completion of the preliminary inquiry into the criminal charges against the Subject Member (scheduled for June 25-28, 2018).

[82] On May 10, 2018, the CAR advised that he had received the Further Information requested by the Board, with the exception of the notes of the CDO/EDO, Chief Superintendent Mehdizadeh and one other officer, but it was anticipated they would be provided.

[83] On July 3, 2018, the MR informed the Board that the Subject Member was committed to stand trial after completion of the preliminary inquiry, and raised whether a meeting should be held to schedule arguments on issues relating to the timing of the conduct proceeding.

[84] In response, the Board advised the Representatives that it did not foresee that a formal hearing would be required to address the limitation period issue, and unless something was missing from the Conduct Report or Further Information recently provided by the CAR that related to the limitation period issue, it was proposed to set a schedule for obtaining written submissions from the Representatives on the limitation period first, and other issues about additional information relating to the substance of the Allegations or timing, given the anticipated criminal trial, would be dealt with later.

[85] Given the limitation period issue was being raised by the MR, the Board proposed that the MR provide a written submission, followed by a response from the CAR, and if necessary, a rebuttal from the MR, all within certain timeframes.

[86] In response, based on a number of factors, the MR requested until August 20, 2018, to provide a written submission on the limitation period issue.

MR Submission

[87] The MR provided a brief update on July 12, 2018, indicating that a decision had been received on the Subject Member's "appeal" of the Suspension, including a quote from the decision (ACMT 2017335906, issued July 12, 2018) ("Appeal Decision"), which appeared to state that the Suspension did not comport with the requirements of applicable policy and/or procedural fairness.

[88] The MR requested an extension of time to provide a submission on August 15, 2018, which the Board granted, and on August 24, 2018, the MR provided a written submission regarding the limitation issue, followed by supporting cases and materials on August 27, 2018 ("MR Submission"), and sought a stay of the conduct proceeding as an abuse of process.

[89] Included in the MR Submission was material that comprised "disclosure made in the course of the [Subject] Member's initial suspension" (i.e., Appeal Decision), which the MR thought may already

be included in the Conduct Report, but in examining this material, the Board noted a number of key emails exchanged between the NCMS and KCAU in June, 2017 (i.e., the KCAU/NCMS Emails) outlined above, were absent from the Conduct Report and Further Information, and given its obvious relevance to the limitation period issue, it ought to have been proactively disclosed by the Conduct Authority.

[90] As an overview, the MR Submission asserts that the "key facts" of the Collision were known throughout the senior RCMP management, up to the Commissioner level, effectively from the date it occurred.

[91] It is also noted that the Subject Member returned to operational duties after the Collision, and the RCMP was so unconcerned with the Collision "from a disciplinary or operational perspective that it took nine months to complete an internal investigation report, which in fact exonerated [the Subject Member] of all wrongdoing."

[92] It is not clear what "internal investigation report" is being referred to in the MR Submission, but based on the timing and description, it must be a reference to the Incident Review, which is not the same as a Code of Conduct investigation, but the point is validly made that conduct had not been addressed.

[93] Further, the MR Submission notes that the RCMP never expressed any significant concerns about the performance of the Subject Member prior to the charges being laid after the ASIRT investigation, but even then, it took the RCMP another eight months to initiate the conduct proceeding (i.e., after the CDO said he became aware of the conduct issue and the Commanding Officer forwarding the Notice to the Designated Officer).

[94] In terms of the limitation period, the MR Submission posits that more than 18 months elapsed between the time that the Conduct Authority became aware of the identity of the Subject Member and the "so-called contravention" (i.e., date of Collision), and as consequence, the conduct proceeding is time-barred.

[95] The MR Submission cites and relies upon *Commanding Officer National Division v. Sergeant Douglas*, 2018 RCAD 5 ("*Douglas*"), where the conduct board found the integrity of the conduct process is better served by a stay of proceedings than condoning unacceptable delay and proceeding with a hearing (para. 36).

[96] The MR Submission refers to Briefing Note 1 sent by the EDO, Chief Superintendent Mehdizadeh, to show that the Watch Commander (who prepared the briefing note), Detachment Operations Officer, then OIC of the Detachment, District Officer, and CROPS were all aware of the Collision (information also subsequently incorporated into a briefing note to the Commissioner) and that it involved an injury to Mr. C and death of Mr. J, which was being investigated by ASIRT.

[97] Reference is also made to the KCAU/NCMS Emails to demonstrate several facts, summarized as: first, the relevant persons in the chain of command (i.e., conduct authorities) within the Detachment, District, and Division were fully aware of the circumstances of the Collision; second, that NCMS provided advice regarding the limitation period and the pertinent date to rely upon; and third, NCMS also gave advice to pursue an extension of time, which was not followed.

[98] The MR Submission also refers to various other administrative communications, including the Memo and Suspension, to highlight the fact that, in concert with the above KCAU/ NCMS Emails, in June, 2017, the Conduct Authority still had "two full months" before the expiration of the limitation period (based on the date of the Collision).

[99] While a negligently missed limitation period is indefensible, the MR Submission asserts it is wholly indefensible in the present circumstances:

> …when everyone knew about it [i.e., Collision], a decision was taken to do nothing for 10 months after the [Collision], the issue is revisited two month[s] prior to its expiry, and then another eight months pass before the initiation of proceedings…

[100] The MR Submission asserts the Conduct Authority should not be "rewarded" after being advised of the limitation period, and then chose to ignore it, which is even worse when at any time a request could have been made for an extension of time, although given the facts, it is opined it would not have been justified.

[101] In effect, asserts the MR Submission, the Conduct Authority is acting as if there is no limitation period, and to give any countenance to such actions would send a message that there is effectively no limitation period.

[102] It is also noted in the MR Submission that no explanation is provided as to why it took the RCMP ten months (after the Collision) to even initiate a Code of Conduct investigation, and implicitly asserts that the Memo (dated June 16, 2017) is disingenuous when it states that Allegations have come to the CDO's attention, as he and other colleagues "knew all about this matter ten months previously."

[103] Although the Memo asserts the Commanding Officer became aware of the Allegations on January 20, 2017, which the MR Submission does not accept as the relevant date for determining the limitation period, it notes that even that date contravenes the limitation period because the Notice to the Designated Officer did not initiate proceedings until a month later (i.e., February) in 2018 (it is noted that the MR Submission is incorrect in its dates analysis, but the assertion that the date for computing the limitation period is a live issue is correct).

[104] The MR Submission also notes that it is significant, and unusual, that the Suspension was already overturned due to procedural unfairness (paras. 39-40) in the Appeal Decision, and the initiation of the conduct proceeding has only served to compound the procedural unfairness visited upon the Subject Member.

[105] Critical of the purported claims in the Memo and Suspension about operational and public risks as justifying the suspension of the Subject Member ten months after the Collision, when she had been fully operational in the interim, the MR Submission questions the implicit claim that the criminal charges triggered the Conduct of Conduct investigation, given the facts had been known for months and were of no concern.

[106] The MR Submission points to the NCMS advice to the KCAU that the limitation period should be the date of the Collision, and expressly counselled KCAU to consider an extension of time request, advice which was not followed.

[107] The claims by KCAU that delay arose from the fact that ASIRT does not normally "share a lot" unless they have "a file ongoing and are in the process from our end" (i.e., a conduct investigation is underway), that "No code was ordered here as they [ASIRT] took on the file", and that KCAU still does not have access to the ASIRT investigative report, and will not until a Code of Conduct is ordered, are dismissed by the MR Submission as "institutional negligence."

[108] This is especially so, according to the MR Submission, given the pointed questions by NCMS about issues informing the limitation period, and the KCAU admission that the organization was aware of the Collision, but only just became aware of the decision by ASIRT to charge the Subject Member.

[109] The MR Submission quotes extensively from the findings, conclusions, and recommendations of the Incident Review, which are not really determinative of the preliminary limitation period issue, other than noting the Incident Review into the Collision was initiated on August 30, 2016, days after it occurred.

[110] However, given the conclusions and recommendations from the Incident Review, the MR Submission contends it not surprising no Code of Conduct investigation was initiated until ten months after the Collision, which begs the question as to what changed, "…since nowhere in any of the material is there any attempt to justify the Code of Conduct solely on the grounds that criminal charges against the [Subject M]ember had now been laid."

[111] Returning to *Douglas*, the MR Submission identifies it as the leading decision on the matter of limitation periods under the new conduct process, which relied on *Thériault v. RCMP*, 2006 FCA 61 ("*Thériault*"), to find that the limitation period under subsection 41(2) of the amended[7] *RCMP Act* is intended to protect the public and the credibility of the RCMP and provide fair treatment for members.

[7] Where appropriate, and for simplicity, this decision will refer to the "amended" *RCMP Act* to refer to changes made to it in November, 2014, and the "old" *RCMP Act* to refer to its content prior to November, 2014.

[112] For the purposes of determining the limitation period under subsection 41(2) of the amended *RCMP Act*, the conduct board in *Douglas* formulated a five step framework (and the Board has substituted numbers for letters for purposes of analysis and application):

1. Who was the CA [Conduct Authority] in respect of the Applicant?

2. Did an alleged contravention of a provision of the Code of Conduct by a member become known to the CA?

3. Did the identity of the member as the one who is alleged to have committed the contravention become known to the CA?

4. Did the CA investigate the allegation or cause it to be investigated?

5. If prerequisites A through D were satisfied, when did the limitation period end? ["Douglas Test"]

[113] The conduct board in *Douglas* noted that not every last particular needs to be known by a conduct authority for the time period to be triggered, as it is a matter of whether there is sufficient information to recognize that there was an alleged contravention to warrant action (para. 24), which expressly rejected the argument that a conduct authority's knowledge can only be perfected by an investigation, whereupon the limitation period would be initiated, as the explicit requirement is to complete an investigation and initiate a hearing within one year, or ask for an extension.

[114] In addition to *Thériault* and *Douglas,* the MR Submission cites C*abiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195 ("*Cabiakman*"), *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*"), and *Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643 ("*Cardinal*") to assert that the law: (1) imposes a duty of fairness on employers in matters of employer-employee relations, (2) discharge procedures attract a high degree of procedural fairness, and (3) breaches of procedural fairness render decisions invalid in all but the most exceptional circumstances.

[115] Further, based on *Baker* (p. 839), the MR Submission asserts the Subject Member had a "legitimate expectation" that the conduct proceeding would be commenced within one year as required by the *RCMP Act*, particularly given everyone knew about the Collision within the relevant command structure, and there was "no murky evidence" or "systemic confusion."

[116] According to the MR Submission, the "key concept" is "reasonableness" and where the respective conduct authorities left the Subject Member on full operational status based on what seems to be have been considered "an unfortunate accident" based on the Incident Review and other materials (requiring at most remedial training), "it is impossible to conclude that such a decision to suddenly initiate a Conduct Proceeding 18 months after the [Collision], based on no new evidence, is reasonable" (emphasis added).

[117] The MR Submission concludes that there has been a breach of the duty of fairness and natural justice, and the Notice is therefore invalid and the proceeding and/or Allegations against the Subject Member should be stayed.

CAR Reply

[118] The CAR proactively advised the Board on August 27, 2018, that a reply to the MR Submission would be provided on September 7, 2018, which was received by the Board on that date, and included a written reply, along with the submission other additional supporting material not forming part of the Conduct Report (e.g., Incident Review) ("CAR Reply").

[119] The CAR Reply submits that the statutory requirements relating to the limitation period have been met, and the motion to stay the proceeding should be denied.

[120] The CAR Reply accepts the facts presented by the MR Submission, but cites and provides the ASIRT update letters, noting the ASIRT Letter (dated January 20, 2017) indicates their investigative file had been forwarded to Crown Counsel, and "Following receipt of legal advice, the Conduct Authority determined that the prescription period commenced on January 20, 2017" (emphasis added), citing the Memo of the CDO.

[121] The CAR Reply also notes that the Notice to the Designated Officer was received on January 9, 2018, and the Board was appointed on January 16, 2018.

[122] In determining the level of knowledge and identity required under subsection 41(2) of the amended *RCMP Act* to commence the limitation period, the CAR Reply, like the MR Submission, relies on *Thériault* as stating the relevant threshold, in that (para. 35) "…the person empowered to conduct investigations must have sufficient credible and persuasive information about the alleged offence and its perpetrator to reasonably believe that the offence has been committed and that the person to whom it is attributed was the perpetrator."

[123] The CAR Reply similarly relies upon *Douglas* under the "new" conduct process, which as the MR Submission noted, essentially adopts *Thériault* in finding that the limitation period commences when there is (para. 24) "sufficient information in the complaint brought forward… to recognize that there was an alleged contravention of the code of conduct…" (emphasis added).

[124] Adopting the Douglas Test, the CAR Reply addresses the first question by asserting that the relevant conduct authority was the CDO.

[125] In respect of the second question, the CAR Reply asserts the critical issue is when the Conduct Authority had sufficient knowledge that a contravention occurred, and rejects the assertion of the MR Submission that it was the date of the Collision, based on the following factors:

1. Not every motor vehicle accident involving a member is as a result of a breach of the Code of Conduct and in situations "where it is not automatically clear that the member involved breached the Code of Conduct, the benefit of the doubt should be given to the member" and given there was 2,068 police motor vehicle accidents in 2017, the Board is asked to "imagine a scenario where members were automatically subject to a Code of Conduct investigation every time there was a collision";

2. Just because Mr. J died "does not automatically lead to the assumption that the [Subject M]ember breached the Code of Conduct";

3. While "there was clear information that the [S]ubject [M]ember had been travelling at a high rate of speed at the time of the [Collision], that in of itself is not [a] breach of the Code of Conduct;

4. The Subject Member "provided a plausible explanation" regarding the Collision in her Statement of August 21, 2016;

5. Following the Collision the Conduct Authority was "motivated by giving the benefit of the doubt to the [S]ubject [M]ember";

6. Until the results of the ASIRT investigation were known "the conduct authority did not have sufficient knowledge that the [S]ubject [M]ember breached the Code of Conduct."

7. The ASIRT investigation was statutorily mandated and independent based on the death and/or serious injury;

8. "For practical reasons, the RCMP did not engage in an investigation of its own while the ASIRT investigation was ongoing";

9. "It is not an efficient use of resources to conduct concurrent investigations in the same event";

10. "Concurrent investigations could impact the integrity of the information being collected";

11. Although some RCMP resources assisted during the ASIRT investigation (e.g., TAI Report) the results need to be viewed in the context of the entire investigation which the RCMP did not have access to until the ASIRT investigative report was provided to the RCMP on September 1, 2017;

12. The ASIRT investigation report contained a dozen witness statements, TAI Report, Peer Report, GPS report, mechanical check report, Autopsy Report, and medical records, all of which needed to be considered to determine fault regarding the Collision;

13. The TAI Report was "not sufficient to determine whether or not the [S]ubject [M]ember had breached the Code of Conduct" because it was just a part of "a much larger investigation" and

the Peer Report found that the conclusions of the TAI Report "that the [S]ubject [M]ember was not at fault was incorrect";

14. The ASIRT Letter "was the first communication from ASIRT that the [S]ubject [M]ember was being recommended for criminal charges" which gave the Conduct Authority "the first inkling" that conduct might be an issue; and

15. The KCAU/NCMS Email and discussion about the limitation period were "speculative in nature" and it was "only after the [C]onduct Authority received qualified legal advice that the prescription date was set to January 20, 2017" (underline emphasis added).

[126] In terms of the third question, the CAR Reply (para. 27) states the identity of the Subject Member was never in issue and the Conduct Authority knew that the Subject Member "was alleged to have committed a contravention of the Code of Conduct" but it did not "appear" that the Subject Member "had contravened the Code of Conduct until ASIRT communicated" it was recommending criminal charges in the ASIRT Letter.

[127] Addressing the fourth question, the CAR Reply states the Conduct Authority (i.e., CDO) ordered the Code of Conduct investigation regarding the Collision on June 16, 2017 (i.e., date of the Memo).

[128] Finally, in relation to the fifth question, assuming questions one to four are satisfied, the CAR Reply asserts the limitation period ended on January 20, 2018, based on the fact the ASIRT Letter "was received" on January 20, 2017, and the Notice to the Designated Officer was received on January 9, 2018, thereby meeting the limitation period.

[129] In summary, the CAR Reply asserts (para. 32) "that it is clear from the above that the Conduct Authority did not possess sufficient knowledge that the [S]ubject [M]ember may have breached the Code of Conduct until January 20, 2017" [i.e., date of ASIRT Letter], and therefore having met the limitation period, the motion to stay the proceeding should be denied.

[130] On September 10, 2018, noting it may have some inquiries regarding the MR Submission and CAR Reply, the Board inquired if the MR would be seeking to provide any rebuttal.

[131] The MR replied on September 11, 2018, that a formal response to the CAR Reply would not be submitted.

[132] The Board updated the Representatives on November 9, 2018, that after several absences from the office, the Board was now reviewing the MR Submission and CAR Reply and supporting materials, and given there are no further submission, would be making a preliminary decision on the limitation period issue, subject to any question or additional information that may be required.

[133] In reviewing the Further Information provided by the CAR, the Board noted that the two sets of officer notes which had not been provided were still outstanding, and concluding that they would be relevant to the limitation period issue, on November 13, 2018, the Board requested that the CAR obtain and provide those notes.

[134] One set of notes was provided by the CAR the same day, and follow up was undertaken regarding the provision of the notes of the former EDO (now CDO), Chief Superintendent Mehdizadeh.

[135] While waiting for the notes, on November 19, 2018, the Board also asked the CAR to confirm what position Chief Superintendent Mehdizadeh occupied on certain specific dates, including when the Collision occurred, when the Memo and Suspension were signed, and when the notes of Superintendent Dicks were created on June 13, 2017.

[136] On November 21, 2018, the CAR forwarded the reply of Chief Superintendent Mehdizadeh (dated November 19, 2018), which indicated he had no notes about the Collision, he had Briefing Note 1 (issued on the date of the Collision), provided an outline of the dates he held the EDO and CDO positions, and, although not solicited, stated that while the Subject Member was in Eastern Alberta District assigned to the Detachment, “no CoC [Code of Conduct] was ordered as we were waiting for some more info and had discussions with CROPS.”

[137] For present purposes, it was confirmed that Chief Superintendent Mehdizadeh was the EDO on the date of the Collision until he became the CDO on July 1, 2017.

[138] On December 7, 2018, the Board emailed the Representatives to determine if their respective clients will waive the requirement to serve the preliminary decision on them personally, and that the Representatives can accept service electronically on behalf of their client.

[139] The same day, the Representatives both confirmed that they would accept service on behalf of their respective clients, which only addressed their acceptance of service, and did not amount to confirmation that the Conduct Authority or Subject Member had agreed to waive the service requirement, and acknowledging it was being technical, the Board requested that the Representatives provide confirmation that their respective clients waived this requirement, a confirmation which the MR provide within about 45 minutes.

[140] On December 10, 2018, the CAR replied:

> As the assigned representative for the Conduct Authority, I am authorized to waive the requirement to serve your decision on the Conduct Authority personally. I do so waive this requirement and ask for the decision to be served electronically to me on behalf of my client.

[141] The Board subsequently replied that the role of the CAR is not in question, but that it would be preferred that it be stated or confirmed that the Conduct Authority is waiving the service requirement, as otherwise it appears that the CAR is waiving the requirement, which is not quite the same thing.

[142] The CAR subsequently confirmed on December 12, 2018, that the Conduct Authority waived the requirement to serve the preliminary decision and that it be provided electronically to the CAR, which was acknowledged by the Board.

4. Limitation Period

Context

[143] Before addressing the issue of the limitation period, the Board notes that the purpose, objectives and intent of the new conduct regime, and in particular reforms to formal proceedings, have been articulated in the Principles section of the *Conduct Board Guidebook* (2017):

> **2. Principles**

2.1 The Legislative Reform Initiative (LRI) was tasked with developing a modernized conduct process and engaged in broad-based consultations with a wide range of stakeholders and examined various internal and external reports and studies regarding the RCMP, as well as other police agencies, relative to dealing with instances of alleged misconduct by police officers.

2.2 The reforms adopted under the LRI were expressly based upon certain principles arising from a broad consensus and understanding among stakeholders that conduct proceedings, including hearings before a conduct board, are to be timely and not overly formalistic, legalistic, or adversarial.

2.3 As such, proceedings before a conduct board are not to be interpreted or understood as requiring highly formalized and legalistic practices and procedures akin to a formal court-like process, but rather will be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

2.4 In most respects, a conduct hearing will unfold much like a conduct meeting, except that a conduct board has certain authorities to compel evidence and give direction, when it considers it necessary, given it is dealing with a dismissal case. A conduct hearing is administrative in nature and will be led by the conduct board (and not the parties), and it has broad discretion to control its own process and give direction.

2.5 In support of this approach, the former right of parties to be afforded a full and ample opportunity to present evidence, cross-examine witnesses, and to make representations at a hearing were expressly removed from the *Royal Canadian Mounted Police Act*, R.S.C 1985, c. R-10 (as amended) (*Act*) (former subsection 45.1(8)).

2.6 Further, a conduct board will expressly rely upon an investigative report and supporting material in making findings and determinations. At the sole discretion of the conduct board, a witness will generally only be summoned to testify where the conduct board considers there to be a serious or significant unresolved conflict in the evidence and the testimony of the witness would be material and necessary in resolving that conflict.

2.7 The responsibility for determining whether the information in the investigative report and supporting material is sufficient to permit a determination of whether an allegation is established resides with the conduct board.

2.8 The conduct board may issue a direction for further investigation or order the production of further information or documents only where it determines that the additional investigation or information is material and necessary to resolving an outstanding issue in the conduct proceeding.

2.9 Finally, subject members are now required to admit or deny an allegation as early in the proceedings as possible and to identify any defences or evidence

> which they seek to rely upon, in order that the conduct board can effectively complete a conduct proceeding.

[144] More recently, responding to an assertion by the External Review Committee ("ERC") in report C-017 (dated June 28, 2017), that the role of conduct boards in the new regime does not differ materially from the former discipline and adjudicative process, the Level II (appeal) Adjudicator in *Commanding Officer "J" Division v. Constable Cormier* (dated November 20, 2017) (file 2016-33572) ("*Cormier*") stated:

> [132] …. With respect, this is a point of view I do not share. The amendments to the *RCMP Act* and the creation of the new conduct regime changed the nature of the role of conduct boards by enhancing their ability to actively manage proceedings and make conclusive determinations in a more informal and expeditious setting. In short, a conduct board is no longer reliant on the traditional to and fro presentation of evidence by the parties.
>
> [133] A comparative analysis of a conduct board's knowledge of the case prior to the hearing, the form and presentation of evidence, and the management of witnesses provides a useful illustration.
>
> [134] First, conduct boards now have comprehensive knowledge of the case before the hearing. In accordance with subsection 45.1(4) of the former *RCMP Act* (in effect prior to November 28, 2014), the only document provided to adjudication boards in the normal course was a bare notice of hearing containing the allegations and the particulars against the subject member. Now, conduct boards are provided with the notice of hearing, the investigation report, including witness statements and exhibits, an admission or denial of each alleged contravention of the Code of Conduct, the subject member's written submissions, any evidence, document or report the subject member intends to rely on at the hearing, as well as a list of witnesses submitted by the parties for consideration. The applicable provisions under the current process are the following:
>
> *RCMP Act*
>
> 43(2) As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.
>
> *CSO (Conduct)* [*Commissioner's Standing Order (Conduct)*, SOR/2014- 291]
>
> 15(2) As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.

> 15(3) Within 30 days after the day on which the member is served with the notice or within another period as directed by the conduct board, the subject member must provide to the conduct authority and the conduct board
>
> > (a) an admission or denial, in writing, of each alleged contravention of the Code of Conduct[;]
> >
> > (b) any written submissions that the member wishes to make; and
> >
> > (c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.
>
> 18(1) Within 30 days after the day on which the notice of hearing is served, the parties must submit to the conduct board a list of the witnesses that they want to have summoned before the board and a list of the issues in respect of which they may want to rely on expert testimony.

[135] In fact, under the former *RCMP Act*, in the absence of an admission by the subject member or evidence presented by the Appropriate Officer at the hearing, a finding of misconduct could not be established by an adjudication board. Conversely, in the current regime, by virtue of subsection 23(1) of the *CSO (Conduct)*, a conduct board can render a decision based entirely on the documentary record provided before the hearing should the parties choose not to make further submissions:

> 23(1) If no testimony is heard in respect of an allegation, the conduct board may render a decision in respect of the allegation based solely on the record.

[136] Second, the rules surrounding the presentation of evidence before conduct boards have changed. Previously, evidence was presented during the hearing:

> [Repealed, 2013, c 18, s 29]
>
> 45.12(1) After considering the evidence submitted **at the hearing,** the adjudication board shall decide whether or not each allegation of contravention of the Code of Conduct contained in the notice of hearing is established on a balance of probabilities.
>
> [Repealed, 2013, c 18, s 29]
>
> 45.13(1) An adjudication board shall compile a record of the hearing before it, which record shall include
>
> > (a) the notice of the hearing under subsection 43(4);
> >
> > (b) the notice of the place, date and time of the hearing under subsection 45.1(2);
> >
> > (c) a copy of all written or documentary evidence **produced at the hearing;**
> >
> > (c) a list of any exhibits **entered at the hearing;** and

> (e) the recording and the transcript, if any, of the hearing. [Emphasis added.]

[137] Under the current regime, in accordance with subsection 15(3) of the *CSO (Conduct),* extensive information is filed with the conduct board prior to the hearing. Section 26 of the *CSO (Conduct)* reflects this change. While evidence and exhibits were previously produced at the hearing; now, available information and exhibits are produced beforehand and may be treated as evidence as a conduct board sees fit (see also, the long-standing powers granted by subsection 45(2) of the *RCMP Act;* and previously, section 45 of the former *RCMP Act).* This reality is demonstrated by the replacement of a specific reference to evidence produced at the hearing in former paragraph 45.13(1)(c) by a more general reference to any information provided to the conduct board in paragraph 26(c) of the *CSO (Conduct):*

> *CSO (Conduct)*
>
> 26 The conduct board must compile a record after the hearing, including
>
> (a) the notice of hearing referred to in subsection 43(2) of the Act;
>
> (b) the notice served on the subject member of the place, date and time of the hearing;
>
> (c) a copy of **any other information provided to the board**;
>
> (d) a list of any exhibits entered at the hearing;
>
> (e) the directions, decisions, agreements and undertakings, if any, referred to in subsection 16(2);
>
> (f) the recording and the transcript, if any, of the hearing; and
>
> (g) a copy of all written decisions of the board. [Emphasis added.]

[138] Lastly, the management of witnesses has also changed. While the adjudication registrar was previously obligated to issue a summons at the request of a party, pursuant to subsection 6(1) of the *Commissioner's Standing Orders (Practice and Procedure),* SOR/88-367 [*CSO (Practice and Procedure)*], conduct boards, in accordance with subsections 18(3) and 18(4) of the *CSO* (*Conduct),* must provide the parties a list of witnesses they intend to summon. In addition, conduct boards must give reasons for accepting or refusing any witness that is requested by the parties. The applicable provisions in both the repealed and current regimes are the following:

> *CSO (Practice and Procedure)* [Repealed, SOR/2014-293]
>
> 6(1) Any party requiring the attendance of a witness at a hearing shall forward the name of the proposed witness to the registrar who **shall** issue a summons of behalf of the board.
>
> CSO *(Conduct)*

> 18(3) The board **must** establish a list of the witnesses that it intends to summon, including any expert in respect of whom a party has indicated an intention under subsection 19(3) to question, and may seek further submissions from the parties.
>
> 18(4) The board **must** provide the parties with a list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.
>
> [Emphasis added.]
>
> [139] In all, the amendments to the *RCMP Act,* the repeal of the CSO *(Practice and Procedure),* and the enactment of the CSO *(Conduct)* have meaningfully changed the nature of the role of conduct boards and, in particular, their authority to manage proceedings.

[145] The foregoing quotations, while somewhat lengthy, provide a clear indication of the context in which conduct boards are intended to operate, which requires a conduct authority and subject member, and in particular representatives, to critically examine the evidence and circumstances as early as possible, as the default or mindset that most matters will simply, or must be, litigated in a formal hearing before a conduct board is no longer extant.

[146] However, even in spite of the direction provided in the *Conduct Board Guidebook* and *Cormier*, there continues to be some confusion around the role of a conduct board, in that sometimes it is characterized (as it was in *Cormier*) as an "inquisitorial" process where, among other things, the conduct board is responsible for the conduct of a file, such as seeking out evidence where a case is not sufficient, which is not accurate.

[147] While conduct proceedings are now board-led, and parties are subject to proactive requirements to disclose information in a timely way, it is still a process wherein the respective parties are required to gather relevant information and evidence in order to present their best case, and while a conduct board has the residual authority to request further information at its own behest or that of a party (normally a subject member), in the first instance it remains the responsibility of a conduct authority representative to ensure that a case has been assembled and presented which addresses any applicable legal requirements to proceed (e.g., limitation period), and contains relevant and material evidence that demonstrates the elements of the alleged misconduct in a Notice of Conduct Hearing are met, and if not present, takes the required steps to identify and present the necessary information proactively before engaging a conduct board.

[148] While both conduct authority representatives and member representatives have amplified obligations to critical examine and present their cases at the earliest opportunity, the Representative's Code of Ethics (Administration Manual App. XII-1-22) places an additional and important obligation on the role of a conduct authority representative, which is to "not primarily seek to obtain a finding of a contravention of the Code of Conduct, but to see that justice is done" (para. 1) n)).

Framework

[149] After reading the MR Submission and CAR Reply, and supporting documentation, it is clear that the Board needs to address some general considerations and/or a framework in which to consider the limitation period issue, as there is some imprecision in the application of terminology, legal requirements, and related facts within both the MR Submission and CAR Reply.

Burden

[150] The first consideration, and not addressed by the MR Submission and CAR Reply, is who has the burden? In other words, is it the responsibility of the CAR to demonstrate that the limitation period was met, or is it the responsibility of the MR to demonstrate that the limitation period was not met?

[151] Superficially, the intuitive response might be that the MR Submission is, pursuant to a motion, seeking to have the case against the Subject Member stayed, so the MR has the burden of establishing on a balance of probabilities that the limitation period was not met.

[152] However, one of the primary obligations of the CAR is to ensure the statutory and/or legal requirements to initiate a proceeding against the Subject Member were met when submitting the Notice to the Designated Officer and subsequently providing the Notice and Conduct Report to the Board and Subject Member.

[153] Indeed, under the old discipline process, prior to amendments to the *RCMP Act* in 2014, it was possible under subsection 43(9) to rely on a certificate signed by an appropriate officer to establish when the appropriate officer became aware of the alleged contravention and identity of the member, which in effect created a presumption, unless disturbed by evidence to the contrary.

[154] For present purposes, it might be argued that where an issue arises over the limitation period, the CAR must first demonstrate that it was met before it would fall to the MR to demonstrate that it was not met, which is an essential underpinning of *Thériault,* and the approach adopted in the *Appropriate Officer "H" Division v. Constable Walker* (2006), 31 A.D. (3d) 128 (paras. 35-37), where the Commissioner found that, in the absence of a certificate, there is no presumption the one-year limitation period had been met and an adjudication board should have determined the date on which the contravention and identify of the member became known to the appropriate officer, rather than requiring that the member establish the relevant date.

[155] As will become evident below, the Board is of that view that regardless of who had the burden in this case, the result would be the same, although it would be preferable if the Representatives actually considered and addressed this issue in their respective submissions.

Stay

[156] A second or additional consideration is that the MR Submission is seeking a stay of the proceeding based on an abuse of process, but neither the MR Submission, nor CAR Reply, actually identify or address the applicable test and/or categories for finding an abuse of process (see, for example, *R. v. O'Connor*, [1995] 4 S.C.R. 411 (criminal context), C*anada (Minister of Citizenship and Immigration) v. Tobiass,* [1997] 3 S.C.R. 391 (administrative context), *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, and *Smart v. Canada (Attorney General),* 2008 FC 936 ("*Smart*") (RCMP context)).

[157] Despite the fact that the test for finding an abuse of process has not been addressed by the Representatives, it is the Board's view that in the present case it is not necessary to consider or rely upon the common law abuse of process doctrine, given that the more basic question is whether the statutory limitation period has been properly met to initiate and continue with the proceeding, because if not met, it is statute-barred.

[158] Stated another way, while abuse of process may be an alternate ground upon which to address the limitation period, it does not have to be addressed if the proceeding was commenced after the

expiration of the limitation period, as that alone would invalidate the present Notice, resulting in the dismissal of the Allegations.

Knowledge

[159] A third, more intricate consideration, is that the form, content, requirements and objectives of the limitation period under the amended *RCMP Act* are somewhat different than under the old *RCMP Act*, and as will be demonstrated, it is no longer the knowledge of the conduct authority who is *initiating* the *conduct hearing* that is central to determining the limitation period, a point not fully considered in the MR Submission and CAR Reply.

[160] While *Thériault* provides an important analysis around the examination of the limitation period issue, it is essential to note there were significant amendments to the *RCMP Act* in 2014 as they pertain to the conduct process, including with respect to the handling of alleged misconduct and the limitation period, and the following table provides the relevant provisions to aid in that analysis.

RCMP Act – New "Conduct" Process (2014)	**RCMP Act – Old "Discipline" Process (1988)**
Investigation 40 (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to enable the conduct authority to determine whether the member has contravened or is contravening the provision.	Investigation 40 (1) Where it appears to an officer or to a member in command of a detachment that a member under the command of the officer or member has contravened the Code of Conduct, the officer or member shall make or cause to be made such investigation as the officer or member considers necessary to enable the officer or member to determine whether that member has contravened or is contravening the Code of Conduct.

Notice to designated officer 41 (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct and the conduct authority is of the opinion that the conduct measures provided for in the rules are insufficient, having regard to the gravity of the contravention and to the surrounding circumstances, the conduct authority shall initiate a hearing into the alleged contravention by notifying the officer designated by the Commissioner for the purpose of this section of the alleged contravention.	Initiation 43 (1) Subject to subsections (7) and (8), where it appears to an appropriate officer that a member has contravened the Code of Conduct and the appropriate officer is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, informal disciplinary action under section 41 would not be sufficient if the contravention were established, the appropriate officer shall initiate a hearing into the alleged contravention and notify the officer designated by the Commissioner for the purposes of this section of that decision.
Limitation period (2) A hearing shall not be initiated by a conduct authority in respect of an alleged contravention of a provision of the Code of Conduct by a member after the expiry of one year from the time the contravention and the identity of that member as the one who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated.	Limitation period (8) No hearing may be initiated by an appropriate officer under this section in respect of an alleged contravention of the Code of Conduct by a member after the expiration of one year from the time the contravention and the identity of that member became known to the appropriate officer. [underline emphasis provided throughout]

[161] It is generally known that as a result of *Thériault* and other decisions and reports relating to the former RCMP discipline process that reforms were required, and in respect of the limitation period there were several concerns, including: first, that there be a clearer obligation on the RCMP to act expeditiously in the investigation and disposition of cases of misconduct, particularly serious cases; second, in order to avoid "shielding" (see, *Smart* at paras. 25, 62, and 102, as well as *Thériault*

generally) and other questionable measures aimed at prolonging timeframes, the limitation period would be triggered based on a conduct authority (not just the highest ranking officer in a division as the appropriate officer) becoming aware of the misconduct (i.e., seizing the organization with, in effect, institutional knowledge); and third, that there be an ability to obtain an extension of time to the limitation period where warranted (which was not available under the old discipline process).

[162] It is important to recognize then, that the reference to "conduct authority" in subsection 40(1) of the amended *RCMP Act* is, arguably, broader than in former subsection 40(1) when it comes to initiating a conduct proceeding and interpreting or understanding what is required under subsection 41(2) of the amended *RCMP Act*, particularly given the categories of designated conduct authorities under subsection 2(1) of the *CSO (Conduct)*.

[163] In basic terms, under subsection 40(1) of the amended *RCMP Act* where it "appears" to a conduct authority (i.e., a member in command of a detachment or who reports directly to an officer or person (e.g., civilian) holding an equivalent managerial position (e.g., a unit commander reporting to an operations officer within a detachment), an officer or person who holds an equivalent managerial position, and officers in command of a Division) that a member under their command has contravened the Code of Conduct the conduct authority "shall make or cause to be made any investigation considered necessary to determine" (emphasis added) if there has been a contravention.

[164] Similarly, subsections 41(1) and (2) of the amended *RCMP Act* also refer to a "conduct authority" initiating a hearing by notifying the Designated Officer, which must be done within one year "from the time the contravention and identity of [the]…member…who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated" (emphasis added).

[165] There are several things to be noted regarding the language in amended subsection 41(2) (formerly subsection 43(8)), and the first is that the *RCMP Act* and *CSO (Conduct)* do not, in fact, appear to limit who can be a conduct authority with the ability to initiate a conduct hearing, and it is only by virtue of policy under Administration Manual XII.1. ("Conduct Policy") at 11.2. (and the applicable Delegation of Authorities and Designation of Authorities matrix) that the Commanding

Officer of a division (or such other persons designated by the Commissioner) is the only class of conduct authority who may initiating a hearing under subsection 41(2) of the *RCMP Act.*

[166] Accepting without deciding that the policy provisions cited are sufficient to limit the authority to initiate conduct hearings to a Commanding Officer, the key feature of subsection 41(2) of the amended *RCMP Act* is that the limitation period is triggered by the conduct authority who initiated the *investigation* into the misconduct, which may or may not be the Commanding Officer, which is much different than the circumstances under former subsection 43(8) of the old *RCMP Act*, where the limitation period was solely tied to the knowledge about the contravention and identity held by the Appropriate Officer (i.e., Commanding Officer).

[167] In other words, it is no longer simply a question of what the Commanding Officer (as Conduct Authority (or formerly Appropriate Officer)) knew and when, the key issue in determining the limitation period under subsection 41(2) of the amended *RCMP Act* is when the alleged contravention and identify of the member became known to the conduct authority who initiated the investigation into the alleged misconduct, which may or may not be the Commanding Officer, and in many cases may be a conduct authority below the Commanding Officer.

[168] Plainly read and understood then, subsection 41(2) of the amended *RCMP Act* is expressly designed to ensure the limitation period is triggered by the knowledge of the conduct authority who initiated the investigation, and not the knowledge, necessarily, of the conduct authority who is deciding to initiate a hearing, which among other things, was intended to ensure the organization acted promptly in dealing with alleged misconduct and to avoid "shielding" and other measures that by, intention or default, extended the limitation period.

[169] While the foregoing does not disturb some of the important interpretative components of *Thériault* as it pertains to examining compliance with the limitation period in the amended *RCMP Act*, it does require a reconsideration of some elements of the Court's analysis, the foremost being that it is now the knowledge of the conduct authority who initiates an investigation under subsection 40(1) of the amended *RCMP Act* that is central to determining the limitation period under subsection 41(2) of the amended *RCMP Act* (which, again, is not necessarily connected to the conduct authority who is responsible for initiating a conduct hearing).

Threshold

[170] It appears that the main potential interpretative question that arises is whether the standard or threshold of knowledge remains as stated in *Thériault*, or is it now perhaps lower, when determining the limitation period?

[171] In reading *Thériault*, the Court may not have been as clear as it might have been in dealing with the fact that subsections 41(1) and 43(1) of the old *RCMP Act* both referred to a circumstance where it "appears" that a member has contravened the Code of Conduct as the threshold for initiating an *investigation* and initiating a *hearing*, which may play a more central role under the amended *RCMP Act* provisions.

[172] First, the Court states (para. 33) that "it goes without saying that mere suspicion as to the existence of a contravention and the identity of its perpetrator, while they may justify the initiation of an investigation, cannot provide the knowledge required for the subsection 43(8) limitation to begin to run" (emphasis added).

[173] Plainly read, the Court seems to state that "suspicion" could justify the initiation of an investigation under subsection 40(1) of the old *RCMP Act*, but that would not be sufficient to initiate a hearing under former subsection 43(8), even although former subsection 43(1) expressly referred to initiating a hearing where it "appears" there has been a contravention.

[174] Perhaps the distinction is in the fact that subsection 43(8) of the old *RCMP Act* refers, additionally, to the "alleged contravention" and requires knowledge of the member's identity, given the Court expressly states (para. 35):

> Whether in cases of disciplinary or criminal proceedings, knowledge of an offence and of the identity of its perpetrator means that the person empowered to conduct investigations must have sufficient credible and persuasive information about the alleged offence and its perpetrator to reasonably believe that the offence has been committed and that the person to whom it is attributed was the perpetrator. [emphasis added]

[175] In articulating the foregoing threshold for subsection 43(8) of the old *RCMP Act*, the Court expressly rejected that "it is necessary…to have all the evidence that may prove necessary or that may

be admitted at trial" (para. 36), nor does it require knowing the information that is required to be provided to a member in a notice of hearing and particulars under former subsections 43(4) and (6) of the old *RCMP Act*, which were intended to meet the requirements of natural justice and fairness for a hearing, not the "starting point of the limitation" period (para. 37).

[176] Noting the importance of not confusing matters in legal terms, the Court continues (para. 38):

> It may well be that at the time the appropriate officer acquires knowledge of the existence of a contravention for the purposes of starting the limitation period, he does not have all the information necessary to meet the requirements of subsections 43(4) and (6); but at that stage he is not required to initiate a disciplinary hearing if, under subsection 43(1), he is not aware of the gravity of the offence and in the circumstances he cannot know whether informal disciplinary action will suffice. He may proceed with the investigation or require further investigation to satisfy himself and meet the conditions of subsections 43(4) and (6). [emphasis added]

[177] Based on the foregoing, the Court appears to state that: (1) the limitation period under former subsection 43(8) commences when the appropriate officer "acquires knowledge of the existence of a[n alleged] contravention"; (2) which does not require the information necessary to meet the requirements of former subsections 43(4) and (6); and (3) the initiation of a disciplinary hearing is not required under former subsection 43(1) if the appropriate officer is not aware of the gravity of the offence and whether informal disciplinary action will suffice.

[178] The Court rejects, for three reasons, the argument that the knowledge and information requirements of former subsections 43(1) and (8) of the old *RCMP Act* are the same (paras. 39- 40), noting (para. 40):

> Under subsection 43(1), an appropriate officer has a duty to initiate a disciplinary hearing when it **appears** to him or her that there has **been a breach of the Code of Conduct** and having regard to the gravity of the contravention and the surrounding circumstances, formal disciplinary action is required. **At that point, he has more information than is required to start the limitation period running**. He has the information necessary to meet the requirements of natural justice set out in subsections 43(4) and (6): hence the duty placed upon him to initiate the disciplinary hearing at that point. [underline emphasis original, bold emphasis added]

[179] For purposes of triggering the *limitation period* under subsection 43(8) of the old *RCMP Act*, the Court expressly stated that the appropriate officer does not need to have sufficient information to know that the gravity of the contravention and surrounding circumstances require a disciplinary hearing (which is a threshold directed at meeting natural justice under former subsections 43(4) and (6)) because (para. 44):

> It is this knowledge of the existence of the contravention to which the subsection 43(8) limitation refers, not the seriousness and circumstances of the contravention, which are required to initiate the disciplinary hearing. When the appropriate officer acquires knowledge of the existence of a contravention (and of the identity of its perpetrator), he has 12 months to establish the circumstances and assess the seriousness so as to determine whether formal rather than informal disciplinary action should be taken. [emphasis added]

[180] But, as already noted, under subsections 40(1) and 41(2) of the amended *RCMP Act*, it is the knowledge of the conduct authority that investigated or caused the alleged contravention to be investigated that triggers the one year limitation period, not that of the conduct authority who is bound to determine if a conduct hearing should occur, which is not concerned with the sufficiency of measures given the gravity of the contravention and surrounding circumstances as set out under subsection 41(1) of the amended *RCMP Act*.

[181] In aid of clarification, the Court in *Thériault* (para. 45) adopts the approach in *R. v. Fingold* (1999), 45 B.L.R. (2d) 261 (Ont. Gen. Div) (*"Fingold*") paras. 60-1, pointing out that the process of evidence gathering, verification and analysis to determine if there is sufficient information to proceed or "prosecute" under the stricter requirements of subsection 43(1) of the old *RCMP Act* takes place during the limitation period, stating (para. 47):

> To conclude on the question of the knowledge and degree of knowledge required by subsection 43(8) of the Act for a limitation period to begin to run, I feel that the appropriate officer acquires knowledge of a contravention and the identity of its perpetrator when he or she has sufficient credible and persuasive information about the components of the alleged contravention and the identity of its perpetrator to **reasonably believe** that the contravention was committed and that the person to whom it is attributed was its perpetrator. From that point, within the limitation period, an inquiry to check and confirm the credible and persuasive information received and now known regarding the contravention and its perpetrator can be carried out, if it is deemed necessary.

> Accordingly, for there to be knowledge of these facts for the purposes of a limitation period, there need not be evidence beyond all reasonable doubt or for its existence to have been confirmed by proof or verification. As Keenan J. so clearly puts it in *Fingold*, at paragraph 56, "'knowledge' does not require proof or verification to constitute knowledge."

[182] So, in summary, the Court in *Thériault* has explicitly or implicitly stated that under the old *RCMP Act*:

1. The threshold of knowledge to initiate an investigation under subsection 40(1) may be justified where there is a "suspicion" that a member has contravened the Code of Conduct (para. 33);

2. The threshold of knowledge to initiate the limitation period under subsection 43(8) requires sufficient credible and persuasive information about the alleged contravention and identity of the member to reasonably believe that the contravention has been committed by the member (which does not require all the evidence necessary to prove the contravention, carry out the prosecution, provide particulars, or prepare a notice of hearing (paras. 35-37 and 69)); and

3. The threshold to initiate a disciplinary hearing under subsection 43(1) is met when it appears to the appropriate officer that a member has contravened the Code of Conduct and having regard to gravity of the contravention and the surrounding circumstances formal disciplinary action is required, which is more information than is required to start the limitation period (under subsection 43(8)) and sufficient to meet the requirements of subsection 43(4) and (6).

[183] The issue that arises, however, and at the risk of being repetitive, is that the amended *RCMP Act* changes the limitation period analysis because the knowledge requirement under subsection 41(2) is triggered by subsection 40(1), that is, where it "appears" to the conduct authority that a member has contravened the Code of Conduct, which the Court in *Thériault* found only required a "mere suspicion" (and perhaps, arguably, not the higher threshold of former subsection 43(8) of credible and persuasive information to reasonably believe that the member contravened the Code of Conduct).

[184] This is an important point, as it goes directly to the issue, in this case, of whether the threshold required to initiate a Code of Conduct investigation was met, and if so, when the limitation period was triggered, and whether the one year limitation period was met.

[185] Based on a plain reading of subsection 41(2) of the amended *RCMP Act* the limitation period is triggered when it appears to a conduct authority under subsection 40(1) that a member has contravened a provision of the Code of Conduct, but there are further potential considerations around that assessment.

Assessment

[186] The next question then, is whether the "mere suspicion" threshold under former subsection 40(1) of the old *RCMP Act* still applies when assessing the knowledge required of a conduct authority under subsection 40(1) of the amended *RCMP Act,* given the apparently more direct connection to subsection 40(2) of the amended *RCMP Act*, which did not exist under the old *RCMP Act*, as it was solely the knowledge of the appropriate officer that was under examination.

[187] Or, stated in the alternative, is the perhaps higher threshold established in *Thériault* under subsection 43(8) of the old *RCMP Act* (i.e., sufficient credible and persuasive information about the alleged contravention and identity of the member to reasonably believe that the contravention has been committed by the member) the more appropriate standard for purposes of determining the limitation period?

[188] In considering this question, the Court in *Thériault* provided some useful observations regarding the assessment of the threshold of knowledge under the amended *RCMP Act* (and using them with the substitution of new conduct terminology), the first being that it is an "objective standard" (para. 48) and not the "subjective opinion" of a conduct authority (para. 49) as to when the limitation period commenced which is to be determined by a conduct board based on the evidence.

[189] While the belief of a conduct authority is one relevant factor which must be taken into account, it is the obligation of the conduct authority to demonstrate there has been compliance with the limitation period (paras. 49-50).

[190] Second, the Court in *Thériault* stated it is the knowledge of the applicable conduct authority that causes the limitation period to begin to run, not that of third parties within the RCMP and/or subordinates of the conduct authority (para. 1) (provided there is not some form of inappropriate

attempt to shield the conduct authority from acquiring knowledge of an alleged contravention or the identity of the subject member).

[191] Third, the Court noted that the objective standard is one of "reasonableness" and whether faced with the same information that the conduct authority had, would a reasonable person "only" come to the same conclusion (para. 52) (which might state an overly rigid test for application in the reasonable person context).

[192] Based on the foregoing then, what is the relevant test for determining the limitation period under the amended *RCMP Act*?

[193] In considering this question, as canvassed, there a number of potential issues, such as the fact that the conduct authority who initiated the investigation may be different than the conduct authority who initiated the conduct hearing.

[194] Additionally, what happens if a conduct authority arguably had knowledge of a contravention but did not start or cause an investigation to be undertaken?

[195] It is important to note that reference is being made to "a" conduct authority, not "the" conduct authority, because in this context, it is the case that there is the possibility for a number of conduct authorities to be potentially identified in the command chain where it appears a member has contravened the Code of Conduct, which is recognized in the Conduct Policy, and deals with the evaluation of information alleging a Code of Conduct contravention by stating:

> 4.1.1. When information is received that a member has allegedly contravened a provision of the Code of Conduct, the conduct authority at the level that is the most appropriate to the subject member must consider the information to determine the best means of addressing the situation, which may include referring it to the next level of conduct authority where it is clear, if established, the alleged contravention could not be adequately dealt with by the receiving level of conduct authority.

[196] In considering these issues, the Board has examined the Douglas Test, and it may not fully address the examination required, as it asks (under question 4) whether the conduct authority investigated the alleged misconduct or caused it to be investigated, which does not capture

circumstances where a conduct authority who may have had the necessary knowledge to initiate an investigation, but for whatever reason, did not, which creates a potential situation whereby the limitation period can be artificially extended by the failure to investigate, or as here, a new conduct authority stating he did not know about the alleged misconduct, but yet various and sundry other conduct authorities were fully aware of the circumstances and by default or design took no action.

[197] Stated somewhat differently, is it possible for the limitation period to be artificially extended by simply arguing that according to the conduct authority there was insufficient information to meet the knowledge required to initiate an investigation, which is the approach of the CAR Reply (and railed against by the MR Submission), and raises the spectre that under an objective test, there may be occasions where it is necessary to ask whether the conduct authority knew, or ought to have known, that there appeared to be a contravention that required investigation.

[198] Indeed, the Court in its analysis in *Thériault* (paras. 53-69) was responding to these types of artificialities that could be invoked to avoid or extend the limitation period, such as substituting appropriate officers, which, as evidenced by the facts of this case, in some respects has not been wholly eliminated by the amendments to the *RCMP Act* and must be taken into account.

[199] However, if conduct authorities are required under subsection 40(1) of the amended *RCMP Act* to initiate an investigation where there is a "mere suspicion" that a member has contravened the Code of Conduct, as indicated in *Thériault*, does that present too low of a threshold of knowledge to initiate an investigation for purposes of a limitation period?

[200] On the other hand, it might be argued that requiring a conduct authority to have "credible and persuasive information…to reasonably believe" that a contravention has been committed (paras. 35-7) may be instituting too high of a threshold, thereby shielding potential misconduct from investigation.

[201] It might also be argued that basing the limitation period on an examination of the knowledge of the various conduct authorities in the command chain of a subject member is too difficult or arduous to manage, but as noted by the Court in *Thériault*, "the protection of the public interest and integrity" of the RCMP requires that there be coordination by conduct authorities in order to meet the limitation

period, particularly given the fact it relates to the knowledge of the position or function (i.e., institutional), not the individual (paras. 58-9).

[202] It is also the case that in some circumstances the conduct authority who initiated the investigation is the same conduct authority who is responsible for determining whether to initiate a conduct hearing, which limits the scope of the knowledge examination in those cases.

[203] As noted in *Thériault*, Parliament acts with intent (paras. 27, 28, 29, 43, 59 and 60), and therefore, by expressly indicating in subsection 41(2) of the amended *RCMP Act* that it is the knowledge of the contravention and identity of the member of the conduct authority who initiated the investigation that determines the limitation period (and not the conduct authority who initiates the conduct hearing), there was an intention to have serious conduct matters dealt with sooner by having an earlier triggering event than formerly existed, and that it be triggered on a threshold that protects the public interest and confidence and treats members fairly.

[204] For the Board, the solution to resolving the threshold question seems to reside in the objective and reasonable person test, wherein the knowledge required is greater than mere suspicion, but less than credible and persuasive, and can be understood as information upon which it is to reasonable to believe that a member has, or allegedly, contravened the Code of Conduct for purposes of initiating an investigation.

[205] Indeed, on this point, the Court in *Thériault*, in addressing the limitation period threshold under former subsection 43(8) of the old *RCMP Act* stated there must be (para. 35) "sufficient and credible and persuasive information…to reasonably believe…" (emphasis added) a contravention "has been committed", which the conduct board in *Douglas* articulated as (para. 24) "sufficient information…to recognize that there was an alleged contravention" (emphasis added), and Conduct Policy delineates as (4.1.1.) "information [that] is received that a member has allegedly contravened…" (emphasis added), and indeed, subsection 40(2) of the amended *RCMP Act* speaks of "an alleged contravention" (although "alleged" is not found in subsection 40(1)).

[206] As will become evident though, it is the "has contravened" component of subsection 40(1) of the amended *RCMP Act* (which existed in former subsection 40(1)) that seems to bedevil or confound

the analysis, because even though the preceding qualifier is “appears”, matters seem to descend into an explicit or implicit assertion that it was not, in effect, established that a contravention had occurred, and therefore the limitation period was not triggered, which is the core argument of the CAR Reply.

[207] An approach to the limitation period that hinges on there being sufficient information to establish that there was a contravention also ignores the plain language of subsection 40(1) of the *RCMP Act* which states that the purpose of an investigation is “to enable the conduct authority to determine whether the member contravened or is contravening…” the Code of Conduct.

[208] So, in order to try and balance the issues, factors, and considerations that have been discussed, the Board is proposing the following inquiry be applied under subsection 40(1) of the amended *RCMP Act* to determine whether a Code of Conduct investigation is required, thereby triggering the limitation period: *When did a conduct authority of a subject member have sufficient information to reasonably believe that there appears to have been a contravention of the Code of Conduct*?

[209] Of course, as in this case, if a conduct authority did not initiate a Code of Conduct investigation, or where there was a Code of Conduct investigation, and there is some question as to whether it should have been commenced earlier, it will require an examination of the information that was known to the relevant conduct authorities of a subject member, which is something conduct authority representatives must consider and address in documentation provided to a conduct board, where applicable.

Analysis

[210] In applying the above framework to the MR Submission and CAR Reply, a number of issues require attention.

[211] First, the CAR Reply has incorrectly asserted that the limitation period was initiated when the Commanding Officer became aware of the ASIRT Letter, based on the simple fact that the Commanding Officer did not initiate or cause any investigation to be undertaken (as required by subsection 41(2) of the amended *RCMP Act*).

[212] Even so, the CAR Reply has also inaccurately claimed that the Commanding Officer became aware of the ASIRT Letter on January 20, 2017, which is the date on it, but based on date-stamps and notations, it was not received by the Commanding Officer's office until January 27, 2017, and she did not read it until January 30, 2017.

[213] In effect, if the Commanding Officer's knowledge were pertinent to the limitation period, it would have started 10 days later than claimed by the CAR Reply, which reinforces the importance of closely examining relevant documents.

[214] And, perhaps most fatal to the argument of the CAR Reply that the ASIRT Letter determines the limitation period, is, if as asserted, it was only when the Commanding Officer became aware of the ASIRT Letter that she possessed sufficient knowledge that the Subject Member may have breached the Code of Conduct (para. 32), there is no evidence that the Commanding Officer took any steps to initiate an investigation, which is contrary to subsection 40(1) of the *RCMP Act*, as it states a conduct authority "shall" cause an investigation to be made that is necessary to determine whether there has been a contravention.

[215] So, if the ASIRT Letter possessed the Commanding Officer with sufficient knowledge as expressly claimed by the CAR Reply, the evidence unequivocally establishes that nothing was done by the RCMP, in particular the Commanding Officer as a conduct authority, or any other conduct authority, between January, 2017, when the ASIRT Letter allegedly affixed the Commanding Officer with sufficient knowledge, and June, 2017, when the CDO finally took some action, only after becoming aware that ASIRT was going to charge the Subject Member.

[216] The CAR Reply also does not address the fact that the notes of the acting CROPS reveal that the CROPS (who may have been the acting Commanding Officer on the date of the Collision) was briefed about and provided direction regarding the Collision on the date it occurred.

[217] Second, while the Board does not necessarily question that the CDO may have been a late arrival in becoming aware of the circumstances around the Collision, as stated in the Memo and Suspension, it also does not present the relevant date for determining the limitation period, as will be outlined below, but if it did, under subsections 40(1) and 41(2) of the *RCMP Act*, June 9, 2017, would

have been the relevant and material date for triggering the limitation period (i.e., as the CDO commenced the investigation), which simply is not tenable on the facts.

[218] Third, the CAR Reply is quite deliberate in indicating that the CDO, as conduct authority, based on "legal advice" or "qualified legal advice" (i.e., from the CARD) determined that the limitation period commenced on January 27, 2017, based on the ASIRT Letter.

[219] As noted in *Thériault*, the Conduct Authority's subjective opinion or view regarding the limitation period, while a factor to be considered by the Board, is not determinative, and, in this instance, it is wholly incorrect and/or unpersuasive, because as already noted, the Commanding Officer was not a conduct authority who initiated an investigation.

[220] Nevertheless, it might be argued that the CAR Reply has, by expressly stating twice that the CDO relied on legal advice, put that advice in issue and in so doing effectively waived (explicitly, inferentially, or implicitly) privilege, and, or alternatively, that fairness to the Subject Member now requires its disclosure given it has been put in issue by the CAR Reply to prove or justify that the limitation period has been met (see generally, *Nova Chemicals et al. v. CEDA- Reactor Ltd. et al.*, 2014 ONSC 3995; *P. (C.W.) v. P. (C.D.C.)*, 2014 BCSC 738; *Mordo v. HSBC Bank Canada*, 2016 BCSC 282).

[221] However, rather than seeking further submissions from the Representatives on the matter of waiver and/or relying on the above cases, the Board has determined that the limitation period issue can be resolved by simply placing no weight on the fact that the CDO received legal advice, because the obligation resided with the CAR to put the content of that advice into evidence, if the intent was to rely on that advice to demonstrate that the limitation period was met, otherwise it is just a bald statement without any evidential value, and in some respects, should perhaps not have been asserted if it were not going to be disclosed.

[222] Moreover, given that the CAR Reply has relied on the ASIRT Letter to establish the commencement of the limitation period, without apparently appreciating the requirement in subsection 41(2) of the *RCMP Act* that required the Commanding Officer to be the one who started the

investigation, it can be reasonably inferred, but is unnecessary to determine, that any legal advice that was provided to the CDO may not have been correct.

[223] Fourth, the CAR Reply relies on a number of other legal, factual, and policy claims about why other potential conduct authorities did not have the requisite knowledge and/or there was insufficient information upon which to initiate a Code of Conduct investigation.

[224] In this regard, the CAR Reply first suggests that "where it is not automatically clear" that a member has contravened the Code of Conduct, "the benefit of the doubt" should be given to the member, especially given there are many police motor vehicle accidents every year, and it cannot be the case that a member is "automatically" subject to an investigation every time there is an accident.

[225] Unfortunately, the CAR Reply has misunderstood and/or appears to misstate or misconstrue the threshold for initiating a Code of Conduct investigation or the requirements of the decision making process associated thereto.

[226] There is no suggestion or requirement that every police motor vehicle accident "automatically" requires a Code of Conduct investigation, but what is required is that the responsible conduct authority look at the facts and circumstances of each individual case to determine if there is a basis to initiate an investigation under the Code of Conduct.

[227] The more troubling scenario to imagine is the one proposed by the CAR Reply, whereby the "benefit of the doubt" is supposed to generally determine whether a Code of Conduct investigation is required rather than an assessment of the individual facts and circumstances in a police motor vehicle collision to determine if there is a basis for a statutory, Code of Conduct, or some other form of administrative investigation.

[228] Indeed, police officers and managers are called upon every day to recognize circumstances that must be examined to determine what response is required, which is not something that is to be avoided because there are, for instance, too many accidents or it might cause too much work.

[229] The CAR Reply further suggests that the "high rate of speed" and death of Mr. J do notindividually, or presumably collectively, lead to the "assumption" or conclusion that the Subject

Member breached the Code of Conduct, which, again, is not a correct understanding of what is required when making decisions in such cases.

[230] That this is so, is further highlighted by the fact that according to the CAR Reply because the Subject Member "provided a plausible explanation" about the Collision there was no basis to initiate a Code of Conduct investigation, even in the face of other evidence from witnesses at the scene of the Collision and other considerations that would objectively bring that explanation into question.

[231] The fact that a "plausible explanation" has been provided does not relieve a conduct authority of exercising the due diligence, indeed, statutory obligation, to evaluate the existing and/or developing information or evidence available about the circumstances to determine whether a Code of Conduct investigation is required.

[232] It should be noted that the CAR Reply (para. 18) (and Conduct Report (p. 50)) can also be read as indicating that the Statement of the Subject Member was provided on August 21, 2016 (the date on the Statement), but it is clear that it was not provided until August 26, 2016.

[233] Nevertheless, what has not been considered by the CAR Reply is that it was known within hours, but certainly not more than days, based on the statements of witnesses at the Collision, that the Subject Member was incorrect in her perception that the vehicles were simply responding to the PMV, and that there was in fact at least three persons on the Highway in her immediate path, two of which she struck with the PMV while travelling at an undiminished speed of 156 km/hr.

[234] The above, along with other factors known to various conduct authorities, would actually heighten rather than diminish a reasonable person's appreciation of whether a Code of Conduct investigation was required.

[235] Perhaps most disconcerting, are the claims in the CAR Reply that the existence of the ASIRT investigation somehow governed the ability of the RCMP to meet its distinct legal and administrative obligations to evaluate and address the conduct of the Subject Member under the *RCMP Act.*

[236] The fact that ASIRT is legally mandated to investigate instances of serious injury and death where the police are involved to determine if there has been a statutory/criminal violation, does not

absolve the RCMP of its legal mandate and obligation to determine if the Code of Conduct has been contravened.

[237] In fact, some of the arguments or claims advanced in the CAR Reply are expressly and blatantly contrary to policy decisions and/or policy direction of the RCMP about dealing with conduct matters when a concurrent statutory investigation is underway, and it is unnecessary to go any further than the Conduct Policy in this regard:

> 4. 2. 1. 2. When a subject member is believed to have committed a statutory offence, see OM ch. 54.3. For serious incidents, see OM ch. 54.1. When the matter has been referred to, or is in the hands of the police force of jurisdiction, i.e. outside agency or RCMP, continue with the conduct process, unless there is a justifiable reason not to proceed.
>
> 4. 2. 1. 2. 1. The existence of statutory proceedings does not prevent you from **initiating** a conduct process, making a finding of misconduct on the balance of probabilities, or imposing conduct measures.
>
> 4. 2. 1. 2. 2. Statutory proceedings and conduct proceedings are **separate and distinct systems** that **base findings on different criteria** and operate under l**egal requirements specific to each system**. The decision as to whether a conduct process should be placed on hold awaiting the outcome of statutory proceedings will be determined on a case-by-case basis, in consultation with the divisional and national conduct advisors. [emphasis added]

[238] Similarly, the National Guidebook – Conduct, states (pp. 20-21):

> 3.5 Statutory Investigation
>
> Additionally, it may be determined that the alleged contravention(s) should be investigated via a statutory investigation. In this case, the conduct authority will advise the division's Criminal Operations Branch (CROPS) who will subsequently initiate a statutory investigation in accordance with Operational Manual 54.1 and ensure the matter is reported to the police force of jurisdiction. The conduct authority should confirm the division's process regarding statutory investigations by contacting their Line Officers and/or Criminal Operations.
>
> Similarly, there could be instances where an allegation under the Code of Conduct is first reported through a statutory investigation being conducted internally by the RCMP or by an external police agency. When the conduct authority becomes aware of potential conduct allegations within a statutory process, he/she will advise the Line Officer and CROPS. The commander should also consult with the conduct advisor to discuss the possibility of initiating the conduct process.

When a subject member is believed to have committed a statutory offence, see OM 54.2. When the matter has been referred to, or is in the hands of the police force of jurisdiction, i.e. outside agency of RCMP, a conduct authority should continue with the conduct process, unless there is a justifiable reason not to proceed (Section 4.2.1.2, policy).

> Criminal or statutory proceedings and conduct processes are separate and distinct systems that base findings on different criteria and operate under legal requirements specific to each system. The decision as to whether a conduct process should be placed on hold awaiting the outcome of criminal or statutory proceedings will be determined on a case-by- case basis in consultation with the divisional and national conduct advisors (Section 4.2.1.2.2, policy). Additionally, the conduct authority may find it necessary to contact CROPS and/or the statutory investigator to confirm the conduct process will not interfere with the statutory investigation. The time lines surrounding a Code of Conduct matter should be closely monitored and there could be situations where the conduct process needs to be initiated, investigated or finalized despite the presence of statutory allegations. Once, again, regular consultation between the conduct authority and the conduct advisor will help mitigate the risks. Finally, the conduct authority can explore the need to seek an extension from the Commissioner through a request to the Director General, Workplace Responsibility Branch (see section 1.5.3 of this Guidebook). [red and exclamation emphasis original, underline emphasis added]

[239] Based on the foregoing, it is clear that a conduct authority has a positive obligation to determine if a Code of Conduct investigation is required, regardless of whether there is a concurrent statutory investigation, in order to ensure that the RCMP meets its legal obligation to govern the conduct of members.

[240] No evidence has been adduced that within a reasonable timeframe after the Collision any conduct authority actually considered the requirement to initiate a Code of Conduct investigation, sought advice, or otherwise considered or addressed the requirements of the Conduct Policy outlined above, or if they did, it has not been disclosed, which would raise a separate issue.

[241] That there was a flurry of activity ten months later in June, 2017, after the RCMP became aware that ASIRT would be laying charges, which included consultation with NCMS, and the provision of advice by NCMS as outlined in the KCAU/NCMS Emails, does not constitute compliance with the intent or spirit of the Conduct Policy, in fact, it only directs a glaring light on the fact that there had been no apparent consultation, advice, documentation, administration, or coordination

around the potential conduct aspect arising from the Collision by the relevant and responsible conduct authorities.

[242] In this regard, the recent claim by the now CDO (and former EDO) in an email of November 21, 2018, that no Code of Conduct was ordered in respect of the Collision because they were waiting for some form of unspecific information and had discussions with CROPS, is wholly inadequate and unhelpful, and does not address what he, and other relevant and responsible conduct authorities, did in relation to meeting their express statutory and policy obligations relative to the conduct aspect of the Collision.

[243] The existence of the Conduct Policy and National Guidebook, in addition to other aids relating to the conduct process, are widely known within the RCMP, and do not constitute some obscure, unknown or recent decision, precedent, or statement, and indeed the provisions outlined ought to have been addressed by the Representatives.

[244] In the face of the Conduct Policy, the further suggestion in the CAR Reply that it would not be an "efficient use of resources" to have concurrent investigations reveals a fundamental misunderstanding of these processes and their associated legal obligations and requirements, and the policy position of the RCMP on such matters, nor did it identify any "practical reasons" to support waiting for the ASIRT investigation to complete (and if they did exist, there was a requirement for consultation, decision making, and documentation, of which there is no evidence).

[245] Further, the suggestion in the CAR Reply that concurrent investigations "could impact the integrity of the information being collected" is wholly speculative or theoretical at best, conflicts with the Conduct Policy, and there is certainly no evidence of a conduct authority or anyone suggesting it would be a problem in the specific case of the Subject Member, and in accordance with the Conduct Policy, consulting or seeking advice in that regard.

[246] The suggestion in the CAR Reply that "the conduct authority did not have sufficient knowledge" that the Subject Member breached the Code of Conduct will be examined further below, but at this point it can be observed that the threshold of knowledge adopted in the CAR Reply did not comport with the analysis in *Thériault*, to the extent that CAR Reply explicitly or implicitly asserts

that the RCMP required the entire investigation of ASIRT to make a determination on commencing a Code of Conduct investigation, which is simply wrong.

[247] It is worth repeating, and the Board adopts, the comments of *Thériault* that a conduct authority does not require a complete investigation or all the information for the limitation period to be triggered (paras. 35, 36, 40, and 47).

[248] In other words, the CAR Reply has continued to advance the argument that, essentially, the Conduct Authority required a completed investigation before the knowledge threshold was triggered to initiate an investigation, which was not only rejected in *Thériault*, but also more recently in *Douglas* (para. 33), and such an argument ought not to be advanced in the future.

[249] Unfortunately, rather than focussing or concentrating on what evidence and information the RCMP and/or relevant conduct authorities had during the relevant period, the CAR Reply states (para. 23) that the ASIRT report and investigation contained a large amount of information that was unknown to, or not in the possession of the RCMP, such as witness statements, the TAI Report, Peer Report, and other reports, such as the mechanical report, Autopsy Report and medical records, all of which needed to be considered to "determine fault" (emphasis added) regarding the Collision.

[250] Again, the CAR Reply has misstated or misunderstood that a conduct authority is not determining fault when making a decision to initiate a Code of Conduct investigation.

[251] In addition, it is clear that the RCMP was, within days or at most weeks, in possession of much of the information (perhaps with the exception of the Peer Report and Autopsy Report) cited by the CAR Reply, as outlined by the background provided above, the content of the RCMP File and Incident Review, and ASIRT itself provided statements of witnesses and photographs to the Detachment about the Collision on August 29, 2016 (and indeed ASIRT told the Professional Responsibility Unit investigator that most of the information he was seeking for purposes of the Code of Conduct investigation was already in the RCMP File (pp. 652 and 655)).

[252] Nevertheless, or in the alternative, it was wholly unnecessary to have all the information gathered by ASIRT, in that the Autopsy Report, Peer Report, TAI Report, mechanical reports, and

medical records were not required for purposes of determining whether to initiate a Code of Conduct investigation, for the simple reason that the purpose of the investigation would be to acquire such information for purposes of determining whether there was misconduct and, if so, imposing measures.

[253] Again, the Court in *Thériault* made it clear that the purpose of the investigation is to gather, during the limitation period, the relevant and necessary information required to make a decision on initiating a hearing, and it is not to be used as basis for delaying the initiation of the limitation period (para. 45, quoting *Fingold*), which is what the CAR Reply is trying to support by saying that the entire ASIRT report was required in order to determine whether to initiate an investigation.

[254] Referring to the TAI Report specifically, the CAR Reply states it was "not sufficient to determine whether or not" (emphasis added) the Subject Member breached the Code of Conduct, which again, incorrectly states the threshold required to initiate a Code of Conduct investigation, as concluding whether or not there has been misconduct is not the requirement at this stage.

[255] Although the CAR Reply initially argued that the RCMP was not aware, or in possession of the TAI Report until it received the ASIRT investigation (which is put in considerable doubt by the Incident Review and ASIRT (p. 652)), the explicit or implicit alternative argument here is that it if in possession of the TAI Report it did not provide a basis to initiate a Code of Conduct investigation.

[256] Whether or not the TAI Report was part of a "larger [ASIRT] investigation", it did not deal with "fault", but avoidability, within the narrow constrictions and conditions set out in the TAI Report, and it would be the broader facts and data within the TAI Report that would occupy a conduct authority in deciding whether to initiate a Code of Conduct investigation, not determining fault.

[257] Whether or not the RCMP was in possession of all the information contained in the ASIRT investigation, or more specifically aware of the TAI Report and Peer Report and their respective conclusions is not the issue, the more specific issue is whether at some point a conduct authority had sufficient information to reasonably believe that it appeared there had been a contravention of the Code of Conduct.

[258] While the CAR Reply impugns the KCAU/NCMS Email and advice of the NCMS about the limitation period as being "speculative", and apparently superseded by the undisclosed "qualified legal advice" of the CARD, the comments of the NCMS probably are the most knowledgeable, informed, and balanced, reflecting a proper understanding of the statutory and Conduct Policy obligations and requirements relating to the limitation period, advice which the MR Submission properly identifies as being wholly ignored by the Conduct Authority.

[259] This brings matters to an analysis of the claim in the CAR Reply that the ASIRT Letter also constituted, in limitation terms, the "first inkling" that the conduct of the Subject Member might be an issue (but at the same time also claimed it provided sufficient information to trigger the limitation period).

[260] The Board has already found that in legal and chronological terms the ASIRT Letter does not determine the limitation period, yet it remains unclear to the Board how it can be credibly claimed that the content of the ASIRT Letter somehow changed the circumstances so as to trigger the limitation period, especially given there is no evidence anything was done in response to the ASIRT Letter, and it was only upon hearing five months later that the Subject Member would be charged that anyone actually took any action as it pertained to conduct.

[261] As already outlined, the ASIRT Letter simply informed the Commanding Officer that the "investigative file has been forwarded to Crown counsel for review and opinion" and once the opinion is received the Executive Director of ASIRT "will make a decision in relation to the investigation."

[262] The ASIRT Letter does not say the Subject Member will be charged, it simply states an opinion has been sought from Crown Counsel, which is not an uncommon step under police accountability regimes, and certainly does not provide any fundamental alteration in the facts or circumstances, and certainly did not, as claimed by the CAR Reply, crystallize matters that made it apparent to the Conduct Authority (i.e., the Commanding Officer) that action was required, especially when none was taken but to forward the ASIRT Letter for information to the CROPS.

[263] Simply put, the "inkling" provided by the ASIRT Letter would not meet the knowledge threshold or deficit that the CAR Reply has claimed was required or operating (i.e., to determine fault).

[264] Stated elsewise, it is inconsistent to say that the ASIRT Letter provided an "inkling" about misconduct and required action given the CAR Reply consistently argued that the Conduct Authority required a completed investigation or sufficient information to make a determination or finding of fault that the Code of Conduct was contravened in order to initiate an investigation.

[265] Further, even knowing that the limitation period was somehow triggered based on the CAR Reply's assertion that ASIRT Letter provided sufficient information, there is no evidence that the respective conduct authorities took any action to initiate a Code of Conduct investigation for approximately five months, and indeed, up until a few days before the Subject Member was arrested, and knowing of the forthcoming actions to be taken by ASIRT, the conduct authority who ultimately reviewed the Conduct Report (i.e., former EDO on the night of the Collision and now CDO), had told the now OIC of the Detachment, Superintendent Dicks (who was a line officer on the night of the Collision) in a phone call on June 13, 2018 that the Subject Member's driving was not a conduct issue and it was a matter of performance (which also seems to contradict the claim of the CDO (former EDO) on November 19, 2018 that he had been waiting for further information and direction).

[266] It is perplexing that at the same time as the EDO is advising the OIC of the Detachment that conduct is not an issue (June 13, 2017), the KCAU and NCMS are actively engaged in discussing the circumstances of the Collision and limitation period and extension issues (June 12-13, 2018) in order to initiate the conduct process, and the CDO states he became aware of the information about a contravention on June 9, 2018, and subsequently issued the Memo and Suspension on June 16, 2017.

[267] After advancing the various factual, legal and policy claims above to support that the limitation period was met, and misidentifying or misapplying the applicable threshold, the CAR Reply in addressing the third question of the Douglas Test states that it did not "appear" before the ASIRT Letter that the Subject Member had contravened the Code of Conduct, as it was the "first communication" from ASIRT that the Subject Member was "being recommended for criminal charges".

[268] However, the ASIRT Letter does not state that it was recommending charges as claimed by the CAR Reply, although the claim that it did not "appear" there had been a contravention is closer to the

correct threshold required, it is inconsistent with the threshold requirement the CAR Reply advanced earlier in the form of being able to find fault or determine there was misconduct.

[269] Based on the foregoing, in summary, the Board does not accept that the Commanding Officer or the CDO were the relevant conduct authorities for purposes of the limitation period in the specific circumstances presented.

[270] Based on the information available, the *CSO (Conduct)*, and Conduct Policy, it is clear that, for the purposes the limitation period, the Watch Commander (who reported to an officer), then Inspector Dicks (as a line officer in the Detachment and subsequent OIC of the Detachment), the Operations Officer of the Detachment (Inspector Hancock), the then OIC of the Detachment (Superintendent McCloy) (who for a brief period at the time was also the acting EDO), the EDO (Chief Superintendent Mehdizadeh), acting CROPS (Superintendent Bennett), and CROPS (who may have also been the acting Commanding Officer, but no finding is made in that regard) (Assistant Commissioner Degrand) were *potential* conduct authorities relative to the Subject Member.

[271] More specifically, for the purposes of considering the limitation period, the documentary evidence is more than sufficient, in the form of Briefing Note 1 and the notes of the OIC of the Detachment, Operations Officer of the Detachment, then Inspector Dicks (as well as the notes of the acting CROPS), to establish that they knew, by the latest August 29, 2018, that the Subject Member in responding to the Second Call (about a person who had been struck on the Highway), was travelling (with "emergency equipment activated") 156 km/hr at night on the (rural) Highway with no artificial lighting, when she came upon three vehicles (parked on the side of the road, two with emergency flashers activated and one, a semi-truck, with emergency flashers and beacon lights activated) and at least three to four persons were on or near the Highway (one laying on the roadway), and without reducing her speed whatsoever, ran over Mr. J and struck Mr. C who were on the Highway.

[272] On these circumstances alone, it is hard to understand how then Inspector Dicks, the Operations Officer, but more particularly, the then OIC of the Detachment did not comprehend as conduct authorities that they had sufficient information to reasonably believe that there appeared to be a contravention of the Code of Conduct that required an investigation.

[273] It could also be argued that the information that the Detachment Operations Officer, then Inspector Dicks, then OIC of the Detachment (and acting EDO), acting CROPS, and CROPS had on the date of the Collision, August 21, 2016, was sufficient to meet the knowledge requirement for purposes of initiating a Code of Conduct investigation and triggering the limitation period, but August 29, 2016, removes any question that the RCMP was in full possession of information about the confirmed speed of the PMV and statements of the witnesses to the Collision which was known at the Detachment level based on the respective notes of the conduct authorities at that level and the notes of the acting CROPS.

[274] In the face of this information, whether or not the Subject Member presented a "plausible explanation", there was other information that would have caused a reasonable person, not to mention trained and experienced police officers, to conclude that the circumstances required investigation under the Code of Conduct, arguably based on the very basic fact alone that the Subject Member was travelling at 156 km/hr at night and failed to reduce her speed when encountering three vehicles with emergency flashers activated parked on the two lane Highway.

[275] Indeed, and in the alternative, even if the "mere suspicion" or "persuasive and credible evidence to reasonably believe" tests were relied upon from *Thériault*, a reasonable person would find there was sufficient information to believe that there appeared to be a contravention of the Code of Conduct by the Subject Member that required investigation.

[276] It was not necessary for these prospective conduct authorities to have every scrap of information or evidence, or the complete ASIRT investigation, in order to decide whether an investigation was required under the Code of Conduct as suggested by the CAR Reply, as the purpose of the investigation is to obtain the relevant and material information to permit an ultimate determination at later time on whether there had been misconduct, and if so, whether a conduct meeting or conduct hearing was required.

[277] Moreover, even if there had been evidence that one of the prospective conduct authorities actually considered whether to initiate a Code of Conduct investigation, which there is not, such a decision would properly be the subject of an examination by a conduct board, which is why conduct authorities and advisors must take care to properly document decisions and/or actions as required by

the Conduct Policy, and basic experience, and conduct authority representatives must ensure they have assembled, in the first instance, the relevant information to address the limitation period when sending material to a conduct board, especially where it may be an issue.

[278] It is also hard to understand how there was such a widespread divisional failure throughout the command structure and advisory services to recognize the importance of the limitation period, as the default appears to have been that ASIRT will sort it out (or perhaps more disconcerting, there was no conduct aspect that required investigating), and when advice was sought from NCMS, it was completely ignored, although it was thoroughly sound and competent, because even in June, 2017, there was still time to request an extension of time.

[279] Aside from the limitation period issue, the KCAU/NCMS Emails reveal a number of serious institutional issues that appear to require attention, not the least of which is ensuring that conduct authorities and advisors undertake steps to properly track, document, record, and coordinate conduct matters and related decisions in order to comply with the Conduct Policy, *CSO (Conduct)*, and *RCMP Act*.

Summary

[280] Based on the foregoing, the Board finds that the pertinent date for establishing the limitation period is August 29, 2016, based on the information known to the OIC of the Detachment, Operations Officer of the Detachment, and/or then Inspector Dicks, and given the Notice to the Designated Officer was not forwarded until January, 2017, the one year limitation period was not met.

[281] In this regard, the CAR Reply has not established on a balance of probabilities that the limitation period was met, or in the alternative, the MR Submission has established on a balance of probabilities that the limitation period was not met.

[282] The Board wishes to reiterate that this decision has dealt with the preliminary issue of whether the limitation period was met, and in so doing, it is not making any findings of fact, law, or otherwise, that the Subject Member contravened the Code of Conduct, but rather has analyzed whether information existed that would prompt a reasonably informed person to require that an investigation be

initiated under the Code of Conduct based on the relevant provisions of the *RCMP Act*, *CSO (Conduct)*, and Conduct Policy.

5. Conclusion

[283] The Board finds that the conduct proceeding against the Subject Member was not commenced within the limitation period contained in subsection 41(2) of the *RCMP Act* and it is statute-barred.

[284] The Subject Member is given notice that decisions rendered by a conduct board are available to the public, and the Subject Member will not be notified of any such requests for a copy of this decision.

[285] Pursuant to section 25(2) of the *CSO (Conduct)*, this decision takes effect as soon a copy is served on the Subject Member.

[286] This record of decision constitute the final decision of the Board and the Subject Member or Conduct Authority may appeal this decision as provided for in the *RCMP Act.*

December 17, 2018

Craig S. MacMillan — Date

Conduct Board

Table of Defined Terms

Allegation 1	Failing to slow her PMV and striking a member of the public ("Mr. J") which resulted in his death
Allegation 2	Failing to slow her PMV and striking a member of the public ("Mr. C") which resulted in serious bodily harm
Allegations	Collectively, Allegation 1 and Allegation 2
Appeal Decision	Decision issued in response to Subject Member's appeal of the Suspension issued July 12, 2018
ASIRT Letter	ASIRT letter dated January 20, 2017, received by the Commanding Officer's office on January 27, 2017, reviewed by the Commanding Officer on January 30, 2017
ASIRT	Alberta Serious Incident Response Team
Autopsy Report	Medical examiner's report of the autopsy of Mr. J
Baker	*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
Board	Conduct Board appointed to deal with Notice.
Briefing Note 1	Briefing note sent by the EDO on August 21, 2016 to the Detachment Management as well as the District and Divisional management teams
Briefing Note 2	Briefing Note dated June 12, 2017
Cabiakman	*Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195
CAR Reply	Reply submitted by the CAR on behalf of the Conduct Authority on

CAR	Mr. Brad Smallwood, Conduct Authority Representative
CARD	Conduct Authority Representative Directorate
Cardinal	*Cardinal v. Kent Institution,* [1985] 2 S.C.R. 643
CDO	Central Alberta District Officer
Collision	Incident in which the Subject Member's PMV struck two members of the public on the Highway
Conduct Policy	RCMP Administration Manual XII.1
Cormier	*Commanding Officer "J" Division v. Constable Cormier* 2016 RCAD 2
CROPS	Criminal Operations Officer
CSO (Conduct)	*Commissioner's Standing Orders (Conduct)*
Detachment	Wood Buffalo RCMP Detachment, Fort McMurray, Alberta
Douglas	*Commanding Officer National Division v. Sergeant Douglas*, 2018 RCAD 5
Douglas Test	Test formulated by the conduct board in *Douglas* for the purposes of determining the limitation period under subsection 41(2) of the amended *RCMP Act*.
EDO	Eastern Alberta District Officer
Fingold	*R. v. Fingold* (1999), 45 B.L.R. (2d) 261 (Ont. Gen. Div)
First Call	Complaint of a person wearing all black clothing and walking down the middle of the Highway near kilometre 252 (or 251 depending on which

	record is relied upon)
Further Information	Additional information requested by the Board concerning the issue of the limitation period
Highway	Highway 881 near Anzac, Alberta
Incident Review	Incident Review requested by the Operations Officer of the Detachment on August 30, 2016
KCAU	K Division Conduct Advisory Unit
KCAU/NCMS Emails	Emails exchanged between the K Division Conduct Advisory Unit and the National Conduct Management Section
Km/hr	Kilometers an hour
Meeting	Meeting held April 24, 2018 between the Board and the Representatives
Memo	Memorandum initiating the Code of Conduct investigation signed by the CDO on June 16, 2017
MR Submission	MR's submission on the limitation issue received August 24, 2018 on behalf of the Subject Member
MR	Mr. Gordon Campbell, Member Representative
Mr. C	Member of the public (injured)
Mr. J	Member of the public (deceased)
MRD	Member Representative Directorate
NAOCC	Northern Alberta Operational Communications Centre

NCMS	National Conduct Management Section at RCMP National Headquarters
Notice	Notice of Conduct Hearing dated February 26, 2018
OIC	Officer in Charge
Peer Report	Peer review of the TAI Report obtained by ASIRT from an Edmonton Police Service Collision Reconstructionist
PMV	Police Motor Vehicle
RCMP Act	*Royal Canadian Mounted Police Ac*t, R.S.C. 1985, c. R-10 (as amended)
RCMP File	PROS file created for the initial accident investigation where Ms. D's vehicle struck Mr. J
Second Call	Pedestrian had been struck by a vehicle on the Highway, approximately five to ten kilometers south of Anzac, Alberta
Smart	*Smart v. Canada (Attorney General),* 2008 FC 936
Statement	Subject Member's written statement
Suspension	Order of Suspension dated June 16, 2017 issued by CDO
TAI Report	Traffic Analyst Investigation Report dated October 20, 2016
Team Meeting	Briefing held August 29, 2016 with the Team Commander and Inspector Dicks along with the investigative team
Thériault	*Thériault v. RCMP*, 2006 FCA 61